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

٧.

Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth, et al.,

Respondents.

BRIEF OF INTERVENOR-RESPONDENTS DCCC, DEMOCRATIC NATIONAL COMMITTEE ("DNC"), AND THE PENNSYLVANIA DEMOCRATIC PARTY ("PDP")

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INTRODUCTION

In 2020, when Republican party committees, candidates, and legislators first asked this Court to discard thousands of mail-in and absentee ballots (collectively, "mail ballots") because of a missing, handwritten date on the ballot envelope, they did so in the midst of an exceptional 2020 process with a scant evidentiary record on an expedited schedule. The Court did not have the benefit of thorough briefing on the actual intake and review process for mail ballots; the historical context of the provisions in question; or the potential implications of existing federal law, including the materiality provision of the Civil Rights Act. This resulted in a fractured ruling that permitted undated ballots to be counted in 2020 while leaving the ultimate question unresolved.

Much has changed since then. Evidence developed in recent litigation debunks each justification relied on to suggest that the Date Instruction was mandatory. Specifically, undisputed record evidence shows that the handwritten date is not used to identify fraudulent ballots, establish whether an elector is eligible to vote, or even ensure that a ballot is timely cast. In fact, the Deputy Secretary of the Department of State, Jonathan Marks, has testified that he "cannot think of any administrative purpose" to the

¹ See 25 P.S. §§ 3146.6(a), 3150.16(a) (collectively, the "Date Instruction").

handwritten date and that he didn't believe there was any situation where the handwritten date would be relevant to whether the vote is counted. App. 17 at p. 0170, Berks Cnty. N.T., J. Marks, at 22:3–82; Id. at p. 0265, Berks Cnty. N.T., J. Marks at 117:15–18; see also, e.g., App. 27 at p. 0681, Pa. Dep't of State, Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes at 2 (Sept. 11, 2020) (to track when a mailed ballot has been received, Department of State Guidance directs counties to "scan the correspondence ID barcode on the outside of the envelope"). As President Judge Cohn Jubelirer of the Commonwealth Court concluded following a full exploration of the undisputed record evidence, "the purposes expressed" for relying on the declaration date—i.e., determining "an elector's qualifications, or the timeliness of the ballot," which are the same interests asserted by Petitioners here—"are unsupported by the facts[.]" Chapman v. Berks Cnty. Bd. of Elections, No. 355 M.D. 2022, 2022 WL 4100998 at *18 (Pa. Cmwlth. Aug. 19, 2022). This unrefuted evidence conclusively establishes that the Date Instruction does not advance any weighty interest—and thus cannot be considered mandatory under this Court's precedents.

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² Intervenor-Respondents have compiled the relevant parts of the evidentiary record submitted in *Berks County* and attached them as an appendix to this brief.

Further, the text and structure of the Election Code, including the legislative history that was not previously presented to this Court, confirm that the language in the statute was directory and was not intended to disqualify undated ballots. Interpreting the Date Instruction in the draconian manner that Petitioners propose would contradict the statutory language and raise serious questions of federal law: the Third Circuit already has found that disqualifying ballots for simply having undated envelopes violates the Civil Rights Act. And although this Court need not consider that question anew, it should presume—in accordance with the Statutory Construction Act and well-settled rules of statutory interpretation—that the General Assembly was aware of the Civil Rights Act and did not endeavor to violate federal law.

In short, Petitioners' proposed interpretation cannot withstand the evidentiary record, which was not available to the Court in *In re Canvass*, and which conclusively demonstrates that the date on the ballot envelope serves no meaningful purpose; is not consistent with the text, history and structure of the Election Code; and would violate the Civil Rights Act, which prohibits disenfranchisement based on immaterial errors or omissions "on any record or paper relating to" an act "requisite to voting." When analyzed under this Court's settled precedents, each of these sources point in the same direction: the date provision is directory, and undated or misdated

ballots cannot be disqualified—particularly in the middle of an ongoing

election.

COUNTER STATEMENT OF THE QUESTIONS INVOLVED

a. Do the Petitioners have standing to bring the instant appeal?

Answer: The individual-voter Petitioners do not have standing.

Intervenors take no position on political committee Petitioners' standing.

Regardless of whether any Petitioner has standing, the pressing need for

resolution of this question warrants addressing the merits of this dispute.

Does the Election Code's instruction that electors "shall... b.

date" absentee and mail-in ballots, 25 P.S. §§ 3146.6(a); 3150.16(a),

require that the votes of those electors who do not comply with that

instruction are not counted?

Answer: No.

Assuming, arguendo, that this Court answers the second

issue in the affirmative, would such a result violate the materiality

provision of the Civil Rights Act of 1964? See 52 U.S.C. § 10101(a)(2)(B).

Answer: Yes.

COUNTER STATEMENT OF THE CASE

In October 2019, the General Assembly—led by unanimous

Republican support in the Senate and with only two defections in the House.

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along with the support of a sizable number of Democratic legislators in each chamber—approved Act 77 to allow all qualified electors to vote by mail and, according to the Republican House Majority Leader, to "lift the voice of every voter in the Commonwealth."

But the 2020 election, along with differing responses to the pandemic, apparently altered the general support for mail-in voting, such that, in the 2020 general election, Democrats cast nearly three times as many mail ballots as Republicans.⁴ As a result of this disparity, the Republican party's political calculus shifted, and the party's committees, candidates, legislators, and voters have launched one lawsuit after another to roll back their signature legislative achievement.⁵

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³ House Republican Caucus, Historic Election Reform, https://www.pahousegop.com/electionreform (last visited Sept. 6, 2022).

⁴ Holly Otterbein, *Democrats return nearly three times as many mail-in ballots as Republicans in Pennsylvania*, POLITICO (Nov. 3, 2020) (hereinafter "Otterbein"), available at https://www.politico.com/news/2020/11/03/democrats-more-mail-in-ballots-pennsylvania-433951.

⁵ See, e.g., Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899, 923 (M.D. Pa. 2020) (challenging Pennsylvania election officials' ability to implement cure procedures allowing voters to resolve minor, correctible errors on mail ballots); Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania, 830 F. App'x 377, 384, 391 (3d Cir. 2020) (same); Republican Nat'l Comm. v. Chapman, No. 447 M.D. 2022 (Pa. Cmwlth. Sept. 29, 2022) (same); Donald J. Trump for President, Inc. v. Boockvar, 493 F.Supp.3d 331 (W.D. Pa. 2020) (challenging mail-in voting process and seeking to throw out thousands of validly cast mail-in ballots); In re: Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058 (Pa. 2020) (same); Ziccarelli v. Allegheny Cnty. Bd. of Elections, 2:20-cv-1831-NR, 2021 WL 101683 (W.D. Pa. Jan. 12, 2021) (Republican state senate candidate sought to throw out hundreds of undated mail ballots); Kelly v. Pennsylvania, No. 620 MD 2020, 2020 WL 7224280 (Pa. Cmwlth. Nov. 27, 2020)

This action, filed three weeks before the November 8, 2022 general election and after Pennsylvania voters have begun voting by mail, is just the latest chapter in these ongoing efforts to make mail voting more difficult for Pennsylvanians—this time targeting the Acting Secretary's guidance to include *qualified and registered* voters' *timely received* mail ballots in the precanvass and canvass.

Act 77 provides a series of instructions for voting by mail, which include the following:

At any time after receiving an official mail-in ballot, but on 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.

⁽Republican congressman challenging mail-in voting process and moving to exclude mail-in ballots entirely from Pennsylvania and various counties' certification of the presidential election); *McLinko v. Dep't of State*, 270 A.3d 1243 (Pa. Cmwlth. 2022) (Republican member of board of elections and Republican members of Pennsylvania House of Representatives challenging constitutionality of entire mail-in voting process); *Bonner v. Chapman*, No. 364 MD 2022 (Pa. Cmwlth. July 20, 2022) (Republican members of Pennsylvania House of Representatives challenging validity of entire mail-in voting process).

Act 77 § 8 (codified at 25 P.S. § 3150.16(a)) (emphasis added); see also 25 P.S. § 3146.6(a) (including similar instruction for absentee ballots). Once the ballot is returned, county boards of elections must "examine the declaration" and, "[i]f the county board has verified the proof of identification . . . and is satisfied that the declaration is sufficient" and that the voter has the right to vote, the ballot "shall be counted and included with the returns of the applicable election district." 25 P.S. § 3146.8(g)(3).

Sections 3146.6(a) and 3150.16(a) instruct voters to "date" the declaration printed on a mail ballot's outer envelope, among other technical directions, including a request to use black lead pencil, or blue or black ink in marking the ballot. Each instruction is preceded by the word "shall"; but, as this Court held 50 years ago when interpreting this provision, not all instructions are mandatory pre-requisites for counting a ballot. See In re Luzerne Cnty. Return Bd., Appeal of Elmer B. Weiskerger, 290 A.2d 108, 109 (Pa. 1972) ("This section of the code merely assures the validity of ballots marked in blue, black or blue-black ink. It does not . . . specify that any other type of marking will necessarily be void."). Thus, the question presented before the Court is whether the Legislature's "contextually ambiguous use of the word 'shall'," Pa. Democratic Party v. Boockvar, 238 A.3d 345, 390-91 (Pa. 2020) (Wecht, J., concurring), prohibits county boards of elections from determining that an undated or misdated declaration "is sufficient" and counting the vote.

This Court previously concluded that undated ballots must be counted for the 2020 election but left the fate of such ballots in future elections unresolved. *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. 2020) ("*In re 2020 Canvass*"), *cert. denied sub nom. Donald J. Trump for President, Inc. v. Degraffenreid*, 141 S. Ct. 1451 (2021). Applying its longstanding and settled precedents, the Court recognized that the framework for determining whether a statutory provision is mandatory or directory turns on whether the directive represents "weighty interests." *Id.* at 1073 (plurality op.); *id.* at 1090 (Dougherty, J., concurring in part and dissenting in part). Three justices concluded in a plurality opinion that the Date Instruction did not implicate any weighty interests, *id.* at 1078 (plurality op.), and three justices concluded in dissent that it did, *id.* at 1090.

In the two years since *In re 2020 Canvass*, a fuller evidentiary record developed in litigation specifically directed to the Date Instruction has confirmed that this provision does not implicate any weighty state interests and thus must be read as directory. First, in May 2022, the U.S. Court of Appeals for the Third Circuit concluded—based on undisputed evidence developed during the 2021 General Election—that the date on a mail ballot

envelope served no purpose, and that disqualifying undated ballots thus would violate the Materiality Provision of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B). *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022). "The nail in the coffin," according to the court, was the undisputed evidence that "ballots were only to be set aside if the date was *missing*—not incorrect," revealing that the content of what a voter supplied on the date line was meaningless. *Id.* at 164.

Although the U.S. Supreme Court recently vacated as moot the Third Circuit's decision in *Migliori* without commenting on the merits, vacatur does not call into question the Third Circuit's ruling. *Ritter v. Migliori*, No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). Rather, "[t]he established practice of the [U.S. Supreme] Court in dealing with a civil case . . . which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Munsingwear*,

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⁶ The issue came before the Third Circuit in *Migliori* on a suit by voters whose mail-in ballots—all of which were received by county election officials prior to 8 p.m. on election day—were nevertheless rejected in a 2021 local judicial race in Lehigh County, simply because handwritten dates on the ballot envelopes were missing. By the time the Supreme Court considered the petition for certiorari, the 2021 election had been certified and the winning judicial candidate installed.

340 U.S. at 39. And the Third Circuit's ruling and the factual findings in that case remain persuasive authority.

Indeed, the President Judge of the Commonwealth Court reached the same conclusion this past August relying primarily on Pennsylvania law. *Berks Cnty.*, 2022 WL 4100998, at *24. In a thorough and well-reasoned 67-page opinion—again relying on a fully-developed evidentiary record—the President Judge agreed that "the material facts . . . do not factually support the existence of the 'weighty interests' that would require invalidation [of undated or incorrectly dated mail ballots]." *Id.* Consistent with these decisions, the Secretary recently directed county boards to accept and count undated or misdated mail ballots. See Appl. Ex. A. This guidance remains in effect as eligible Pennsylvanians have started voting, with more than 600,000 ballots returned as of October 24, 2022, and tens of thousands more arriving in election offices each day.⁷

SUMMARY OF ARGUMENT

Disputes over undated ballots have proliferated in recent months, casting a cloud of uncertainty over the ballots of millions of Pennsylvanians who plan to vote (or have already voted) by mail—particularly those who

⁷ Pa. Dep't of State, Election Results, https://www.vote.pa.gov/About-Elections/Pages/Election-Results.aspx

inadvertently neglected to enter a handwritten date on their ballot envelope—and will likely result in further post-election litigation in all sixty-seven counties absent judicial intervention. This Court should take the opportunity to confirm that mail ballots cannot be disqualified merely because of a missing date.

The Court's well-established precedents compel this result. For decades, this Court has stated that some legislative commands are mandatory while others are directory, with the distinction turning on the statutory context-including an analysis of the relevant interests advanced by the provision. Consistent with the Statutory Construction Act and this Court's jurisprudence, laws enacted by the General Assembly must be presumed to reflect this long-recognized distinction. Here, the Legislature has directed voters to date their ballot, but it has not ordered boards of elections to discard undated or incorrectly dated ballots, nor has it ascribed any relevance whatsoever to the handwritten date itself. And as the evidence gathered in recent cases has shown, the date on the ballot envelope serves no purpose whatsoever in determining voter eligibility or detecting fraud; instead, it is a vestigial requirement that (if Petitioners prevail) would serve only as pretext to throw out timely votes cast by eligible Pennsylvania voters.

The text, structure, and history of the Election Code confirm that this could not have been the Legislature's intent.

That alone should decide the issue. But even further confirmation of the Legislature's intent can be determined by reference to federal law. The Materiality Provision of the Civil Rights Act prohibits discarding votes due to immaterial errors or omissions on documents or records relating to any acts requisite to voting. Even Petitioners recognize that the handwritten date on declaration is completely immaterial to determining a voter's qualifications or eligibility to vote. Because the Legislature chose to tie eligibility to the voter's status on Election Day rather than at the time the ballot was signed, the Date Instruction is exactly the type of meaningless technicality targeted by the Materiality Provision. If the Election Code is interpreted as directory, consistent with this Court's longstanding jurisprudence and well-settled canons of statutory interpretation of which the Legislature certainly was aware when it passed Act 77, there is no question of conflict between the Date Instruction and federal law. If, however, this Court accepts Petitioners' ahistorical interpretation of the statute requiring boards of elections to discard otherwise valid ballots for failure to include a handwritten date, it would violate federal law—a problem the Legislature certainly did not intend to create.

This Court's jurisprudence and the interpretive rules established by the Legislature confirm that mail ballots cannot be discarded because of missing or incorrect declaration dates. This Court should reject Petitioners' Application in its entirety or, at minimum, clarify that mail votes cast in this election may not be discarded due to immaterial date errors.⁸

ARGUMENT

I. The Court should resolve this pressing issue of public importance regardless of whether Petitioners have standing.

Petitioners consist of (1) registered Pennsylvania voters who intend to participate in the currently ongoing 2022 elections (the "Voter Petitioners"), Appl. 5–7; and (2) Republican Party committees (the "Committee Petitioners"), Appl. 7–9. To demonstrate their standing, Petitioners must identify injuries that are "substantial, direct, and immediate." *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). The Voter Petitioners have not, and cannot, identify such an injury.⁹

⁸ Even if this Court finds otherwise, Petitioners' choice to bring this action now is inappropriate, seeking to throw out ballots in an election in which hundreds of thousands of votes already have been cast.

⁹ Unlike the Voter Petitioners, Intervenors DCCC, Democratic National Committee, and Pennsylvania Democratic Party have an important role in protecting the rights of their members and supporters to exercise the franchise and their rights as candidates. See, e.g., Pa. Democratic Party v. Republican Party of Pa., No. 16-5664, 2016 WL 6582659, *3 (E.D. Pa. Nov. 7, 2016) (recognizing Democratic party committee had standing "to protect the interests of both Democratic candidates running for office and Democratic voters"). Intervenors take no position on the Republican Committee Petitioners' standing.

At the outset, the Voter Petitioners assert only generalized interests in "knowing" the procedure for mail ballots, not having their votes "canceled out and diluted by the counting of undated or incorrectly dated ballots," and uniform application of the Election Code across counties, Appl. 6–7; but the same is presumably true of every Pennsylvania voter. As this Court has long held, a voter's concern that her ballot will somehow be "diluted" by the acceptance of other qualified voters' ballots cannot confer standing because, even assuming that is a legitimate concern (which is highly questionable), it would be "common to that of all other qualified electors." *Kauffman v. Osser*, 271 A.2d 236, 240 (Pa. 1970).

Federal courts have overwhelmingly reached the same conclusion. ¹⁰ Bognet v. Sec'y Commonwealth of Pa., 980 F.3d 336, 356–60 (3d Cir. 2020) (concluding such vote-dilution claims are "paradigmatic generalized grievance[s] that cannot support standing"), cert. granted and judgment vacated on other grounds, 141 S. Ct. 2508 (2021); Wood v. Raffensperger, 981 F.3d 1307, 1313–16 (11th Cir. 2020) (holding plaintiff lacked standing to assert claim that "the inclusion of unlawfully processed absentee ballots diluted the weight of his vote"); see also Donald J. Trump for President, Inc.

¹⁰ While Pennsylvania's standing doctrine does not mirror that of federal courts, this Court has looked to federal standing decisions as persuasive authority. *See Markham*, 136 A.3d at 144-45.

v. Cegavske, 488 F. Supp. 3d 993, 1000 (D. Nev. 2020); Bowyer v. Ducey,
506 F. Supp. 3d 699, 711–12 (D. Ariz. 2020); Martel v. Condos, 487 F. Supp.
3d 247, 253 (D. Vt. 2020).

The same reasoning applies to the Voter Petitioners' wish for clarity on the proper procedures for canvassing mail ballots and concern about differing procedures between counties. Not only are these interests shared by every voter in Pennsylvania, but they are also not injuries: Voter Petitioners do not allege an impediment to anyone's ability to cast a ballot or to have it counted. See Wood, 981 F.3d at 1315. And their brief does not even acknowledge (let alone distinguish) this Court's rejection of their vote dilution theory in Kauffman, nor does it attempt to explain how their generalized interest in the proper application of the voting laws is unique to them. In re Hickson, 821 A.2d 1238, 1241-42 (Pa. 2003) (standing requires the identification of an injury that "surpasses the common interest of all citizens in procuring obedience to the law").

In any event, Voter Petitioners' lack of standing should not preclude this Court from resolving the important issues at hand, which, if not addressed now, will almost surely re-emerge in identical future litigation. Standing is a "prudential" doctrine that serves merely as a "useful tool in regulating litigation"; it does not limit the Court's constitutional authority to resolve a particular legal dispute. *Id.* at 1243 & n.5 (contrasting federal courts' standing doctrine, which "springs from a constitutional source," with Pennsylvania courts' standing doctrine, which "is not constitutionally compelled"). This is especially true when this Court is exercising its King's Bench authority. As Intervenors explained to the Court in their response to this Application, the destabilizing threat to the ongoing 2022 election posed by Petitioners' claims calls for prompt consideration (and rejection) of the relief Petitioners seek. Failure to address Petitioners' claims now will serve only to delay resolution of this issue until the chaotic environment of post-election litigation. These exigencies warrant an expeditious resolution of this dispute.

II. The Election Code does not require discarding undated or misdated mail ballots.

This Court has deployed several analytical tools in determining the consequences of failures to comply with voting instructions set forth in the Election Code. Where the Legislature has clearly specified the appropriate consequences in the text, no further analysis is necessary. Where the text is silent or ambiguous, however, this Court must decide whether the Legislature intended to disqualify ballots because of non-compliance with voting instructions. In conducting this analysis, the Court has established three guiding principles that are instructive here.

First, when interpreting contextually ambiguous provisions, the Court may consider the structure and history of the Election Code to determine the consequences of failure to comply with a statutory directive. Second, this Court has considered evidence of any "weighty interests"—or lack thereof served by the relevant instructions in determining whether a provision is mandatory (requiring the extreme sanction of discarding a voter's ballot for noncompliance) or directory (allowing the vote to be counted if otherwise valid). Finally, the Court must presume that the Legislature is aware of potentially applicable federal law and prevailing common law when enacting legislation; that it fully anticipates its laws will be interpreted in accordance with the standards and guidance developed by this Court, including the wellestablished distinction between mandatory and directory provisions; and that it does not intend to violate federal law.

All of these foundational tenets point in one direction: missing or incorrect dates on mail ballot envelopes do not supply grounds for discarding ballots and disenfranchising Pennsylvania voters.

A. Interpreting the date provision as directory is consistent with the plain text, structure, and history of the Election Code.

This Court should not impose the extreme consequence of ballot invalidation without clear direction from the Legislature. The text, structure,

and history of the Election Code confirm that the Legislature did not intend to disqualify voters who fail to fully comply with the Date Instruction. Petitioners ask this Court to force election officials to either not count or set aside "undated or incorrectly dated" ballots at the canvassing stage. Pet'rs' Br. at 52; 25 P.S. § 3146.8. The canvassing statute specifies that a vote shall be counted if the voter's identification has been verified and the board "is satisfied that the declaration is sufficient." 25 P.S. § 3146.8(3), (4). Petitioners argue that a declaration cannot be sufficient if the voter fails to include an accurate date, but the plain language and history of the canvassing provision decisively rejects that interpretation.

A statute's meaning "should be determined based on evidence of the General Assembly's intention" which is best understood by looking at the text of the statute "in context[] with words bearing their common meaning." Sec'y's Answer to App. ("Chapman Answer") at 16 (citing 1 Pa.C.S. § 1921; Crown Castle NG E. LLC v. Pa. Pub. Util. Comm'n, 234 A.3d 665, 674 (Pa. 2020)). And here the statute's plain language reflects the Legislature's determination that sufficiency—rather than perfection—is the appropriate standard to apply to mail ballot declarations. As the Secretary explained, undated declarations are sufficient so long as they are signed. *Id.* at 15–16 (emphasis added). "Here, the General Assembly required only that a

declaration be 'sufficient'" to allow the voter to swear their eligibility to vote. *Id.* at 16 (citing 25 P.S. § 3146.4; 25 P.S. § 3150.14). And elsewhere, the Election Code makes clear that a "voter's signature on a declaration by itself constitutes the voter's attestation of their qualifications." *Id.* at 16–17 (citing 25 P.S. § 3553).¹¹

With the benefit of the record and historical research developed over the last two years that was not before the Court in 2020, nothing in the text or structure of the Election Code dictates that undated or misdated ballot declarations are insufficient and require invalidation of the ballot. The General Assembly explicitly identified in the canvassing statute which specific errors necessitate disqualifying a ballot; namely, if the secrecy envelope "contain[s] any text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference" or if "an elector fails to provide proof of identification that can be verified by the county board by the sixth calendar day following the election" where proof of identification had not previously been provided. 25 P.S. § 3146.8(g)(4)(ii), (h)(3). As the Berks County court correctly recognized, the Election Code "does not state that a ballot in a return envelope that lacks a

¹¹ Intervenor-Respondents adopt in full the Secretary of State's discussion of canvassing requirements laid out in Section II. A. of her Answer.

dated declaration is invalid, should be rejected, or should not be counted, although the General Assembly has specified these consequences with regard to other aspects of absentee or mail-in ballots." *Berks Cnty.*, 2022 WL 4100998, at *14 (emphasis in original). This Court should not presume that the Legislature intended the extreme consequence of ballot invalidation where it has established a 'sufficiency' standard and nowhere stated that undated ballots cannot be sufficient or must be disqualified.

Notably, the Election Code's history reveals that if the General Assembly wanted to make the Date Instruction a pre-requisite for canvassing, it would have done so explicitly, as it has in the past. As the Secretary's Answer thoroughly explains, the Election Code previously allowed voters to return absentee ballots by the second Friday after Election Day, despite voters needing to complete their ballots by or on Election Day. Act of Mar. 9, 1945, P.L. 29, No. 17, sec. 10, §§ 1306, 1307, 1945 Pa. Laws 29, 37. As such, the Legislature amended the canvassing provision in 1945 to instruct county boards to review the postmark on a ballot's return envelope and to "set aside" ballots in which the jurat was dated after the election. Act of Mar. 9, 1945, P.L. 29, No. 17, sec. 10, § 1307, 1945 Pa. Laws 29, 37. 12

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¹² Jurat is "[a] certification added to an affidavit or deposition stating when and before what authority the affidavit or deposition was made." *Jurat*, Black's Law Dictionary (11th ed. 2019)

When absentee voting was expanded to certain groups of civilians in 1963, the affidavit and jurat requirements merged into the single declaration still used today. Act of Aug. 13, 1963, P.L. 707, No. 379, sec. 22, § 1304, 1963 Pa. Laws 707, 736.

Then, in 1968, the General Assembly imposed a single deadline—by election day—for voters to complete their absentee ballot and for counties to receive them. Act of Dec. 11, 1968, P.L. 1183, No. 375, sec. 8, § 1308(a). After doing so, the General Assembly deleted the requirement that counties discard ballots with improper dates on the ballot envelope. Act of Aug. 13, 1963, P.L. 707, No. 379, sec. 8, § 1308(c), 1963 Pa. Laws 707, 736. These provisions remained largely unchanged from 1968 to 2019 and were incorporated by the General Assembly when it passed Act 77 in 2019. Mot. for Leave to File Br. as Amicus Curiae and Br. for Speaker of the Pa. H.R., Bryan Cutler, et al., Ritter v. Migliori, 2022 WL 3371220 (U.S.), at *4 (noting that since the first amendment to the Election Code was enacted, "the procedure for marking an absentee ballot has remained constant"). Importantly, "Act 77 continued to impose a single deadline for voters to cast, and for counties to receive, most absentee and all mail-in ballots." Chapman Answer at 21.

This history shows that, since 1937, the Legislature has required county boards to review mail ballots for sufficiency, but that review has been separate and apart from any review of dates.

Moreover, the Legislature crafted specific language instructing county boards to review the dates on ballot declarations; but it expressly withdrew that requirement in the 1968 amendments when the ballot receipt deadline and election day merged, rendering the declaration date irrelevant to the canvassing process. Chapman Answer at 22 (quoting *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591, 609 (Pa. 2020)). If the Legislature intended for ballots without a proper date to be excluded, it would have included that language in the canvassing provision, as it has in the past. Its decision not to do so is instructive and provides compelling evidence that discarding undated ballots contravenes the Legislature's intent.

B. Unrefuted evidence of voting and canvassing procedures confirms that the Date Instruction is directory.

Applying this Court's long recognized distinction between "mandatory" and "directory" provisions further confirms that the Legislature did not intend to disqualify undated ballots. Noncompliance with a directive in the Election Code does not disqualify voters in every case; rather, the Court must consider whether the instruction implicates "minor irregularities" or "weighty interests." See *In re 2020 Canvass*, 241 A.3d at 1073.

Where an instruction implicates weighty interests, the Court interprets it "mandatory," meaning noncompliance requires the extreme consequence of disqualifying the voter's ballot. Examples of "weighty interests" include "fraud prevention or ballot security . . . that the General Assembly considered to be critical to the integrity of the election." *Id.*; see also Berks Cnty., 2022 WL 4100998 at *20 ("Where the provision is essential to the integrity of the election or the validity of the ballot, the provisions have been found to be mandatory"); Pa. Democratic Party, 238 A.3d at 380 (recognizing legislative intent that "ballot confidentiality . . . is so essential as to require disqualification" of mail ballots lacking a secrecy envelope). Where an instruction does *not* implicate weighty interests, the Court interprets it as 'directory,' meaning noncompliance does not require ballot disqualification.

Petitioners fail to connect any weighty interests to the Date Instruction such that failure to comply renders a ballot declaration insufficient. Instead, they rely on conclusory assumptions about the use of handwritten dates which, in litigation since *In re 2020 Canvass*, have been discredited with undisputed evidence. For instance, Petitioners claim that the Date Instruction: "provides proof of when the elector actually executed the ballot in full . . ."; "establishes a point in time against which to measure the elector's eligibility to cast the ballot"; and "ensures the elector completed the ballot

within the proper time frame[,]" Pet'rs' Br. at 27; but the evidentiary record in Berks County and Migliori conclusively rejects this theory.

First, it is undisputed that the timeliness of the mail ballot is determined by when the bar code on the ballot's return envelope is scanned into the Statewide Uniform Registry of Electors (SURE) system, *not* by whatever the handwritten date says. See, e.g., Berks Cnty., 2022 WL 4100998, at *6 (noting county commissioners and board members testimony that "the absentee and mail-in ballots are date stamped when they are received by their election bureaus and the barcode on each ballot return envelope that is unique to each elector and each election is scanned into the Statewide Uniform Registry of Electors (SURE) system"); App. 27 at p. 0681, Pa. Dep't of State, Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes at 2 (Sept. 11, 2020) (to track when a mailed ballot has been received, Department of State Guidance directs counties to "scan the correspondence ID barcode on the outside of the envelope"); App. 18 at p. 0280, Berks Cnty. N.T., S. Dunn, at 130:2-5 ("Q: And you don't use the date written on the outer envelope to determine when the ballot was received, correct? A: That is correct."); App. 17 at p. 0246, Berks Cnty. N.T., Deputy Secretary J. Marks at 98:16-21 ("[I]n determining whether [a mail-in or absentee ballot is] legally cast and in determining whether [a ballot is] timely,

I don't know that the date inserted by the voter is relevant in making that determination. It's the date that the county receives the ballot from the voter that is relevant.").

Second, it is undisputed that the handwritten date has nothing to do with an elector's eligibility to vote. See Pet'rs' Br. at 46–47 ("[C]orrectly dating an absentee or mail-in ballot is not one of the four qualifications to vote in Pennsylvania [T]he date requirement does not result in a qualification determination[.]"); see also, e.g., Berks Cnty., 2022 WL 4100998 at *22 ("[T]he date would not aid in determining an elector's qualifications[.]"). Because eligibility is assessed as of Election Day, the handwritten date cannot establish a point in time against which to measure the elector's eligibility to cast the ballot. See Amicus Br. of Pa., Migliori v. Lehigh Cnty. Bd. of Elections, No. 22-1499, 2022 WL 1045074, at *13 (3d Cir. Apr. 1, 2022).

Third, undisputed evidence shows that the handwritten date itself is not actually used to disqualify ballots for any reason. See App. 17 at p. 0170, Berks Cnty. N.T., Deputy Secretary J. Marks, at 22:3–8 (no administrative purpose to the date requirement); App. 19 at p. 0299, Berks Cnty. N.T., R. D'Agostino, at 148:2-7 (Q: "Are you aware of any instance in the May, 2022 primary where the date written on the envelope was used to exclude that

ballot from being counted? On the envelope, sorry. A: To exclude [the ballot] based on the date itself other than the case I mentioned¹³, no."); App. 52 at p. 0987, *Berks Cnty.* N.T., Deputy Secretary J. Marks at 36:8–9 ("I'm not aware of any county that excluded wrongly dated ballots"); *Id.* at 1007, *Berks Cnty.* N.T., Deputy Secretary J. Marks at 117:15–18 ("Q: So is there any situation in which the date written on the envelope would be relevant to whether the vote is counted? A: I don't believe so, no.").

Moreover, the handwritten date does nothing to prevent voter fraud. Petitioners point to a criminal complaint involving a fraudulent ballot cast in the name of a deceased voter but fail to explain how a handwritten date would have facilitated (or prevented) such fraud. If a voter is deceased on election day, their ballot cannot be counted, regardless of the date entered on the ballot declaration. 25 P.S. § 3146.8(d); see also App. 17 at p. 0265, Berks Cnty. N.T., Deputy Secretary J. Marks, at 117:6-14 ("[T]he relevant date is the date the voter is deceased as compared to the date of the election."); App. 19 at p. 0309-10, Berks Cnty. N.T., R. D'Agostino, at 158:12-1, 159:1-4 (noting deceased voter Mrs. Mihaliak was removed from Commonwealth's voter rolls and marked as deceased by Departments of

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¹³ The case referred to is discussed *infra* pp. 26–27 and involved a deceased voter's ballot being rejected for reasons entirely unrelated to the handwritten date on the envelope.

Health and State on April 25, 2022, prior to her ballot being received by the Board of Elections on April 28, 2022, so her ballot never would have counted regardless of the handwritten date). Further, double voting is detected by the bar code on the mail ballot, not the handwritten date. *See Berks Cnty.*, 2022 WL 4100998, at *22 ("[D]ouble voting was detected through the use of the barcode on the ballot that was scanned and entered into the SURE system[.]").

Petitioners also misread the mail voting procedures in the Election Code in suggesting that the handwritten date provides proof of when the voter executed the ballot in the event they appear in person at the polling place. Here too, the handwritten date is irrelevant. If a voter submits a completed and valid mail ballot before the deadline, and later attempts to vote in person on election day, the voter will at most be permitted to submit a provisional ballot, which would be disallowed given timely receipt of the mail ballot. See 25 P.S. §§ 3146.6(b), 3150.16(b), 3050(b). Ultimately, "[a] timely received ballot . . . containing a handwritten date, even an incorrect one, does not ensure or establish *anything* in relation to ballot confidentiality, an elector's qualifications, or the timeliness of the ballot." *Berks Cnty.*, 2022 WL 4100998, at *18 (emphasis added).

Once the evidentiary record in *Migliori* and *Berks County* clarified the mail voting procedures, President Judge Cohn Jubelirer correctly found "the purposes expressed" by the counties in that case—which are the same as those asserted by Petitioners here and represented by common counsel— "are unsupported by the facts[.]" *Id.* That same evidence is now before the Court—though it was not during the previous challenge in 2020. This Court should reach the same conclusion as President Judge Cohn Jubelirer and find that failure to comply with the Date Instruction does not require invalidation and that therefore the provision is directory.

This does not, however, mean that the Legislature's directive that a voter "shall . . . date" the ballot declaration is superfluous. The Legislature clearly intends for voters to include the date; after all, "shall means *shall.*" *In re 2020 Canvass*, 241 A.3d at 1084 (Wecht., J., concurring in part). But the Legislature also provided a framework in the canvassing provisions for evaluating whether failure to comply with this directive requires the extreme remedy of ballot invalidation. 25 P.S. § 3146.8(g). The facts as developed in *Migliori* and *Berks County* show that, in practice, the handwritten date has no bearing on whether the declaration is sufficient to establish the voter's identity or eligibility to vote. To hold that undated ballots nonetheless must

be discarded would contravene both the Legislature's intent and this Court's established precedents.

C. Interpreting the Date Instruction as mandatory contradicts the fundamental purpose and objective of the Election Code and implicates the Free and Equal Elections Clause.

The Election Code's "purpose and objective" is "to obtain freedom of choice, a fair election and an honest election return," and therefore this Court "liberally construe[s]" the Election Code "so as not to deprive . . . electors of their right to elect a candidate of their choice." Pa. Democratic Party, 238 A.3d at 356 (quoting *Perles v. Hoffman*, 213 A.2d 781, 783 (Pa. 1965)); see also Appeal of James, 105 A.2d 64, 65 (Pa. 1954) ("Election laws will be strictly enforced to prevent fraud, but ordinarily will be construed liberally in favor of the right to vote."). Pursuant to this principle, this Court has explained that "[t]he power to throw out a ballot for minor irregularities," "must be exercised very sparingly" and only "for compelling reasons." James, 105 A.2d at 66 (quoting Appeal of Gallagher, 41 A.2d 630, 632 (Pa. 1945)). That is, when interpreting the Election Code, the "goal must be to enfranchise and not to disenfranchise." In re Luzerne Cnty. Return Bd., 290 A.2d 108, 109 (Pa. 1972). Disenfranchising qualified voters on the sole ground that they failed to write a correct date on the outer envelope of their timely mail ballot flips this "longstanding and overriding" interpretation of the Election Code on

its head. And given the long-accepted distinction between directory and mandatory "shall" provisions, this Court should not assume that the Legislature intended such a result. *Pa. Democratic Party*, 238 A.3d at 360–61.

Adopting Petitioners' interpretation would also implicate the Free and Equal Elections Clause. The right to vote is enshrined in the Pennsylvania Constitution, PA. Const. art. I, § 5, and courts have repeatedly recognized "[t]he Constitution is the fundamental law of our Commonwealth," that means "there is a fundamental right to vote," League of Women Voters of Pa. v. Boockvar, 247 A.3d 1183, 2021 WL 62268, at *11 (Pa. Cmwlth. Jan. 7, 2021), aff'd sub nom. League of Women Voters of Pa. v. DeGraffenreid, 265 A.3d 207 (Pa. 2021); see also Friedman v. Corbett, 72 A.3d 255, 258 (Pa. 2013). In considering the constitutionality of election regulations under the state constitution, Commonwealth courts apply the same standards adopted by "the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution." Love v. Borough of Stroudsburg, 597 A.2d 1137, 1139 (Pa. 1991) (citing James v. Se. Pa. Transp. Auth., 477 A.2d 1302 (Pa. 1984)). This analysis requires courts to "weigh 'the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate'

against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiffs' rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); see also In re Zulick, 832 A.2d 572, 580 (Pa. Cmwlth. 2003).¹⁴

For voters who fail to enter a handwritten date on their ballot envelope, the Petitioners' proposed penalty is draconian: their ballots are discarded and they are disenfranchised. But, as discussed above, discarding undated ballots serves no interest at all, much less a *weighty* interest, *supra* at pp. 23–29. Whether a ballot is timely received by the county boards of election is determined by that ballot's scan into the SURE System or receipt stamp. *Supra* at pp. 24–25. And the voter-provided date serves no administrative or fraud-detection function. *See supra* at pp. 25–26. The significance of the state interest "depend[s], in part, on whether the state's intrusion will effect its purpose; for if the intrusion does not effect the state's purpose, it is a gratuitous intrusion, not a purposeful one." *Denoncourt v. Commonwealth of*

¹⁴ See Clifford B. Levine & Jacob S. Finkel, *Shall Your Vote Be Counted?: Evaluating Whether Election Code Provisions Are Directory or Mandatory*, 82 U. Pitt. L. Rev. 525, 535–47 (2021) (surveying the Court's use of balancing tests in interpreting statutory provisions).

Pa., State Ethics Comm'n, 470 A.2d 945, 949 (Pa. 1983). Here, the Date Instruction, if interpreted as mandatory, would be plainly gratuitous, and it certainly does not create the sort of "compelling reason[]" required to justify "throw[ing] out a ballot for minor irregularities." James, 105 A.2d at 66.

In sum, unrefuted evidence regarding the voting and canvassing process; the Election Code's plain text, structure, and history; and this Court's longstanding construction of the Election Code and the Pennsylvania Constitution all counsel against interpreting the Date Instruction in a manner that allows county boards to discard undated ballots and disenfranchise lawful Pennsylvania voters.

III. Petitioners' requested relief would violate federal law.

The Legislature's intended application of the Date Instruction can and should be determined under the well-established principles of Pennsylvania common law and statutory interpretation discussed above, without reference to federal law. However, that Petitioners' preferred interpretation would invite violations of federal law confirms that they are mistaken.

A. The Court should apply Pennsylvania's rules of statutory construction and interpret the Date Instruction in accordance with the Civil Rights Act.

The Materiality Provision of the Civil Rights Act prohibits any "person acting under color of law" from "deny[ing] the right of any individual to vote in

any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101. This Court need not decide whether the Materiality Provision actually prohibits disqualification of mail ballots lacking accurate dates; that it may is enough to require this Court to adopt a permissible alternate interpretation. Cf. Commonwealth v. Herman, 161 A.3d 194, 212 (Pa. 2017) ("Under the canon of constitutional avoidance, if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties and the other of which would not, we adopt the latter construction."); MCI WorldCom, Inc. v. Pa. Pub. Util. Comm'n, 844 A.2d 1239, 1249 (Pa. 2004) ("[W]hen a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."). Here, there is at least a strong possibility that the interpretation advanced by the Petitioners would force county boards to violate the Materiality Provision, and an alternative interpretation can be adopted fully consistent with the SCA.

This Court should avoid interpretations of a statute that raise issues of federal or constitutional law. The SCA directs that "[i]n ascertaining the

intention of the General Assembly in the enactment of a statute" courts may presume "[t]hat the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth." 1 Pa.C.S. § 1922(3). Where two possible readings of a statute exist—one that creates and one that avoids conflict between state and federal laws—the latter interpretation must be employed. See, e.g., Commonwealth, Dep't of Transp. v. McFarren, 525 A.2d 1185, 1188 (Pa. 1987) ("[I]f one interpretation results in conflict with another statute, or violation of the Federal or State Constitution, such interpretation cannot be accepted"). Because the interpretation advanced by Petitioners would require county boards to violate federal law, this Court should avoid adopting that interpretation if at all possible.

B. Petitioners' requested relief would violate the Materiality Provision of the Civil Rights Act.

The Materiality Provision has three relevant elements, all of which are implicated by disqualifying absentee ballots based on missing or incorrect

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¹⁵ While this Court has previously been asked to interpret Act 77's ballot dating provision, the question of whether interpreting the statute as mandatory instead of directory violates the Materiality Provision was not fully briefed in 2020. Nonetheless, a majority of this Court then recognized that arguments about this "binding provision" had "some persuasive force," as "it is inconsistent with protecting the right to vote to insert more impediments to its exercise than considerations of fraud, election security, and voter qualifications require." *In re 2020 Canvass*, 241 A.3d at 1075 n. 5, 1089 n. 54. Intervenor-Respondents agree that this persuasive logic is important but believes that the decision is more properly rooted in a fuller consideration of the state law factors discussed above.

dates on the certification envelope. It prohibits (1) denying the right to vote (2) "because of an error or omission on any record or paper . . . relating to any . . . act requisite to voting" (3) so long as the error or omission is not material to the voter's qualifications. 52 U.S.C. § 10101(a)(2). Based on the plain text of the Provision and relevant sections of the Election Code, refusing to count ballots because of missing or incorrect dates is impermissible.

The first Materiality Provision element is met because the consequence of applying the Petitioners' interpretation is that voters who misdate or fail to date their ballot certification will not have their votes counted. For purposes of the Materiality Provision, "the word 'vote' includes all action necessary to make a vote effective including . . . having [a] ballot counted and included in the appropriate totals of votes cast." *Id.* U.S.C. § 10101(e). Petitioners' argument that "[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" robs the text of its meaning; per the statute, refusal to count a vote is denial of the right to vote itself. Pet'rs' Br. at 43–44 (internal quotation omitted).

The Materiality Provision does not *always* prohibit States from disqualifying ballots, however: the statute only prohibits denial of the right to vote based on immaterial errors or omissions on records or documents. It

that an individual "may be unable to cast a vote," including "showing up to the polls after Election Day, failing to use a secrecy envelope for an absentee or mail-in ballot, returning the ballot to the wrong location, or arriving at the wrong polling place." *Id.* at 44. Petitioners make no argument that these identified reasons involve "an error or omission on any record or paper" at all, and a State may permissibly impose regulations on the exercise of the franchise, *see* Appl. at 20–21; it may not, however, refuse to count votes because of immaterial errors or omissions on the ballot declaration.

The second Materiality Provision element is met because the ballot declaration is a "record or paper . . . relating to any . . . other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). Petitioners argue that "casting a ballot constitutes the *act* of voting, not an application, registration, or other act requisite to voting," and that therefore the declaration is beyond the scope of the Materiality Provision. Appl. at 22. This argument is wrong for at least two reasons. First, the declaration in question appears on the ballot *envelope* and not on the ballot itself. See 25 P.S. § 3146.8(3) (directing board to "examine the declaration *on the envelope of each ballot*") (emphasis added). Filling out the declaration is therefore a separate act from casting a ballot. Second, Petitioners once again ignore the text of the Materiality Provision.

Because "vot[ing]" includes "having [a] ballot counted," "any . . . other act requisite to voting" encompasses any act requisite to *having one's vote counted*. 52 U.S.C. § 10101(a)(2)(B), (e). Completing a declaration that is mandated by law in order to have one's ballot counted indisputably falls within the scope of activities covered by the statute.

The third Materiality Provision element is met because the date on the declaration is completely immaterial to a voter's qualification to vote under Pennsylvania law. See supra pp. 23-29. As Petitioners concede, "correctly dating an absentee or mail-in ballot is not one of the four qualifications to vote in Pennsylvania, which are being at least 18 years of age on the date of the election; having been a citizen of Pennsylvania for at least one month; having lived in the relevant election district for at least 30 days; and not being imprisoned for a felony." Pet'rs' Br. at 46-47 (citing 25 P.S. § 1301). Petitioners argue that the clear immateriality of the declaration date to a voter's qualifications somehow takes it "outside the plain terms and narrow scope of, and does not violate, the federal materiality provision." Pet'rs' Br. at 47. The opposite is true; that the declaration date "is not one of the four qualifications to vote in Pennsylvania," Pet'rs' Br. at 46-47, means that an error or omission with respect to that date cannot be grounds for refusing to count a vote.

Consistent with this interpretation of the Materiality Provision, the U.S. Court of Appeals for the Third Circuit held in May 2022 that disqualifying undated ballots would violate federal law. See Migliori, 36 F.4th 153. The court explained that the Date Instruction "in no way helps the Commonwealth determine whether a voter's age, residence, citizenship, or felony status qualifies them to vote." Id. at 163. This was particularly so, the court explained, given that all the ballots at issue were timely received, and those containing "an erroneous date were counted." *Id.* at 163 ("This, without more, slams the door shut on any argument that this date is material." *Id.* at 164.). The Supreme Court recently vacated that decision as moot, see Ritter, 2022 WL 6571686, but that vacatur in no way undermines the Third Circuit's reasoning. Indeed, months prior to that vacatur, the Supreme Court declined to disrupt the Third Circuit's ruling when one of the parties in *Migliori* sought an emergency injunction to prevent the counting of consequential undated ballots pending appeal. Ritter v. Migliori, 142 S. Ct. 1824 (2022).

Petitioners offer no persuasive reason to depart from the Third Circuit's analysis but instead rely on arguments that mustered the support of only three dissenting Justices. See id. at 1824–26. At most, that dissent establishes that a minority of the Court believes there is some dispute about the proper interaction between the Materiality Provision and the Date

Instruction, but the weight of authority rejects Petitioners' atextual interpretation of the Materiality Provision. See, e.g., Migliori, 36 F.4th at 163-64; League of Women Voters of Ark. v. Thurston, No. 5:20-cv-05174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021); Martin v. Crittenden, 347 F. Supp. 3d 1302, 1308-09 (N.D. Ga. 2018). That is sufficient reason for this Court to refrain from adopting an interpretation of the Election Code that would require entangling itself in this dispute. 1 Pa.C.S. §§ 1921, 1922.

IV. The Court should decline to disrupt the ongoing 2022 general election.

In addition to the legal defects in Petitioners' Application, it is far too late in this election cycle to provide the relief they request. The 2022 general election has been underway for weeks. Counties have distributed over 1.31

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¹⁶ Tellingly, Justice Alito conceded that his dissent constituted only a hasty, preliminary view of the issues involved, explaining: "as is almost always the case when we decide whether to grant emergency relief, I do not rule out the possibility that further briefing and argument might convince me that my current view is unfounded." *Ritter*, 142 S. Ct. at 1824.

Moreover, Petitioners' reliance on *Vote.org v. Callanen*, 39 F.4th 297, 305 n.6 (5th Cir. 2022)—a motions panel order issued on an expedited motion for emergency stay pending appeal—is unpersuasive. In that case, the district court agreed that the Materiality Provision barred election officials from rejecting voter registration applications signed with imaged—as opposed to wet ink—signatures and enjoined county officials from enforcing that requirement. *Vote.org v. Callanen*, --- F.3d ---, No. SA-21-CV-00649-JKP, 2022 WL 2181867 (W.D. Tex. June 16, 2022). While the motions panel order that Petitioners cite stayed the injunction, the panel's additional commentary regarding other applications of the Materiality Provision to factual scenarios not before the court was not only irrelevant dicta—there was no dispute that the provision applied to the voter registration forms at issue—but, as even the panel recognized, the ultimate disposition of the case remains a question for the merits panel which has yet to issue a ruling on the case. *Vote.org*, 39 F.4th at 305 n.5.

million mail-in and absentee ballots to voters since late September, and voters have returned more than 600,000 of those ballots. That activity has occurred under guidance from federal court, the Commonwealth Court, and the Acting Secretary of the Commonwealth indicating that the existence of an accurate, handwritten date is not grounds for disqualifying a mail-in or absentee ballot. Petitioners claim that reversing all of this guidance, at this exceptionally late stage, and consequently disenfranchising countless lawful Pennsylvania voters will somehow promote confidence in the electoral process and facilitate the functioning of our democracy. Pet'rs' Br. at 9-10. The opposite is true: granting the relief Petitioners seek would upend the status quo in the middle of an ongoing election, causing widespread confusion and significant disenfranchisement, sowing distrust in the electoral system along the way.

This Court has explained that it is appropriate to withhold relief when it would alter the electoral status quo in a way that causes "unnecessary disenfranchisement." *Appeal of Zentner*, 626 A.2d 146, 149 (Pa. 1993). That is precisely what Petitioners request. As Justice Wecht recognized in 2020, when "local election officials and voters alike lack[] clear information regarding the consequences of, *e.g.*, failing to . . . record the date beside the voter's declaration signature," it is deeply inequitable to invalidate those

voters' ballots on that basis. *In re 2020 Canvass*, 241 A.3d at 1089. That voters have lacked clear information cannot be disputed; as the Majority Leader and Speaker of the House wrote in a letter attached as Exhibit D to the Petition, "conflicting judicial interpretations, coupled with frequently revised guidance from [the Department of State], has created ambiguity over this provision." Given such ambiguity, this Court should not grant relief that reverses existing guidance from federal and state actors—particularly when it is far too late to make ballot-design changes to mitigate the risk that voters inadvertently fail to properly date their mail ballots—without providing political committees like Intervenors a sufficient opportunity at this late date to educate voters about such significant changes to the way mail ballots are tallied.

The events that predate Petitioners' Application exemplify the circumstances under which the disruptive, status-quo altering nature of relief sought requires the Court to stay its hand. Two years ago, this Court permitted Philadelphia and Allegheny Counties to count mail-in and absentee ballots on which qualified voters had signed but not dated the outer envelope. *In re 2020 Canvass*, 241 A.3d at 1079. In his opinion agreeing with the judgment, Justice Wecht expressed a "sincere hope that the General Assembly [would] see[] fit to refine and clarify" the Election Code so as "to

advance clarity and uniformity across the Commonwealth" on this question. *Id.* at 1089. In the absence of legislative clarification, voters and election officials received mixed signals from the Commonwealth Court, which issued four relevant decisions on this question between January and August of this year, the two most recent of which indicated that a voter's failure to include an accurate, written date on their ballot did *not* render it invalid. *Berks Cnty.*, 2022 WL 4100998 (Pa. Cmwlth. Aug. 19, 2022); *McCormick for U.S. Senate v. Chapman*, No. 286 MD 2022, 2022 WL 2900112 (Pa. Cmwlth. June 2, 2022); *but see In re Election in Region 4 for Downington Sch. Bd. Precinct Uwchlan 1*, 272 A.3d 933, 2022 WL 96156 (Pa. Cmwlth. Jan. 10, 2022); *Ritter v. Lehigh Cnty. Bd. of Elections*, 272 A.3d 989, 2022 WL 16577 (Pa. Cmwlth. Jan. 3, 2022).¹⁷

As discussed, this issue also arose in federal litigation. In late May, the Third Circuit held that federal law prohibited counties from invalidating ballots on the ground that they lacked a written date. *Migliori*, 36 F.4th 153. Two weeks later, the U.S. Supreme Court denied an application to stay the Third Circuit's decision. *Ritter*, 142 S. Ct. 1824. And when the U.S. Supreme Court vacated the Third Circuit's decision on mootness grounds just a week ago,

¹⁷ Petitioners' Application and Brief emphasize that the Commonwealth Court's decisions in *McCormick* and *Chapman* were "unpublished, non-precedential" orders. Appl. 2, 10, 11, 16; Pet'rs' Br. at 4–5. Of course, so are *Downington School Board* and *Ritter*.

Ritter, 2022 WL 6571686, the Secretary immediately issued guidance directing counties to maintain the status quo by including undated or incorrectly dated ballots in their pre-canvass and canvass. Appl. Ex. B.

Thus, since the general election began in late September with counties sending mail ballots to voters, see 25 P.S. §§ 3146.5(a), 3150.15, voters and election officials have been operating under nearly uniform federal and state court guidance that the absence of an accurate, written date is *not* a basis for rejecting a mail ballot. At this very moment, voters are returning ballots pursuant to this guidance. Invalidating those voters' ballots due to their failure to comply with an instruction that they were told was not mandatory would be truly inequitable. To reverse course now, in the middle of voting, would pull the rug out from under those voters. The Court should decline Petitioners' invitation for electoral chaos.

CONCLUSION

For the reasons above, this Court should confirm that timely received ballots with missing or incorrect dates should be counted as required by law.

Dated: October 25, 2022

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I, Adam C. Bonin, certify that this filing contains fewer than 14,000 words as prescribed by Pa.R.A.P. 2135.

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CERTIFICATE OF COMPLIANCE WITH Pa. R.A.P. 127

I, Adam C. Bonin, 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.

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October 25, 2022

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

٧.

Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth, *et al.*,

Respondents.

APPENDIX TO BRIEF OF INTERVENOR-RESPONDENTS DCCC, DEMOCRATIC NATIONAL COMMITTEE ("DNC"), AND THE PENNSYLVANIA DEMOCRATIC PARTY ("PDP") — EVIDENTIARY RECORD OF CHAPMAN v. BERKS CNTY. BD. OF ELECTIONS, NO. 355 M.D. 2022, 2022 WL 4100998 (PA. CMWLTH. AUG. 19, 2022)

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Appendix 1

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioners,

v.

No. 355 MD 2022

BERKS COUNTY BOARD OF ELECTIONS, et. al.,

Respondents.

JOINT STIPULATION OF FACTS

Pursuant to this Court's July 21, 2022 Order, the parties submit the following joint stipulation of facts. There are some disputed facts.

- 1. The form of the declaration that the Secretary of the Commonwealth has prescribed under 25 P.S. § 3146.4 and 25 P.S. § 3150.14, and which has been in use since February 2021, is attached as Joint Exhibit 1.
- 2. The form of absentee and mail-in voter declarations used by Berks County, Fayette County, and Lancaster County conform to the Secretary's form, and include instructions explaining to absentee and mail-in voters that their votes would not be counted if the declaration is not signed and dated.
- 3. The Pennsylvania Department of State ("Department") issued guidance on September 11, 2020 regarding the receipt and recording of absentee and mail-ballots. This guidance is advisory and not binding on county boards of

elections. A copy of the Department's September 11, 2020 guidance is attached as Joint Exhibit 2.

- 4. The Department issued further guidance on September 28, 2020 concerning civilian absentee and mail-in ballot procedures. This guidance is advisory and not binding on county boards of elections. A copy of the Department's September 28, 2020 guidance is attached as Joint Exhibit 3.
- 5. The Department website page for Pennsylvania voters includes instructions to voters regarding completion of absentee and mail-in ballots for the upcoming November 8, 2022 General Election. It is accessible at: https://www.vote.pa.gov/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx (last accessed July 26, 2022). A copy of this webpage is attached as Joint Exhibit 4.
 - 6. On May 17, 2022, Pennsylvania held its general primary election.
- 7. In response to this Court's June 2, 2022 order in *McCormick v*. *Chapman*, No.286 MD 2022, Berks, Fayette, and Lancaster counties reported the following number of ballots lacking a handwritten date on the envelope as having been cast in 2022 general primary election:

- a. Berks County:
 - i. 507 Democratic ballots;
 - ii. 138 Republican ballots.
- b. Fayette County
 - i. 45 Democratic ballots;
 - ii. 6 Republican ballots.
- c. Lancaster County:
 - i. 46 Democratic ballots;
 - ii. 38 Republican ballots.
- 8. On May 24, 2022, the Department of State issued guidance to the county boards of elections. This guidance is advisory and not binding on county boards of elections. A copy of this guidance is attached as Joint Exhibit 5.
- 9. On June 6, 2020, the Berks County Board of Elections and Lancaster County Board of Elections submitted to the Acting Secretary separate vote tallies that included and excluded the votes from their timely received undated absentee and mail-in ballots, in the format requested by and on the Excel spreadsheet provided by the Department in its May 27, 2022 email.
- 10. On June 6, 2022, the Berks County Board of Elections and the Lancaster County Board of Elections submitted to the Acting Secretary their certified election returns for the 2022 general primary election, which returns did not include votes from the timely received undated absentee and mail-in ballots.

- 11. On June 7, 2022, the Fayette County Board of Elections submitted to the Acting Secretary its certified election return for the 2022 general primary election, which returns did not include votes from timely received undated absentee and mail-in ballots.
- 12. On June 8, 2022, the Berks County Board of Elections submitted revised certified election returns to the Acting Secretary that included additional votes from provisional ballots that were cast in Berks County between 8:00 and 9:00 PM on May 17, 2022.¹
- 13. On June 17, 2022, Jonathan Marks, the Department of State's Deputy Secretary for Elections & Commissions, emailed all county boards. A copy of this email is attached as Joint Exhibit 6.
- 14. On June 23, 2022, the Director of Election Services for Berks County responded to Mr. Marks' email. A copy of this email is attached as Joint Exhibit 7.

¹ In Berks County, all polls remained open an additional hour from 8:00 to 9:00 PM on May 17, 2022 because of technical issues experienced at polling places countywide earlier in the day. Because of a legal challenge to counting the provisional ballots cast in Berks County between 8:00 and 9:00 PM, Berks County could not touch those ballots until that challenge was formally dismissed on June 6, 2022. Berks County completed its canvassing and counting of those votes on June 7, 2020, and by Noon on June 8, 2020, the Berks County Board of Elections submitted to the Acting Secretary a second certified return that included votes from the provisional ballots, within the time allotted to complete the statewide recount ordered by the Acting Secretary for the Republican primary election for United States Senator.

- 15. On June 27, 2022, Mr. Marks emailed all counties that had not yet submitted certified results that included ballots missing a handwritten date on the envelope declaration and counties that had not yet informed the Department of State when they would submit those certified results. A copy of this email is attached as part of Joint Exhibit 8.
- 16. On June 27, 2022, the Director of the Fayette County Election Bureau responded to Mr. Marks's email. A copy of this email is attached as part of Joint Exhibit 8.
- 17. On June 27, 2022, counsel for Lancaster County responded to Mr. Marks's email. A copy of this email is attached as Joint Exhibit 9.
- 18. On June 28, 2022, the Chairman of the Berks County Commissioners responded to Mr. Marks's email. A copy of this email is attached as Joint Exhibit 10.
- 19. On June 29, 2022, Tim Gates, the Department of State's Chief Counsel, sent an identical letter to a representative of each of the three Respondent boards. The version of that letter sent to Berks County is attached as Joint Exhibit 11.
- 20. On July 1, 2022, counsel for Berks County responded to Mr. Gates's letter. A copy of that letter is attached as Joint Exhibit 12.
- 21. On July 5, 2022, counsel for Lancaster County responded to Mr. Gates' letter. A copy of that July 5, 2022 email is attached as Joint Exhibit 13.

- 22. On July 5, 2022, and July 8, 2022, Mr. Gates emailed the Director for the Fayette County Election Bureau asking for a response to his June 29, 2022 letter. A copy those emails is attached as Joint Exhibit 14.
- 23. The Acting Secretary has not yet certified the results of any election in the 2022 general primary in which any vote was cast in Berks County, Fayette County, or Lancaster County, including, without limitation, district-level and statewide races.
- 24. The Respondent boards represent, and as far as the Acting Secretary is aware, prior to this action no voter, candidate, or any other "aggrieved person" challenged the final certification of the 2022 general primary election by the Berks County Board of Elections, the Fayette County Board of Elections, or the Lancaster County Board of Elections.

Dated: July 26, 2022 Respectfully submitted,

/s/ Jeffrey D. Bukowski

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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.

Dated: July 26, 2022 /s/ Jacob B. Boyer

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JOINT EXHIBIT 1

YOUR BALLOT WILL NOT BE COUNTED UNLESS: ☐ You sign and date the voter's declaration in your own handwriting ☐ You seal your ballot inside the [color] secrecy envelope ("Official Election Ballot") and place it in here									
Witne	Witne	Today	Voter,	assista of my i receive my sigr	To be Sign: Illnes I hereb my dec	, —	FOR	- 1	

I hereby declare that I am qualified to vote in this election; that I have not already voted in this election; and I further declare that I marked my ballot in seelet. I am qualified to vote the enclosed ballot. I under estand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if me ballot is not received by the county, I understand be I may only vote by provisional ballot at my polling in may only vote by provisional ballot at my polling in the beautiful to the provisional ballot at my polling in the beautiful that is not received by the county, I understand be I may only vote by provisional ballot at my polling in the beautiful that is not received by the county.

Voter, sign or mark here (Required)

voided, to the judge of elections at my polling place

1	Toda
	Today's Date (Required)
	ate (R
	equire
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J	

COUNTY ELECTION USE ONLY

Iness or Physical Disability:
nereby declare that I am unable to sign
y declaration for voting my ballot without ign their Declaration Because ceived assistance in making my mark in lieu of sistance because I am unable to write by reason my illness or physical disability. I have made or **Completed by Voter Unable** 으 to

oter, mark here

y signature.



itness, address (street)

S)

Date

/itness, address (city, zip code)

Witness, sign here

OUR BALLOT <u>WILL NOT</u> BE COUNTED UNLESS: You sign and date the voter's declaration in your own handwriting You <u>seal</u> your ballot inside the [color] secrecy envelope ("Official Election Ballot") and place it	in here

Voter's declaration

I hereby declare that I am qualified to vote in this election; that I have not already voted in this election; and I further declare that I marked my ballot in seelet. I am qualified to vote the enclosed ballot. I under stand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand ballot is not received by the county, I understand place after I return my voted ballot at my polling I may only vote by provisional ballot at my polling I may only vote by provisional ballot my polling I may only vote by provisional ballot my polling I may only vote by provisional ballot my polling I may only vote by provisional ballot my polling I may only vote by provisional ballot my polling I may only vote by provisional ballot my polling I may only vote by provisional ballot my polling I may only vote by provisional ballot my polling I may only vote by provisional ballot my polling I may only vote by provisional ballot my polling I may only vote by provisional ballot my polling I may only vote by provisional ballot my polling I may only vote by provisional ballot my polling I my pol voided, to the judge of elections at my polling place.

Voter, sign or mark here (Required)

FOR COUNTY ELECTION USE ONLY		Today's Date (Required)
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received assistance in making my mark in lieu of of my illness or physical disability. I have made or assistance because I am unable to write by reason Illness or Physical Disability: I hereby declare that I am unable to sign my declaration for voting my ballot without my signature. Sign their Declaration Because To be Completed by Voter Unable 약

Voter, mark here



Today's Date

Witness,

address

(street)

Witness, address (city, zip code)

Witness, sign here

JOINT EXHIBIT 2



GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES

Date: September 11, 2020

Version: 1.0

EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES

1 BACKGROUND:

The Pennsylvania Election Code describes processes that a qualified voter follows to apply for, receive, complete and timely return an absentee or mail-in ballot to their county board of election. These processes include multiple secure methods used by the voter's county board of election to verify that the qualified voter's absentee or mail-in application is complete and that the statutory requirements are satisfied. These include voter identification verification confirmed by either a valid driver's license number, the last four digits of the voter's social security number or other valid photo identification, and unique information on the application including the voter's residence and date of birth. Before sending the ballot to the applicant, the county board of elections confirms the qualifications of the applicant by verifying the proof of identification and comparing the information provided on the application with the information contained in the voter record. If the county is satisfied that the applicant is qualified, the application must be approved. This approval shall be final and binding, except that challenges may be made only on the grounds that the applicant was not a qualified voter, and those challenges must be made to the county prior to five o'clock p.m. on the Friday prior to the election.

Once the qualified voter's absentee or mail-in application is approved, the voter is mailed a ballot with instructions and two envelopes. The outer envelope includes both a unique correspondence ID barcode that links the envelope to the qualified voter's application and a pre-printed Voter's Declaration that the voter must sign representing that the voter is qualified to vote the enclosed ballot and has not already voted. This Guidance addresses the examination of the Voter's Declaration on the ballot return envelope. This Guidance assumes that the voter has satisfactorily completed the steps described above as to application for, receipt and return of an absentee or mail-in ballot.

2 RECORDING THE DATE, RETURN METHOD AND BALLOT STATUS FOR RETURNED BALLOTS:

County boards of elections should have processes in place to record the date, return method, and ballot status for all voted ballots received. County boards of elections must store and maintain returned ballots in a secure location until the ballots may be pre-canvassed or canvassed.

The county board of elections should stamp the date of receipt on the ballot-return. County boards of elections should record the receipt of absentee and mail ballots daily in the SURE system. To record a ballot as returned, the staff should scan the correspondence ID barcode on the outside of the envelope. The correspondence ID on the envelope is unique to each absentee or mail-in voter and each issuance of a ballot to a voter. Once a correspondence ID has been returned in the SURE system, it cannot be returned again. Further, if a ballot issuance record is cancelled by the county board of elections (e.g. voided to reissue a replacement ballot) in the SURE system, the correspondence ID on the cancelled ballot will become invalid. If the same barcode is subsequently scanned, the SURE system will not allow the returned ballot to be marked as being approved for counting.

The county boards of elections should record the date the ballot is received (not the date that the returned ballot is processed). In the event a county board of elections is entering the ballot on a date other than the date the ballot was received, the county personnel should ensure that the SURE record reflects the date of receipt, rather than the date of entry, since by default, SURE will automatically populate both the 'Date Received' and 'Vote Recorded' fields with the current date and time unless users manually correct the date to reflect the date received.

3 EXAMINATION OF DECLARATION ON BALLOT RETURN ENVELOPES:

The county board of elections is responsible for approving ballots to be counted during pre-canvassing.

To promote consistency across the 67 counties, the county boards of elections should follow the following steps when processing returned absentee and mail-in ballots.

After setting aside ballots of elector's who died prior to the opening of the polls, the county board of elections shall examine the Voter's Declaration on the outer envelope of each returned ballot and compare the information on the outer envelope, i.e., the voter's name and address, with the information contained in the "Registered Absentee and Mail-in Voters File, the absentee voter's list and/or the Military Veterans' and Emergency Civilians Absentee Voters File."

If the Voter's Declaration on the return envelope is blank, that ballot return envelope must be set aside and not counted. If the board determines that a ballot should not be counted, the final ballot disposition should be noted in SURE. The ballot return status (Resp Type) should be noted using the appropriate drop-down selection.

If the Voter's Declaration on the return envelope is signed and the county board is satisfied that the declaration is sufficient, the mail-in or absentee ballot should be approved for canvassing unless challenged in accordance with the Pennsylvania Election Code.

The Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections.

Version	Date	Description	Author
1.0	9.11.2020	Initial document release	

JOINT EXHIBIT 3

TLP: WHITE



GUIDANCE CONCERNING CIVILIAN ABSENTEE AND MAIL-IN BALLOT PROCEDURES

Date: September 28, 2020

Version: 1.0

GUIDANCE CONCERNING CIVILIAN ABSENTEE AND MAIL-IN BALLOT PROCEDURES

1 Mail-in and Civilian Absentee Balloting – General Provisions

Qualified voters may apply at any time on or before 5:00 p.m. on the Tuesday before any primary or election for a mail-in or civilian absentee ballot, and county boards of elections must begin processing applications at least fifty (50) days before the primary or election. County boards of elections may process applications earlier than fifty (50) days before the primary or election, if the county board of elections determines that it is better for its operational needs to do so.

1.1 Who May Request an Absentee or Mail-in Ballot?

All qualified voters in Pennsylvania are eligible to vote by mail-in ballot, and no excuse is required. For example, even if a voter will be present in their municipality on Election Day, but would simply prefer to vote from home, they may request a mail-in ballot.

Absentee ballots may be voted by domestic voters who will be absent from their municipality on Election Day due to work or vacation, voters who are celebrating a religious holiday, and voters such as college students who also may be away from the municipality on Election Day, if they don't choose to vote where they go to school. Absentee ballots are also for those who are unable to attend their polling place due to illness or physical disability.

A voter may only qualify for and vote one ballot.

2.2 Permanent Voter Lists

Any qualified voter can request to be placed on the permanent mail-in voter list at any time.

For the permanent annual **absentee** ballot list, only voters with a permanent illness or disability are eligible; this section does not apply to voters expecting to be absent from the municipality. Absentee voters who request to be placed on the permanent absentee list do not have to renew their physician's certification of continued disability every four (4) years or list it on each application.

If voters wish to request to become an annual permanent voter:

- For annual permanent **mail-in** list requests: these requests may be submitted when completing their online mail-in ballot request application.
- For annual permanent **absentee** list requests: this may be submitted by paper application only due to the physician's certification requirement.

Each year the county must send an application to any voter on the permanent absentee and mail-in voter lists by the first (1st) Monday in February. The yearly application, once approved, serves as a standing request for a mail-in or absentee ballot to be mailed to that voter for every election that calendar year and for any special election until the third (3rd) Monday in February the next year.

If a permanent mail-in or permanent absentee voter no longer wishes to receive a ballot for the upcoming election or wishes to cancel her permanent status, the voter can submit a cancellation form to the county board of elections. The cancellation form can be found at VotesPA.com.

2 Requesting an Absentee or Mail-in Ballot

There are three (3) ways by which voters can apply for mail-in or absentee ballots:

- 1. By Mail
- 2. In Person
- 3. Online

2.1 MAIL REQUESTS

A voter may submit a paper application via mail to the county board of elections for absentee and mailin ballot applications.

2.2 In-person (Over the Counter) Requests

Act 77 of 2019 allows voters to request and cast an absentee or mail-in ballot over the counter in advance of Election Day. After ballots are finalized by a county, voters may apply at a County Election Office (CEO) during established business hours to receive and cast a mail-in or absentee ballot in person while the voter is in the office.

Once the voter is determined to be qualified and the application for an absentee or mail-in ballot is approved, the county board of elections **must promptly present** the voter with the voter's mail-in or absentee ballot. Under Section 1305 of the Election Code, 25 P.S. § 3146.5, a county board of elections may not deny the eligible voter's request to have the ballot presented to the voter while the voter is at the office unless there is a bona fide objection to the absentee or mail-in ballot application. Voters still need to provide proof of identification (as defined in the Election Code) to be verified by county boards of elections to vote an absentee or mail-in ballot. Proof of identification for civilian absentee and mail-in voting include a valid driver's license number, the last four digits of the voter's social security number or other valid photo identification.

Voters who receive a mail-in or absentee ballot in person must be provided an opportunity to privately and secretly mark their ballot. **Note:** The marking of the ballot in secret does not have to take place in the election offices. It can be provided in a nearby location.

2.2.1 Satellite County Election Offices

County election boards may provide for mail-in and absentee application processing and balloting at more than one location within county borders.

Counties may establish additional business hours for CEOs; hours do not have to be limited to weekdays or to typical business hours. Counties are encouraged to offer business hours outside of these time frames, including weeknights or weekend hours to enable maximum flexibility and convenience for voters.

When a county decides to provide additional mail-in and absentee balloting by establishing additional CEOs, the county must account for all of the following:

- Each CEO must be staffed by appointed elections personnel in municipal or county-owned or leased locations selected by the county board of elections for processing applications and in-person voting of both mail-in and absentee ballots.
- Each CEO must have a secure county network connection that is capable of connecting to the Statewide Uniform Registry of Electors (SURE), and staff trained and approved to access SURE. NOTE: The Department will work with counties to establish secure connections; the county network extension must be approved by the Department.
- Each CEO must either have copies of all ballot styles available to be voted in the county, or an on-demand ballot printer capable of printing all ballot styles available to be voted in the county.
- Each CEO must have a secure ballot collection receptacle to store voted mail-in or absentee ballots submitted at the location. County boards of election are required to keep voted ballots in a sealed or locked container until the time of pre-canvassing.
- Please see the Department of State's August 19, 2020 Absentee and Mail-In Ballot Return Guidance for more information and guidance on choosing a location for a CEO.

2.3 ONLINE REQUESTS

A voter may submit either an absentee or mail-in ballot request online via the Department's online portal at PA Voter Services.

Online applications must be processed according to the same statutory requirements as an application submitted by-mail or in person, including the proof of identification requirements defined in the Election Code.

3 Delivery of Mail-in and Absentee Balloting Materials

Counties must begin delivering mail-in or absentee ballots as soon they are certified and available. Counties may await the outcome of pending litigation that affects the contents of the ballots, but in any event the county must begin delivering mail-in or absentee ballots no later than the 2nd Tuesday prior to Election Day.

Once the counties begin delivering their ballots, as additional applications are received and approved, the county must deliver or mail ballots to such additional voters within forty-eight (48) hours of receipt of approved applications.

3.1 BALLOTING MATERIALS

The absentee and mail-in balloting materials must include the following:

- 1. The voter's proper ballot style based on the voter's registration address.
- 2. A white, inner (or "secrecy") envelope that indicates official ballot.

3. A pre-addressed outer ballot-return envelope that contains a declaration which the voter must sign and date.

The ballot must be returned within the inner envelope, which must be placed in the pre-addressed outer envelope.

With regard to the inner envelope:

- The Pennsylvania Supreme Court held on September 17, 2020, that any ballot that is not returned in the official ballot envelope (secrecy envelope) must be set aside and declared void. These ballots have been referred to as "naked ballots." In accordance with that ruling, all ballots that are not returned within the inner envelope must be set aside and may not be counted. Counties are strongly encouraged to include an instructional insert which describes how the voter should mark and return their ballot and to clearly warn that ballots must be returned in the secrecy envelopes or they will not be counted. The Department encourages county boards of election to publicize the requirement that ballots must be returned within the inner envelope, including on the county's website, in their offices, at ballot collection sites, and in other locations that may assist and educate voters.
- If any voted ballot's inner (or "secrecy") envelope contains any text, mark, or symbol which reveals the identity of the voter, the voter's political affiliation (party), or the voter's candidate preference, the envelopes and the ballots inside them must be set aside, declared void and may not be counted.

With regard to the outer ballot-return envelope:

- 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.
- A ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted. Ballot-return envelopes must be opened in such a manner as not to destroy the declarations executed thereon.
- All ballot-return envelopes containing executed declarations must be retained for a period of two years in accordance with the Election Code.

3.2 BALLOT DESIGN REQUIREMENTS

Act 12 of 2020 changed the law with respect to the surrender process for voters who request mail-in or absentee ballots.

Pursuant to Act 12 of 2020, a warning notice is required to be listed on both the absentee and mail-in ballots, which states:

WARNING: If you receive an absentee or mail-in ballot and return your voted ballot by the deadline, you may not vote at your polling place on election day. If you are unable to return your voted absentee or mail-in ballot by the deadline, you may only vote a provisional ballot at your polling place on election day, unless you surrender your absentee or mail-in ballot and envelope to the judge of elections to be voided to vote by regular ballot.

4.1 VOTER MUST RETURN OWN BALLOT

A voter must return his or her own completed absentee or mail-in ballot by 8:00 pm on Election Day to the county board of elections or other county-designated drop-off location. Third-person delivery of absentee or mail-in ballots is not permitted, and any ballots delivered by someone other than the voter are required to be set aside. The only exceptions are voters with a disability who have designated in writing an agent to deliver their ballot for them. Agency forms may be found at VotesPA.com. Emergency absentee ballots also may be delivered by a designated agent.

4.2 COLLECTION OF MAIL-IN AND ABSENTEE BALLOTS

In addition to the main CEO and satellite CEOs, counties may provide for other secure ballot collection locations that the county deems appropriate to accommodate in-person return of voted mail-in and absentee ballots. *Please refer to the Department's August 19, 2020 Absentee and Mail-In Ballot Return Guidance for more information and guidance regarding ballot collection locations and procedures.*

County boards of election are required to keep absentee and mail-in ballots in a sealed or locked container(s) until the time of pre-canvassing.

4.3 Surrender Process for Voters Who Request Mail-In or Absentee Ballots

Once a voter requests a civilian absentee or mail-in ballot, they should vote and return that mail-in or absentee ballot by mail, or deliver it in person to a county elections office (CEO) or other designated drop-off location prior to 8:00 P.M. on Election Day.

However, if a voter has not voted their mail-in or absentee ballot, they may take it to their polling place on election day to surrender it. (NOTE: This is a different procedure than was in place for the June 2020 primary. Act 12 of 2020 changed the procedures for voters who request mail-in or absentee ballots, but later appear at their polling place. These changes take effect for the first time in the November 2020 General Election.)

Specifically, a voter who requests a mail-in or absentee ballot and who is not shown on the district register as having voted the ballot may vote at their polling place on Election Day if (1) the voter surrenders the original mail-in or absentee ballot and its outer envelope to the judge of elections to be spoiled, and (2) the voter signs a statement subject to the penalties under 18 Pa. C.S. § 4904 in substantially the following form:

I hereby declare that I am a qualified registered elector who has obtained an absentee ballot or mail-in ballot. I further declare that I have not cast my absentee ballot or mail-in ballot, and that instead I remitted my absentee ballot or mail-in ballot and the envelope containing the declaration of the elector to the judge of elections at my polling place to be spoiled and therefore request that my absentee ballot or mail-in ballot be voided.

If the voter turns in (surrenders) his or her ballot and outer envelope and signs the statement, the voter is permitted to vote by regular ballot at the polling place.

If a voter whose record in the district poll book indicates that the voter requested a mail-in or absentee ballot but the voter does not surrender their ballot and declaration envelope and sign the required statement, the voter should be provided a provisional ballot. Even if the voter asserts that they did not cast a mail-in or absentee ballot and is eligible to vote, the voter should only be provided a provisional ballot.

5 ABSENTEE AND MAIL-IN VOTING PROCESSES FOR COUNTY ELECTION OFFICIALS

5.1 POLL BOOK PROCESSES

The poll books will be divided into two sections.

The main section will include a) voters who have not requested a mail-in or absentee ballot for this election and b) voters who requested an absentee or mail-in ballot but who did not return their ballot by the date the pollbooks were printed. There will be a special watermark in the poll book indicating that voters who did not return their ballot by the date the pollbooks were printed must either surrender their ballot as described in Section 4.3 above or vote provisionally if they appear at the polling place on Election Day.

The secondary section of the pollbook will contain a list of voters who have both requested and returned their ballot (cast their vote) by the time the poll book was printed.

Voters who requested but have not returned their absentee or mail-in ballot may vote in person at their polling place on election day ONLY if they surrender their ballot and the declaration envelope that accompanies it, as described in Section 4.3 above. The poll worker shall take the surrendered ballot and declaration envelope and mark them as "VOID." There is a location in the poll book where the poll worker must indicate that the items were surrendered. The voided ballot and declaration envelope, and the signed surrender declaration should be placed in a secure envelope or container and returned to the county election office with other polling place materials at the end of the voting day. The surrendered ballot materials must be preserved.

As noted above, the poll book record for voters whose cast absentee or mail-in ballot has already been received will indicate that the voter's ballot was cast and they are not eligible to vote at the polling place. This will aid poll workers when checking in voters to easily determine that these voters are not eligible to vote on the voting equipment but may vote provisionally if the voter believes they are eligible to vote.

The watermarks in the poll books as listed above also apply to voters with a permanent flag on their voter record. In either case, the poll worker will be able to determine the appropriate course of action when reviewing the poll book on election day.

5.2 Pre-Canvassing and Canvassing Absentee and Mail-in Ballots

The Act 12 of 2020 amendments provide for a pre-canvass period beginning on the morning of Election Day to canvass all ballots received prior to the pre-canvass meeting. The amendments further provide for a canvass meeting beginning no earlier than the close of polls to canvass all ballots not included in the pre-canvass meeting.

Pre-canvass Meeting

- The **pre-canvass** may begin no earlier than 7:00 AM on Election Day. County boards of election must provide notification of the time and location of a pre-canvass meeting at least 48 hours prior to the meeting by posting notice on its website.
- The county board of elections must provide a list of the names of the voters whose absentee or mail-in ballots are to be pre-canvassed.
- One authorized representative for each candidate and one authorized representative for each
 political party must be permitted to remain in the room where the pre-canvass meeting occurs.
- Persons observing, attending or participating in the pre-canvass meeting MAY NOT disclose the result of any portion of the pre-canvass prior to the close of polls on Election Day.
- The Department strongly urges all counties to begin pre-canvassing at the earliest time allowed to ensure that results can be tabulated promptly.

Canvass Meeting

- The **canvass** of mail-in and absentee ballots may begin no earlier than the close of polls and no later than the 3rd day following the election. County boards of election must provide notification of the time and location of the **canvass** meeting at least 48 hours prior to the meeting by posting notice on its website.
- The county board of elections must provide a list of the names of the voters whose absentee or mail-in ballots are to be canvassed.
- The canvass process must continue through the 8th day following the election to include valid military and overseas ballots received by 5:00 PM on the 7th day following the election.
- One authorized representative for each candidate and one authorized representative for each political party must be permitted to remain in the room where the canvass meeting occurs.
- The Department strongly urges all counties to begin canvassing at the earliest time allowed to ensure that results can be tabulated and reported promptly.

Pre-canvass and Canvass Procedures

At the pre-canvass or canvass, as the case may be, the county board of elections should:

- Segregate the unopened ballots of voters whose applications were challenged by the challenge deadline (5:00 PM on the Friday before the election).
 - These ballots must be placed in a secure, sealed container until the board of elections holds a formal hearing on the challenged ballots.
 - Ballot applications can only be challenged on the basis that the applicant is not qualified to vote.
- Set aside the ballot of any voter who was deceased before election day.

- Set aside any ballots without a filled out, dated and signed declaration envelope.
- Set aside any ballots without the secrecy envelope and any ballots in a secrecy envelope that include text, mark, or symbol which reveals the identity of the voter, the voter's political affiliation (party), or the voter's candidate preference.

The Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis.

No challenges may be made to mail-in or absentee ballot applications after 5:00 pm on the Friday before the election.

No challenges may be made to mail-in and absentee ballots at any time based on signature analysis.

NOTE: For more information about the examination of return envelopes, please refer to the Department's September 11, 2020 *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes*.

Version History:

Version	Date	Description
1.0	9.28.2020	Initial document
		release

JOINT EXHIBIT 4

Voting by mail-in or absentee ballot is safe, secure, and easy.

How to return your mai...



In Pennsylvania, you have two options for mail ballots.

- Mail-in ballot Any qualified voter may apply for a mail-in ballot. You may simply request this ballot without a reason.
- Absentee ballot If you plan to be out of the municipality on election day or if you have a disability or illness that prevents you from going to your polling place on election day, you can request this ballot type, which still requires you to list a reason for your ballot. In order to request either ballot type, you must be registered to vote.

Check Your Registration Status

(https://www.pavoterservice s.pa.gov/Pages/voterregistrati onstatus.aspx)

to review your registration information.

Quick links

Deadlines for the November 8 Election

 November 1, 2022 at 5 p.m. - APPLICATIONS for a mail-in or absentee ballot must be received by your

(https://www.votespa.com/Resources/Pages/Contact-Your-Electic county election board on-Officials.aspx)

 November 8, 2022 at 8 p.m. – VOTED BALLOTS must be RECEIVED by your county election office - postmarks are not enough.

<u>emergency</u>

Missed the deadline? If you have an (such as an unexpected illness or disability or last-minute absence from your municipality) you may still be able to get a ballot after the deadline. Find information about how to emergency absentee ballot get an .

How do I request a mail-in or absentee ballot?

Any registered voter

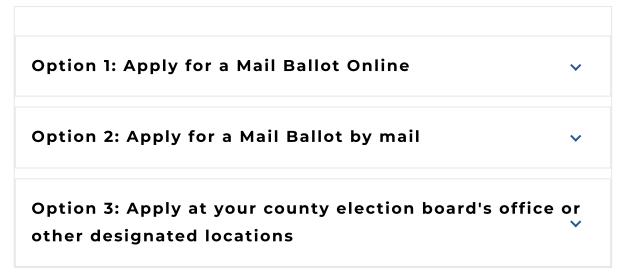
 $(https://www.pavoterservices.pa.gov/OnlineAbsenteeApplication \begin{picture}(c) \hline may request a mail-in ballot \end{picture} n/\#/OnlineAbsenteeBegin)$

<u>Absentee ballots can be requested</u>

(https://www.pavoterservices.pa.gov/OnlineAbsenteeApplicatio n/#/OnlineAbsenteeBegin)

by voters with disabilities or an illness that prevents them from going to their polling place on election day, or those who will be absent from their municipality on Election Day. Request forms must be received by your county election board by 5 pm on November 1, 2022.

Expand All



What's the annual mail-in ballot request?

You now have the option to request to be added to the annual mail-in ballot request list where **you'll** receive an application to renew your mail-in ballot request each year. Once your request is approved, you will automatically receive ballots for the remainder of the year, and you **do not** need to submit an application for each election.

Learn more about the

annual mail-in ballot request

(https://www.vote.pa.gov/Voting-in-PA/Page s/Annual-Mail-in-Voter-List.aspx)

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Third Party Ballot Delivery for Mail Voting

If you have a disability that prevents you from applying in person for your mail ballot or delivering your mail ballot, you may designate an agent to deliver your ballot materials for you. You must

designate the agent in writing using this form

(/Resources/Documents/Authorize-Designated-Agent-for-Mail-in-or-Absentee-Ballot.pdf)

or a form provided by your county.

Accessible Remote Ballot Marking Solution for Mail Voting

The Department of State is committed to increasing accessibility for voters with disabilities. Pennsylvania voters with disabilities now have the opportunity to mark their absentee or mail-in ballot electronically.

Learn more about the accessible remote ballot marking solution

(/Voting-in-PA/Pages/Accessible-Remote-Ballot-Marking-Solution-for-Mail-Voting.aspx)

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How do I vote and return my mail-in or absentee ballot?

Below are general steps on how to vote, prepare, and return your mail ballot. Be sure to follow the instructions included with your ballot. Contact your county election office if you have any questions.

Under Pennsylvania law, voters must return their own ballots. The only exceptions to this are for voters with a disability who have designated someone in writing to deliver their ballot.

Step 1:

Read the instructions carefully and mark your ballot. Be sure to complete the front and back of each page.

Step 2:

Seal your ballot in the inner secrecy envelope that indicates "official election ballot." Do not make any marks on the inner secrecy envelope.

Your ballot must be enclosed and sealed in the inner secrecy envelope that indicates "official election ballot" or it will not be counted.

Step 3:

Seal the inner secrecy envelope in the preaddressed outer return envelope. Complete, 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.

Step 4:

Return your voted ballot to the county election board. Absentee and Mail-in Ballots must be received by 8 pm on election day at your county election board. To ensure your ballot is received by the deadline, return the ballot as soon as possible.

1. You can mail your ballot.

- Using the return envelope supplied with your ballot, make sure you use the proper postage (if needed) and that it arrives to your county election board by 8 pm on election day. Postmarks do not count. If your ballot is not received by the county election board by 8 pm on election day, it will not be counted
- 2. **You can hand-deliver your ballot** before 8 pm on election day to your:

county election office

(/Resources/Pages/Contact-Your-Election-Of

ficials.aspx)

or

other officially designated site

- (/Voting-in-PA/Pages/Return-Ballot.aspx)
- Some counties are providing

(/Voting-in-PA/Pages/Return-Ball

drop-boxes ot.aspx)

for mail

ballots.

Where do I return my ballot?

Voters may return their voted mail-in or absentee ballot to their county election board of election office during that office's business hours, or another officially designated location. **Ballots must be received by your county election board before 8 pm on Election Day.**

Voting early in-person by mail-in or absentee ballot

If you are a registered Pennsylvania voter, you can use the early in-person voting option.

As soon as ballots are ready, you can request, receive, vote and cast your mail-in or absentee ballot all in one visit to your

(/Resources/Pages/Contact-Your-Election-Officials.as

county election board px)

or

other officially designated site

(/Voting-in-PA/Pages/Return-Ballot.aspx)

With this option, there is no need for mail at all, and you can cast your vote at your convenience. Learn more about

voting early in-person by mail-in or absentee ballot

(https://www.vote.pa.gov/Voting-in-PA/Pages/Early-Voting.aspx)

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Identification for Mail Voting

In order to apply for an absentee or mail-in ballot, you must supply proof of identification.

Uniformed and overseas citizens

(https://www.vote.pa.gov/Voting-in-PA/Pages/Military-and-Overs eas-Voters.aspx)

and voters who qualify under the

Voting Accessibility for the Elderly and Handicapped ACT

(https://www.vote.pa.gov/Your-Rights/Pages/Voting-Rights-and-the-law.aspx)

do not need to show ID. All other voters must use one of the following options.

Option 1

Include one of these ID numbers on your absentee or mail-in ballot form:

- Current and valid Pennsylvania driver's license
- PennDOT photo ID card

Option 2

If you don't have one of the documents listed under option 1, you can include the last 4 digits of your Social Security number on your absentee or mail-in ballot form.

Option 3

If you don't have one of the documents listed under option 1 or a Social Security number, you can provide a photocopy of one of the following IDs with your absentee or mail-in ballot application. The photocopy must show name, a photo, and an expiration date that is current.

- U.S. Passport
- U.S. Military ID (active duty and retired military ID may designate an expiration date that is indefinite). Military dependents' ID must contain a current expiration date.
- Employee photo identification issued by Federal, Pennsylvania,
 Pennsylvania county, or Pennsylvania municipal government.
- Photo identification issued by an accredited Pennsylvania public or private institution of higher learning.
- Photo identification issued by a Pennsylvania care facility, including longterm care facilities, assisted living residences and personal care homes.

Frequently Asked Questions

What if I requested a mail-in or absentee ballot but I didn't receive a

ballot, lost my ballot, or changed my mind and want to vote in-person?

- If you already submitted a mail-in or absentee ballot, you cannot vote at your polling place on Election Day.
- If you did not return your mail-in or absentee ballot and you want to vote in person, you have two options:
 - 1. Bring your ballot and the pre-addressed outer return envelope to your polling place to be voided. After you surrender your ballot and envelope and sign a declaration, you can then vote a regular ballot.
 - 2. If you don't surrender your ballot and return envelope, you can only vote by provisional ballot at your polling place. Your county election board will then verify that you did not vote by mail before counting your provisional ballot.

How do I know if my ballot was accepted and counted?

Under current Pennsylvania law, your mail-in ballot can't be opened until Election Day. Therefore, if there's a problem with your mail-in ballot, you won't have the opportunity to correct it before the election. Still, as long as you followed all the instructions and mailed your completed, signed, dated, and sealed in the inner secrecy envelope, ballot by Election Day, you don't have to worry.

Why are there two envelopes with my mail-in ballot?

The smaller secrecy envelope is intended to protect the anonymity of your vote. After you fill out your ballot, you must place it in the secrecy envelope and seal it.

Do not make any marks on this envelope. If you fail to place and seal your ballot in this envelope or if you make marks on this envelope, your ballot will not be counted.

The second, larger envelope is the mailing and declaration envelope. You must use it, even if you are dropping your ballot off at a drop box. Place your secrecy envelope (with your ballot inside) into the mailing and declaration envelope. You must seal it and sign and date the declaration before you can return your ballot.

Both of these envelopes must be used in order for your vote to count.

What if I miss the application deadline? Last Minute Emergencies

In emergency situations (such as an unexpected illness, disability or last-minute absence from your municipality), you can

<u>request an Emergency Absentee Ballot</u>

(https://www.vote.pa.gov/Resources/Documents/PADOS_EmergencyAbsenteeBallotApplication_English.pdf)

after 5 pm on the Tuesday before the election.

The deadline to submit your Emergency Absentee Ballot Application to the County Election Board is 8 pm on Election Day.

Emergency Application for Absentee Ballot (PDF)

(https://www.vote.pa.gov/Resources/Documents/PADOS_Emerg

encyAbsenteeBallotApplication_English.pdf)

<u>Authorized Representative for Emergency Absentee Ballot Form</u>

(https://www.vote.pa.gov/Resources/Documents/PADOS_Author

izeRepresentativeforEmergencyAbsenteeBallot.pdf)

Do not miss voting deadlines!

Sign up to receive emails about mail ballot deadlines, voting processes, new voting system, and more sent directly to your inbox.

JOINT EXHIBIT 5

TLP: WHITE



GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES

Date: May 24, 2022

Version: 2.0

May 24, 2022

Background

On May 19, 2022, the U.S. Court of Appeals for the Third Circuit issued a judgment and order in *Migliori, et al. v. Lehigh County Board of Elections, et al.*, No. 22-1499. Citing the "materiality" provision of the federal Civil Rights Act of 1964 (52 U.S.C. § 10101(a)(2)(B)), the Court of Appeals held that undated ballots cast in Lehigh County in the November 2021 election must be counted. It held that there is no basis to refuse to count the undated ballots because "inasmuch as there is no dispute that ballots that have the wrong date were counted in the [Lehigh] election, the dating provisions contained in the [Pennsylvania Election Code] are immaterial." Subsequent to that judgment, on May 19, the Department of State (Department) asked counties to segregate undated or incorrectly dated ballot return envelopes in anticipation of further guidance from the department.

Though the *Migliori* judgment was issued in the context of the November 2021 election in Lehigh County, it has been the Department's position that ballots that appear to have "incorrect" dates must be counted. Now, in light of the conclusion of the Third Circuit in *Migliori* it is the Department's position that ballots with an undated return envelope must also be counted for the May 17, 2022, Primary. However, out of an abundance of caution the Department advises, that those ballots should be segregated and remain segregated from all other voted ballots during the process of canvassing and tabulation. In other words, those ballots with undated ballot return envelopes or with incorrectly dated ballot return envelopes that have been set aside, should continue to be maintained, preserved, and appropriately logged pending litigation, which we anticipate will be undertaken on an expedited basis. A determination on whether the segregated tabulations will be used in certifying elections has not yet been made, given the ongoing litigation.

Counties should further segregate the ballots in question into two categories:

- 1. Undated.
- 2. Dated with an "incorrect" date.

Like the pre-canvass and canvass of absentee and mail-in ballots last week, the canvass of the undated ballot return envelopes and any incorrectly dated ballot return envelopes that were set aside must be conducted in an open meeting:

- One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the ballots are canvassed.
- No challenges by authorized representatives or any third party are permitted during canvass of the mail-in and absentee ballots.
- To facilitate transparency and ensure that all validly cast ballots are counted, it is critically
 important that county boards maintain accurate records of the disposition of ballots received
 during this period as directed below.

Canvass Procedures

The guidance concerning mail-in and absentee ballots previously provided by the Department on September 28, 2020, continues to apply unless otherwise specified herein.

The county board of elections shall canvass segregated absentee and mail-in ballots that were previously set aside due to being undated or incorrectly dated.

The canvass meeting shall continue until all segregated absentee and mail-in ballots have been canvassed.

The county board of elections shall examine the voter declaration on each envelope to ensure that it is signed and verify that the voter's name appears on the approved list of mail-in and absentee voters.

Please keep in mind that the county board of elections should continue to set aside and not open or count any of the following:

- Ballots cast by any voter who died prior to the opening of the polls on May 17, 2022.
- Ballots that were received after 8:00 p.m. on May 17, 2022.
- Ballots with a missing signature on the Declaration Envelope.
- Ballots that lack the inner secrecy envelope.
- Ballots where the inner secrecy envelope contains any text, mark, or symbol which reveals the identity of the voter or the voter's candidate preference.

Additionally, the county board of elections should not open or count any ballots pending ID verification as follows:

• If proof of identification for an absentee or mail-in voter was not received or could not be verified, the ballot should not be counted unless the elector provided proof of identification, that can be verified by the county board, by the sixth calendar day following the Primary or on or before Monday, May 23rd.

Other than ballots falling into one of the categories set forth above, mail-in and civilian absentee ballots that comply with the Election Code and the Department's prior guidance shall be canvassed as follows:

- Ballots on which the Declaration Envelopes are signed are valid and must be counted.
- Ballots that are signed and either undated or incorrectly dated are valid and must be counted.
- County boards of elections must maintain separate counts for undated and incorrectly dated ballots.

From: Marks, Jonathan <<u>imarks@pa.gov</u>>
Sent: Friday, June 17, 2022 11:46 AM
To: Marks, Jonathan <<u>imarks@pa.gov</u>>

Subject: RE: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Good morning again everyone.

I apologize for the oversight. I forgot to copy summary of events into my earlier email. Please see the summary below.

SUMMARY

1

- 5/20/2022 U.S. Court of Appeals for the 3rd Circuit issues judgment in Migliori acknowledging that the handwritten dates on absentee and mail-in ballots are immaterial. Later that same day, the department instructed counties to segregate undated/wrongly dated ballots and secure them until we could provide further guidance.
- 5/23/2022 Dave McCormick for U.S. Senate files suit in Commonwealth Court seeking, among other things, an injunction that would require counties to count undated ballots.
- 5/24/2022 DOS sends guidance to counties on the segregation, canvassing and tabulation of undated and wrongly dated ballots asking counties to canvass and tabulate those ballots separately from all other ballots.
- 5/24/2022 DOS sends a supplemental statewide reporting form on which counties can report undated ballot vote totals for statewide offices
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- 5/31/2022 Justice Alito issues an administrative stay of the 3rd Circuit's judgment in Migliori.
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- 6/3/2022 To ensure counties comply with the Commonwealth Court's 6/2 order, DOS sends updated guidance instructing counties to canvass, tabulate and report vote totals from undated ballots and to keep those ballots and vote totals segregated from all other ballots.
- 6/9/2022 The U.S. Supreme Court denies the application for stay in the Migliori case and vacates Justice Alito's administrative stay.

Kind Regards,

Jonathan Marks Deputy Secretary for Elections & Commissions Pennsylvania Department of State 401 North Office Building Harrisburg, PA 17120

Email: jmarks@pa.gov / Phone: (717) 783-2035

From: Marks, Jonathan

Sent: Friday, June 17, 2022 9:08 AM **To:** Marks, Jonathan < <u>imarks@pa.gov</u>>

Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

Dear County Election Official,

This email is provided for clarification on which vote totals are to be submitted to the Department of State (DOS) for the May 17th Primary election and the due date for those submissions.

As you are aware, over the last several weeks federal and state courts have determined that a missing handwritten date on the declaration envelope is immaterial in determining whether the

ballot is *valid and timely returned*. (Please see below a summary of events since our last update on May 20th on the litigation.) As a result of that litigation, counties have been instructed that it will be necessary to certify vote totals that include the votes from undated/wrongly dated ballots. **Those certified vote totals for the May 17 Primary are due to DOS no later than Thursday**, **June 23rd**.

Attached is a certification page that you can use to certify your county's tabulation of the May 17th results.

If you have not already canvassed, tabulated, **and certified** the votes from undated/wrongly dated ballots in an open meeting during the official canvass, it is strongly recommending that you schedule such a meeting and provide at least 48 hours' notice as you would for the Board's regular canvassing meetings. It is also recommended that you share this email with your solicitors.

Given the unprecedented nature of these events, it is expected that there will be questions. Please direct any follow up questions to Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov). In other words, please direct your questions to all three of us.

Thank you as always for your patience and continued hard work, particularly in these unprecedented times.

Kind Regards,

Jonathan Marks Deputy Secretary for Elections & Commissions Pennsylvania Department of State 401 North Office Building Harrisburg, PA 17120

Email: <u>imarks@pa.gov</u> / Phone: (717) 783-2035

Click <u>here</u> to report this email as spam.

From: Riegner, Paige <PRiegner@countyofberks.com>

Sent: Thursday, June 23, 2022 12:43 PM

To: Marks, Jonathan

Cc: Mathis, Jessica; Dauberman, Elissa

Subject: RE: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Hello,

Please see this article: Berks will cover mail ballots postage, add ballot drop box (pottsmerc.com)

Specifically, the section about the undated ballots.

Per the Commissioners, Berks County will not be submitting an additional certification at this time.

Thank you, Paige

Paige Riegner, MPA

Director of Election Services | County of Berks 633 Court Street, 1st Floor Reading, PA 19601 P: 610-478-6490 X5577

PRiegner@countyofberks.com

From: Marks, Jonathan < imarks@pa.gov> Sent: Friday, June 17, 2022 9:08 AM To: Marks, Jonathan < imarks@pa.gov>

Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

County of Berks Warning: This is an external email. Please exercise caution.

Dear County Election Official,

This email is provided for clarification on which vote totals are to be submitted to the Department of State (DOS) for the May 17th Primary election and the due date for those submissions.

As you are aware, over the last several weeks federal and state courts have determined that a missing handwritten date on the declaration envelope is immaterial in determining whether the ballot is *valid and timely returned*. (Please see below a summary of events since our last update on May 20th on the litigation.) As a result of that litigation, counties have been instructed that it will be necessary to certify vote totals that include the votes from undated/wrongly dated ballots. **Those certified vote totals for the May 17 Primary are due to DOS no later than Thursday, June 23rd.**

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Thank you as always for your patience and continued hard work, particularly in these unprecedented times.

Kind Regards,

Jonathan Marks
Deputy Secretary for Elections & Commissions
Pennsylvania Department of State
401 North Office Building
Harrisburg, PA 17120
Email: jmarks@pa.gov / Phone: (717) 783-2035

FOR INFORMATION RE: COVID-19 AND WHAT YOU CAN DO... CLICK www.DoYourPartBerks.com

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Thank you.

From: Marybeth Kuznik <mbkuznik@fayettepa.org>

Sent: Monday, June 27, 2022 12:58 PM

To: Marks, Jonathan; Mathis, Jessica; House, Kori

Cc: 'Jack Purcell'; sherylheidlaw@gmail.com; Dave Lohr; Scott Dunn; mark@zeblaw.com

Subject: [External] RE: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the <u>Report Phishing button in Outlook.</u>

Dear Deputy Secretary Marks,

The Board of Elections of Fayette County has voted not to open or count the undated ballots from the May 17, 2022, General Primary. For this reason, I am unable to provide the information you request in your email below.

Dated ballots with the "wrong" date were counted and were already included in Fayette's original certification of the Primary and subsequent Recount.

Sincerely,

Marybeth Kuznik

Marybeth Kuznik Director Fayette County Election Bureau 2 West Main Street, Suite 111 Uniontown, PA 15401 724-430-1289, ext. 101, phone 724-430-4948, fax



From: Marks, Jonathan <jmarks@pa.gov> Sent: Monday, June 27, 2022 12:17 PM To: Marks, Jonathan <jmarks@pa.gov>

Subject: FW: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

CAUTION

This message originated from an external source. Verify the legitimacy before clicking links or opening attachments.

Dear County Election Official,

If you are receiving this email, you are among the group of counties who have either not yet certified vote totals from undated ballots or have not provided the Department with information about when you will be able to do so. I understand that this recent Primary has been unusual due to post-election litigation, but the recent rulings in the Commonwealth Court of Pennsylvania and the U.S. Court of Appeals for the 3rd Circuit makes it clear that we will have to certify vote totals that include the vote totals from undated ballots.

As a result, the Department needs you to send certified vote totals that include the votes from undated/wrongly dated ballots as soon as possible. If for some reason you are not able to do so by Wednesday, June 29, then please respond indicating the date on which you plan to do so.

In order to avoid any additional delays in finalizing our certification of the results of the General Primary, the Department may have no choice but to take action to compel certain counties to certify vote totals with undated/wrongly dated ballots in the event we do not receive those certifications before the end of this week.

As noted in my original email, please send copies of your certifications and any questions or responses **to all three of the following DOS staff members**: Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov).

Thank you for your urgent attention to this matter.

Kind Regards,

Jonathan Marks Deputy Secretary for Elections & Commissions Pennsylvania Department of State 401 North Office Building Harrisburg, PA 17120

Email: <u>imarks@pa.gov</u> / Phone: (717) 783-2035

From: Marks, Jonathan

Sent: Friday, June 17, 2022 9:08 AM
To: Marks, Jonathan < imarks@pa.gov>

Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

Dear County Election Official,

This email is provided for clarification on which vote totals are to be submitted to the Department of State (DOS) for the May 17th Primary election and the due date for those submissions.

As you are aware, over the last several weeks federal and state courts have determined that a missing handwritten date on the declaration envelope is immaterial in determining whether the ballot is *valid and timely returned*. (Please see below a summary of events since our last update on May 20th on the litigation.) As a result of that litigation, counties have been instructed that it will be necessary to certify vote totals that include the votes from undated/wrongly dated

ballots. Those certified vote totals for the May 17 Primary are due to DOS no later than Thursday, June 23rd.

Attached is a certification page that you can use to certify your county's tabulation of the May 17th results.

If you have not already canvassed, tabulated, **and certified** the votes from undated/wrongly dated ballots in an open meeting during the official canvass, it is strongly recommending that you schedule such a meeting and provide at least 48 hours' notice as you would for the Board's regular canvassing meetings. It is also recommended that you share this email with your solicitors.

Given the unprecedented nature of these events, it is expected that there will be questions. Please direct any follow up questions to Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov). In other words, please direct your questions to all three of us.

Thank you as always for your patience and continued hard work, particularly in these unprecedented times.

SUMMARY

- 5/20/2022 U.S. Court of Appeals for the 3rd Circuit issues judgment in Migliori acknowledging that the handwritten dates on absentee and mail-in ballots are immaterial. Later that same day, the department instructed counties to segregate undated/wrongly dated ballots and secure them until we could provide further guidance.
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Kind Regards,

Jonathan Marks Deputy Secretary for Elections & Commissions
Pennsylvania Department of State
401 North Office Building Harrisburg, PA 17120 Email: <u>imarks@pa.gov</u> / Phone: (717) 783-2035

From: Pfursich, Jacquelyn E < <u>JEPfursich@co.lancaster.pa.us</u>>

Sent: Monday, June 27, 2022 2:08 PM To: Marks, Jonathan < imarks@pa.gov>

Cc: Miller, Christa < MChrista@co.lancaster.pa.us >

Subject: [External] FW: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the <u>Report Phishing button in Outlook.</u>

Mr. Marks,

Your email dated June 27, 2022 was forwarded to me from the Lancaster County Board of Elections and Registration Commission Chief Clerk for response. On June 6, 2022 the Lancaster County Board of Elections submitted its certified vote tallies for the 2022 Primary Election. At the same time, Lancaster County also provided to the Department of State a second set of vote tallies that included 82 undated mail in ballots per the Commonwealth Court Order in the McCormick case, Docket No. 286 M.D. 2022. The Commonwealth Court Order specifically indicates that the County provide the vote tallies to the Department of State in that manner so that when a "final decision on the merits of whether the ballots that lack a dated exterior envelop must be counted or not" the Department of State will have the necessary reports. To date, there is no such decision on the merits of this question that would apply to Lancaster County or the 2022 Primary Election. Therefore, the Lancaster County Board of Elections has complied with the Pennsylvania Elections Code as well as the Commonwealth Court Order.

Please continue to use the certified vote tallies previously provided by the Lancaster County Board of Elections and reference the second set of vote tallies as needed.

Regards

Jacquelyn E. Pfursich Lancaster County Solicitor 150 N. Queen Street Suite #714 Lancaster, PA 17603 717-209-3208 Fax 717-293-7208 jepfursich@co.lancaster.pa.us



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From: Marks, Jonathan < imarks@pa.gov > Sent: Monday, June 27, 2022 12:17 PM
To: Marks, Jonathan < imarks@pa.gov >

Subject: [EXTERNAL] FW: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

Dear County Election Official,

If you are receiving this email, you are among the group of counties who have either not yet certified vote totals from undated ballots or have not provided the Department with information about when you will be able to do so. I understand that this recent Primary has been unusual due to post-election litigation, but the recent rulings in the Commonwealth Court of Pennsylvania and the U.S. Court of Appeals for the 3rd Circuit makes it clear that we will have to certify vote totals that include the vote totals from undated ballots.

As a result, the Department needs you to send certified vote totals that include the votes from undated/wrongly dated ballots as soon as possible. If for some reason you are not able to do so by Wednesday, June 29, then please respond indicating the date on which you plan to do so.

In order to avoid any additional delays in finalizing our certification of the results of the General Primary, the Department may have no choice but to take action to compel certain counties to certify vote totals with undated/wrongly dated ballots in the event we do not receive those certifications before the end of this week.

As noted in my original email, please send copies of your certifications and any questions or responses **to all three of the following DOS staff members**: Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov).

Thank you for your urgent attention to this matter.

Kind Regards,

Jonathan Marks
Deputy Secretary for Elections & Commissions
Pennsylvania Department of State
401 North Office Building
Harrisburg, PA 17120

Email: <u>jmarks@pa.gov</u> / Phone: (717) 783-2035

From: Marks, Jonathan

Sent: Friday, June 17, 2022 9:08 AM **To:** Marks, Jonathan < <u>imarks@pa.gov</u>>

Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

Dear County Election Official,

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Thank you as always for your patience and continued hard work, particularly in these unprecedented times.

SUMMARY

• 5/20/2022 – U.S. Court of Appeals for the 3rd Circuit issues judgment in Migliori acknowledging that the handwritten dates on absentee and mail-in ballots are immaterial. Later that same day, the department instructed counties to segregate undated/wrongly dated ballots and secure them until we could provide further guidance.

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Kind Regards,

Jonathan Marks Deputy Secretary for Elections & Commissions Pennsylvania Department of State 401 North Office Building Harrisburg, PA 17120

Email: jmarks@pa.gov / Phone: (717) 783-2035

Click here to report this email as spam.

From: Leinbach, Christian Y < CLeinbach@countyofberks.com>

Sent: Tuesday, June 28, 2022 12:32 PM **To:** Marks, Jonathan <jmarks@pa.gov>

Cc: Riegner, Paige <PRiegner@countyofberks.com>; Kauffman, Cody <CKauffman@countyofberks.com>; Yocom-Grill, Anne-Marie <AGrill@countyofberks.com>; Ischaefer <Ischaefer@pacounties.org>; awhite <awhite@pacounties.org>;

Daryl Miller (millerd@mail.bradfordco.org) <millerd@mail.bradfordco.org>

Subject: Certification of undated ballots

Importance: High

Jonathan

Please help me understand where the clear court guidance is regarding certification on undated ballots. I do not see it. "rulings in the Commonwealth Court of Pennsylvania and the U.S. Court of Appeals for the 3rd Circuit makes it clear that we will have to certify vote totals that include the vote totals from undated ballots." I believe the rulings are anything but clear. At best the issue is not settled.

I look forward to your response.

Sincerely,

Christian Y. Leinbach
Chairman - Berks County Commissioners

633 Court Street Reading, PA 19601-4310

Phone: 610-478-6136 Ext. 3 / Ext. 6127

Fax: 610-478-6139

Email: <u>CLeinbach@CountyofBerks.com</u> Website: www.CountyofBerks.com

1



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From: Marks, Jonathan < <u>imarks@pa.gov</u>>
Sent: Monday, June 27, 2022 12:17 PM
To: Marks, Jonathan < <u>imarks@pa.gov</u>>

Subject: FW: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

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As a result, the Department needs you to send certified vote totals that include the votes from undated/wrongly dated ballots as soon as possible. If for some reason you are not able to do so by Wednesday, June 29, then please respond indicating the date on which you plan to do so.

In order to avoid any additional delays in finalizing our certification of the results of the General Primary, the Department may have no choice but to take action to compel certain counties to certify vote totals with undated/wrongly dated ballots in the event we do not receive those certifications before the end of this week.

As noted in my original email, please send copies of your certifications and any questions or responses to all three of the following DOS staff members: Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov).

Thank you for your urgent attention to this matter.

Kind Regards,

Jonathan Marks Deputy Secretary for Elections & Commissions Pennsylvania Department of State 401 North Office Building Harrisburg, PA 17120

Email: <u>imarks@pa.gov</u> / Phone: (717) 783-2035

FOR INFORMATION RE: COVID-19 AND WHAT YOU CAN DO... CLICK www.DoYourPartBerks.com

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Thank you.



Paige Riegner
Director, Berks County Election Services
Berks County Services Center
633 Court Street, 1st Floor
Reading, PA 19601

priegner@countyofberks.com

June 29, 2022

Dear Ms. Riegner,

As Chief Counsel to the Department of State I write on behalf of Acting Secretary of the Commonwealth Leigh M. Chapman and the Department regarding the failure of your County Board of Elections to certify the results of the May 17, 2022, Primary Election based on a computation of *all* legally cast votes.

By statute, all counties must canvass, compute, certify, and submit election results to the Acting Secretary. See 25 P.S. § 2642(k). The Acting Secretary has the authority and duty to receive those results and to finally certify statewide election results. See 25 P.S. § 2621(f).

On June 17, 2022, and again on June 27, 2022, the Department of State reminded all county election officials of their obligation to canvass, tabulate, and certify the votes from *all* valid absentee and mail-in ballots that were timely received on or before May 17, 2022, at 8 P.M. *See* 25 P.S. § 3146.8.

It is now clear that the lack of a handwritten date on the exterior envelope of a timely received absentee or mail-in ballot cannot be the basis for invalidating a ballot and disenfranchising eligible voters. Both the Commonwealth Court, while resolving a dispute about the very ballots your county refuses to include in its certification, and the Third Circuit recently held as much. *See* Memorandum Opinion, *McCormick v. Chapman*, No. 286 M.D. 2022 (Pa. Commw. Ct. June 2, 2022); *see also Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir. 2022) (holding that failure to date a ballot return envelope cannot justify denying the right to vote). The County is therefore legally obligated to certify election results that include timely received absentee and mail-in ballots that lack a voter's handwritten date.

Re: Certification of Undated Ballots

June 29, 2022

Page 2

The failure of your county to submit accurate certified results disenfranchises voters in your county and is preventing the Acting Secretary from certifying *all* legally cast votes. Please respond indicating that you intend to send the Department certified vote totals that include votes from *all* legally valid absentee and mail-in ballots. If we do not hear from you by July 1, the Acting Secretary intends to pursue all necessary and appropriate legal action, including seeking a writ of mandamus, emergency relief, injunctive and declaratory relief, and other remedies.

Sincerely,

Timothy E. Gates Chief Counsel

Pennsylvania Department of State

Cc:

Leigh M. Chapman, Acting Secretary



COUNTY OF BERKS, PENNSYLVANIA

Office of the Solicitor

Services Center, 13th Floor 633 Court Street Reading, PA 19601

Christine M. Sadler - Solicitor

Christian Y. Leinbach, Chair Kevin S. Barnhardt, Vice Chair Michael S. Rivera, Commissioner Cody L. Kauffman, Esquire Direct Dial 610.478.6105, Ext. 6111 Email: ckauffman@countyofberks.com

Via Electronic Mail Only

Mr. Timothy E. Gates Chief Counsel, Pennsylvania Department of State 306 North Office Building Harrisburg, PA 17120 tgates@pa.gov

July 1, 2022

Dear Mr. Gates,

Thank you for your June 29th, 2022, correspondence sent to Ms. Paige Riegner, Director of the Berks County Office of Election Services. Pursuant to a majority vote of the Berks County Board of Elections, the County of Berks will not be recertifying the results of the May 17th, 2022, Primary Election as requested in your correspondence.

Sincerely,

Cody L. Kauffman, Esq.

First Assistant County Solicitor

For The Berks County Board of Elections

From: Gates, Timothy <tgates@pa.gov>
Sent: Tuesday, July 5, 2022 4:30 PM

To: Pfursich, Jacquelyn E

Subject: RE: [External] RE: Certification of Undated Ballots

Good afternoon Jacquelyn -

We believe that the county can certify the election results for the undated ballots separately without having to decertify the results that have already been certified. That being said, I appreciate your response explaining that Lancaster County's position has not changed.

Many thanks,

--Tim

Timothy E. Gates | Chief Counsel Office of Chief Counsel | Department of State 306 North Office Building | Harrisburg, PA 17120 Phone: 717.783.0736 | Fax: 717.214.9899 tgates@pa.gov | www.dos.state.pa.us

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From: Pfursich, Jacquelyn E < JEPfursich@co.lancaster.pa.us>

Sent: Tuesday, July 5, 2022 4:17 PM **To:** Gates, Timothy <tgates@pa.gov>

Subject: [External] RE: Certification of Undated Ballots

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Good afternoon Tim,

The Lancaster County Board of Elections is in receipt of your letter dated June 29, 2022 as well as your email dated July 5, 2022. On June 27, 2022, I provided to Mr. Marks the County's position regarding the unsigned mail in-ballots and the status of the litigation regarding this issue. The County's position has not changed. Furthermore, the County believes that certifying an election twice without decertifying the first certification is not consistent with the Pennsylvania Election Code.

The County has provided you the vote tallies in accordance with the Commonwealth Court Order and hopes that you reconsider your position regarding litigating this matter.

Regards,

Jacquelyn E. Pfursich
Lancaster County Solicitor
150 N. Queen Street Suite #714
Lancaster, PA 17603
717-209-3208
Fax 717-293-7208
iepfursich@co.lancaster.pa.us



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From: Gates, Timothy < tgates@pa.gov > Sent: Tuesday, July 5, 2022 2:25 PM

To: Pfursich, Jacquelyn E < <u>JEPfursich@co.lancaster.pa.us</u>> **Subject:** [EXTERNAL] RE: Certification of Undated Ballots

Jaquelyn -

Following up on my email/letter from last week.

If you do not provide the requested information by 5pm today the Acting Secretary intends to pursue all necessary and appropriate legal action.

--Tim

From: Gates, Timothy

Sent: Wednesday, June 29, 2022 12:56 PM

To: jepfursich@co.lancaster.pa.us

Subject: Certification of Undated Ballots

Importance: High

Dear Jacquelyn Pfursich -

Please see the attached letter regarding certification of undated ballots by your county board of elections.

Note that I have requested a response from you by this Friday, July 1, 2022.

--Tim

Timothy E. Gates | Chief Counsel Office of Chief Counsel | Department of State 306 North Office Building | Harrisburg, PA 17120 Phone: 717.783.0736 | Fax: 717.214.9899 tgates@pa.gov | www.dos.state.pa.us

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From: Gates, Timothy <tgates@pa.gov>
Sent: Friday, July 8, 2022 6:31 PM

To: 'Marybeth Kuznik'; jackpurcell146@gmail.com **Subject:** Re: [External] RE: Certification of Undated Ballots

Following up again. Please advise on your response as requested. Fayette County is the ONLY county that I have not yet heard from.

Many thanks,

—Tim

From: Gates, Timothy <tgates@pa.gov> Sent: Tuesday, July 5, 2022 2:32 PM

To: 'Marybeth Kuznik' <mbkuznik@fayettepa.org>; jackpurcell146@gmail.com <jackpurcell146@gmail.com>

Subject: RE: [External] RE: Certification of Undated Ballots

Jack -

Following up on my email/letter from last week.

If you do not provide the requested information by 5pm today the Acting Secretary intends to pursue all necessary and appropriate legal action.

--Tim

Timothy E. Gates | Chief Counsel Office of Chief Counsel | Department of State 306 North Office Building | Harrisburg, PA 17120 Phone: 717.783.0736 | Fax: 717.214.9899 tgates@pa.gov | www.dos.state.pa.us

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From: Gates, Timothy

Sent: Wednesday, June 29, 2022 1:56 PM **To:** Marybeth Kuznik <mbkuznik@fayettepa.org>

Subject: RE: [External] RE: Certification of Undated Ballots

Many thanks.

--Tim

From: Marybeth Kuznik < mbkuznik@fayettepa.org>

Sent: Wednesday, June 29, 2022 1:53 PM **To:** Gates, Timothy <tgates@pa.gov>

Subject: [External] RE: Certification of Undated Ballots

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Dear Tim --

A few moments ago I forwarded your message and letter to the Fayette County Board of Elections and to the county solicitors.

Marybeth

Marybeth Kuznik Director Fayette County Election Bureau 2 West Main Street, Suite 111 Uniontown, PA 15401 724-430-1289, ext. 101, phone 724-430-4948, fax



From: Gates, Timothy < tgates@pa.gov>
Sent: Wednesday, June 29, 2022 12:56 PM
To: Marybeth Kuznik < mbkuznik@fayettepa.org>

Subject: Certification of Undated Ballots

Importance: High

CAUTION

This message originated from an external source. Verify the legitimacy before clicking links or opening attachments.

Dear Marybeth Kuznik -

Please see the attached letter regarding certification of undated ballots by your county board of elections.

Note that I have requested a response from you by this Friday, July 1, 2022.

--Tim

Timothy E. Gates | Chief Counsel Office of Chief Counsel | Department of State 306 North Office Building | Harrisburg, PA 17120 Phone: 717.783.0736 | Fax: 717.214.9899 tgates@pa.gov | www.dos.state.pa.us

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Appendix 2

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioners,

v.

No. 355 MD 2022

BERKS COUNTY BOARD OF ELECTIONS, et. al.,

Respondents.

JOINT STIPULATION OF FACTS

Pursuant to this Court's July 21, 2022 Order, the parties submit the following joint stipulation of facts. There are some disputed facts.

- 1. The form of the declaration that the Secretary of the Commonwealth has prescribed under 25 P.S. § 3146.4 and 25 P.S. § 3150.14, and which has been in use since February 2021, is attached as Joint Exhibit 1.
- 2. The form of absentee and mail-in voter declarations used by Berks County, Fayette County, and Lancaster County conform to the Secretary's form, and include instructions explaining to absentee and mail-in voters that their votes would not be counted if the declaration is not signed and dated.
- 3. The Pennsylvania Department of State ("Department") issued guidance on September 11, 2020 regarding the receipt and recording of absentee and mail-ballots. This guidance is advisory and not binding on county boards of

elections. A copy of the Department's September 11, 2020 guidance is attached as Joint Exhibit 2.

- 4. The Department issued further guidance on September 28, 2020 concerning civilian absentee and mail-in ballot procedures. This guidance is advisory and not binding on county boards of elections. A copy of the Department's September 28, 2020 guidance is attached as Joint Exhibit 3.
- 5. The Department website page for Pennsylvania voters includes instructions to voters regarding completion of absentee and mail-in ballots for the upcoming November 8, 2022 General Election. It is accessible at: https://www.vote.pa.gov/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx (last accessed July 26, 2022). A copy of this webpage is attached as Joint Exhibit 4.
 - 6. On May 17, 2022, Pennsylvania held its general primary election.
- 7. In response to this Court's June 2, 2022 order in *McCormick v*. *Chapman*, No.286 MD 2022, Berks, Fayette, and Lancaster counties reported the following number of ballots lacking a handwritten date on the envelope as having been cast in 2022 general primary election:

- a. Berks County:
 - i. 507 Democratic ballots;
 - ii. 138 Republican ballots.
- b. Fayette County
 - i. 45 Democratic ballots;
 - ii. 6 Republican ballots.
- c. Lancaster County:
 - i. 46 Democratic ballots;
 - ii. 38 Republican ballots.
- 8. On May 24, 2022, the Department of State issued guidance to the county boards of elections. This guidance is advisory and not binding on county boards of elections. A copy of this guidance is attached as Joint Exhibit 5.
- 9. On June 6, 2020, the Berks County Board of Elections and Lancaster County Board of Elections submitted to the Acting Secretary separate vote tallies that included and excluded the votes from their timely received undated absentee and mail-in ballots, in the format requested by and on the Excel spreadsheet provided by the Department in its May 27, 2022 email.
- 10. On June 6, 2022, the Berks County Board of Elections and the Lancaster County Board of Elections submitted to the Acting Secretary their certified election returns for the 2022 general primary election, which returns did not include votes from the timely received undated absentee and mail-in ballots.

- 11. On June 7, 2022, the Fayette County Board of Elections submitted to the Acting Secretary its certified election return for the 2022 general primary election, which returns did not include votes from timely received undated absentee and mail-in ballots.
- 12. On June 8, 2022, the Berks County Board of Elections submitted revised certified election returns to the Acting Secretary that included additional votes from provisional ballots that were cast in Berks County between 8:00 and 9:00 PM on May 17, 2022.¹
- 13. On June 17, 2022, Jonathan Marks, the Department of State's Deputy Secretary for Elections & Commissions, emailed all county boards. A copy of this email is attached as Joint Exhibit 6.
- 14. On June 23, 2022, the Director of Election Services for Berks County responded to Mr. Marks' email. A copy of this email is attached as Joint Exhibit 7.

¹ In Berks County, all polls remained open an additional hour from 8:00 to 9:00 PM on May 17, 2022 because of technical issues experienced at polling places countywide earlier in the day. Because of a legal challenge to counting the provisional ballots cast in Berks County between 8:00 and 9:00 PM, Berks County could not touch those ballots until that challenge was formally dismissed on June 6, 2022. Berks County completed its canvassing and counting of those votes on June 7, 2020, and by Noon on June 8, 2020, the Berks County Board of Elections submitted to the Acting Secretary a second certified return that included votes from the provisional ballots, within the time allotted to complete the statewide recount ordered by the Acting Secretary for the Republican primary election for United States Senator.

- 15. On June 27, 2022, Mr. Marks emailed all counties that had not yet submitted certified results that included ballots missing a handwritten date on the envelope declaration and counties that had not yet informed the Department of State when they would submit those certified results. A copy of this email is attached as part of Joint Exhibit 8.
- 16. On June 27, 2022, the Director of the Fayette County Election Bureau responded to Mr. Marks's email. A copy of this email is attached as part of Joint Exhibit 8.
- 17. On June 27, 2022, counsel for Lancaster County responded to Mr. Marks's email. A copy of this email is attached as Joint Exhibit 9.
- 18. On June 28, 2022, the Chairman of the Berks County Commissioners responded to Mr. Marks's email. A copy of this email is attached as Joint Exhibit 10.
- 19. On June 29, 2022, Tim Gates, the Department of State's Chief Counsel, sent an identical letter to a representative of each of the three Respondent boards. The version of that letter sent to Berks County is attached as Joint Exhibit 11.
- 20. On July 1, 2022, counsel for Berks County responded to Mr. Gates's letter. A copy of that letter is attached as Joint Exhibit 12.
- 21. On July 5, 2022, counsel for Lancaster County responded to Mr. Gates' letter. A copy of that July 5, 2022 email is attached as Joint Exhibit 13.

- 22. On July 5, 2022, and July 8, 2022, Mr. Gates emailed the Director for the Fayette County Election Bureau asking for a response to his June 29, 2022 letter. A copy those emails is attached as Joint Exhibit 14.
- 23. The Acting Secretary has not yet certified the results of any election in the 2022 general primary in which any vote was cast in Berks County, Fayette County, or Lancaster County, including, without limitation, district-level and statewide races.
- 24. The Respondent boards represent, and as far as the Acting Secretary is aware, prior to this action no voter, candidate, or any other "aggrieved person" challenged the final certification of the 2022 general primary election by the Berks County Board of Elections, the Fayette County Board of Elections, or the Lancaster County Board of Elections.

Dated: July 26, 2022 Respectfully submitted,

/s/ Jeffrey D. Bukowski

Jeffrey D. Bukowski, Esquire Attorney I.D. No. 76102 SMITH BUKOWSKI, LLC 1050 Spring Street, Suite 1 Wyomissing, PA 19610 (610) 685-1600 JBukowski@SmithBukowski.com

Attorneys for Respondents Berks County Board of Elections and Lancaster County Board of Elections

DILLON, McCandless, King, Coulter & Graham, L.L.P.

By: /s/ Thomas W. King, III

Thomas W. King, III
PA. I.D. No. 21580
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Counsel for Respondent, Fayette County Board of Elections

Josh Shapiro Attorney General

Michael J. Fischer (Bar. No. 322311) Chief Counsel and Executive Deputy Attorney General

/s/ Jacob B. Boyer

Jacob B. Boyer (Bar No. 324396) Deputy Attorney General

1600 Arch Street, Suite 300 Philadelphia, PA 19103 (267) 768-3968 jboyer@attorneygeneral.gov

Attorneys for Petitioners

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.

Dated: July 26, 2022 /s/ Jacob B. Boyer

Appendix 3

	ou sign ar	nd date th	e voter's decla	ration	TED UNLESS: in your own handwriting crecy envelope ("Official Election	on Ballot") and pl	ace it in here
Witness, address (city, zip code)	Witness, address (street)	Today's Date	×	Voter, mark here	To be Completed by Voter Unable Sign their Declaration Because of Illness or Physical Disability: I hereby declare that I am unable to sign my declaration for voting my ballot without assistance because I am unable to write by reof my illness or physical disability. I have mare received assistance in making my mark in lie my signature.		FOR COUNTY ELECTION USE ON	-

Voter's declaration

I hereby declare that I am qualified to vote in this election; that I have not already voted in this election; that I have not already voted in this election; and I further declare that I marked my ballot in seelet. I am qualified to vote the enclosed ballot. I under stand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand below to by provisional ballot at my polling I may only vote by provisional ballot at my polling to be in the county of the county.

voided, to the judge of elections at my polling place.

Voter,

sign or mark here (Required)

FOR COUNTY ELECTION USE ONLY		Today's Date (Required)	×
------------------------------	--	-------------------------	---

to

oday oter, S) mark here Date

Witness, sign here Vitness, address (city, zip code)

OUR BALLOT <u>WILL NOT</u> BE COUNTED UNLESS: You sign and date the voter's declaration in your own handwriting You <u>seal</u> your ballot inside the [color] secrecy envelope ("Official Election Ballot") and place it	in here

Voter's declaration

I hereby declare that I am qualified to vote in this election; that I have not already voted in this election; that I have not already voted in this election; and I further declare that I marked my ballot in seelet. I am qualified to vote the enclosed ballot. I under stand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand ballot is not received by the county, I understand place after I return my voted ballot at my polling I may only vote by provisional ballot at my polling to be in the county. voided, to the judge of elections at my polling place.

Voter, sign or mark here (Required)

FOR COUNTY ELECTION USE ONLY		Today's Date (Required)
------------------------------	--	-------------------------

Sign their Declaration Because To be Completed by Voter Unable 약

received assistance in making my mark in lieu of of my illness or physical disability. I have made or assistance because I am unable to write by reason Illness or Physical Disability:
I hereby declare that I am unable to sign
my declaration for voting my ballot without my signature.

Voter, mark here

Today's Date

Witness, address (city, zip code)

Witness, sign here

Appendix 4



GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES

Date: September 11, 2020

Version: 1.0

EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES

1 BACKGROUND:

The Pennsylvania Election Code describes processes that a qualified voter follows to apply for, receive, complete and timely return an absentee or mail-in ballot to their county board of election. These processes include multiple secure methods used by the voter's county board of election to verify that the qualified voter's absentee or mail-in application is complete and that the statutory requirements are satisfied. These include voter identification verification confirmed by either a valid driver's license number, the last four digits of the voter's social security number or other valid photo identification, and unique information on the application including the voter's residence and date of birth. Before sending the ballot to the applicant, the county board of elections confirms the qualifications of the applicant by verifying the proof of identification and comparing the information provided on the application with the information contained in the voter record. If the county is satisfied that the applicant is qualified, the application must be approved. This approval shall be final and binding, except that challenges may be made only on the grounds that the applicant was not a qualified voter, and those challenges must be made to the county prior to five o'clock p.m. on the Friday prior to the election.

Once the qualified voter's absentee or mail-in application is approved, the voter is mailed a ballot with instructions and two envelopes. The outer envelope includes both a unique correspondence ID barcode that links the envelope to the qualified voter's application and a pre-printed Voter's Declaration that the voter must sign representing that the voter is qualified to vote the enclosed ballot and has not already voted. This Guidance addresses the examination of the Voter's Declaration on the ballot return envelope. This Guidance assumes that the voter has satisfactorily completed the steps described above as to application for, receipt and return of an absentee or mail-in ballot.

2 RECORDING THE DATE, RETURN METHOD AND BALLOT STATUS FOR RETURNED BALLOTS:

County boards of elections should have processes in place to record the date, return method, and ballot status for all voted ballots received. County boards of elections must store and maintain returned ballots in a secure location until the ballots may be pre-canvassed or canvassed.

The county board of elections should stamp the date of receipt on the ballot-return. County boards of elections should record the receipt of absentee and mail ballots daily in the SURE system. To record a ballot as returned, the staff should scan the correspondence ID barcode on the outside of the envelope. The correspondence ID on the envelope is unique to each absentee or mail-in voter and each issuance of a ballot to a voter. Once a correspondence ID has been returned in the SURE system, it cannot be returned again. Further, if a ballot issuance record is cancelled by the county board of elections (e.g. voided to reissue a replacement ballot) in the SURE system, the correspondence ID on the cancelled ballot will become invalid. If the same barcode is subsequently scanned, the SURE system will not allow the returned ballot to be marked as being approved for counting.

The county boards of elections should record the date the ballot is received (not the date that the returned ballot is processed). In the event a county board of elections is entering the ballot on a date other than the date the ballot was received, the county personnel should ensure that the SURE record reflects the date of receipt, rather than the date of entry, since by default, SURE will automatically populate both the 'Date Received' and 'Vote Recorded' fields with the current date and time unless users manually correct the date to reflect the date received.

3 EXAMINATION OF DECLARATION ON BALLOT RETURN ENVELOPES:

The county board of elections is responsible for approving ballots to be counted during pre-canvassing.

To promote consistency across the 67 counties, the county boards of elections should follow the following steps when processing returned absentee and mail-in ballots.

After setting aside ballots of elector's who died prior to the opening of the polls, the county board of elections shall examine the Voter's Declaration on the outer envelope of each returned ballot and compare the information on the outer envelope, i.e., the voter's name and address, with the information contained in the "Registered Absentee and Mail-in Voters File, the absentee voter's list and/or the Military Veterans' and Emergency Civilians Absentee Voters File."

If the Voter's Declaration on the return envelope is blank, that ballot return envelope must be set aside and not counted. If the board determines that a ballot should not be counted, the final ballot disposition should be noted in SURE. The ballot return status (Resp Type) should be noted using the appropriate drop-down selection.

If the Voter's Declaration on the return envelope is signed and the county board is satisfied that the declaration is sufficient, the mail-in or absentee ballot should be approved for canvassing unless challenged in accordance with the Pennsylvania Election Code.

The Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections.

Version	Date	Description	Author
1.0	9.11.2020	Initial document release	

Appendix 5

TLP: WHITE



GUIDANCE CONCERNING CIVILIAN ABSENTEE AND MAIL-IN BALLOT PROCEDURES

Date: September 28, 2020

Version: 1.0

GUIDANCE CONCERNING CIVILIAN ABSENTEE AND MAIL-IN BALLOT PROCEDURES

1 Mail-in and Civilian Absentee Balloting – General Provisions

Qualified voters may apply at any time on or before 5:00 p.m. on the Tuesday before any primary or election for a mail-in or civilian absentee ballot, and county boards of elections must begin processing applications at least fifty (50) days before the primary or election. County boards of elections may process applications earlier than fifty (50) days before the primary or election, if the county board of elections determines that it is better for its operational needs to do so.

1.1 Who May Request an Absentee or Mail-in Ballot?

All qualified voters in Pennsylvania are eligible to vote by mail-in ballot, and no excuse is required. For example, even if a voter will be present in their municipality on Election Day, but would simply prefer to vote from home, they may request a mail-in ballot.

Absentee ballots may be voted by domestic voters who will be absent from their municipality on Election Day due to work or vacation, voters who are celebrating a religious holiday, and voters such as college students who also may be away from the municipality on Election Day, if they don't choose to vote where they go to school. Absentee ballots are also for those who are unable to attend their polling place due to illness or physical disability.

A voter may only qualify for and vote one ballot.

2.2 Permanent Voter Lists

Any qualified voter can request to be placed on the permanent mail-in voter list at any time.

For the permanent annual **absentee** ballot list, only voters with a permanent illness or disability are eligible; this section does not apply to voters expecting to be absent from the municipality. Absentee voters who request to be placed on the permanent absentee list do not have to renew their physician's certification of continued disability every four (4) years or list it on each application.

If voters wish to request to become an annual permanent voter:

- For annual permanent **mail-in** list requests: these requests may be submitted when completing their online mail-in ballot request application.
- For annual permanent **absentee** list requests: this may be submitted by paper application only due to the physician's certification requirement.

Each year the county must send an application to any voter on the permanent absentee and mail-in voter lists by the first (1st) Monday in February. The yearly application, once approved, serves as a standing request for a mail-in or absentee ballot to be mailed to that voter for every election that calendar year and for any special election until the third (3rd) Monday in February the next year.

If a permanent mail-in or permanent absentee voter no longer wishes to receive a ballot for the upcoming election or wishes to cancel her permanent status, the voter can submit a cancellation form to the county board of elections. The cancellation form can be found at VotesPA.com.

2 Requesting an Absentee or Mail-in Ballot

There are three (3) ways by which voters can apply for mail-in or absentee ballots:

- 1. By Mail
- 2. In Person
- 3. Online

2.1 MAIL REQUESTS

A voter may submit a paper application via mail to the county board of elections for absentee and mailin ballot applications.

2.2 In-person (Over the Counter) Requests

Act 77 of 2019 allows voters to request and cast an absentee or mail-in ballot over the counter in advance of Election Day. After ballots are finalized by a county, voters may apply at a County Election Office (CEO) during established business hours to receive and cast a mail-in or absentee ballot in person while the voter is in the office.

Once the voter is determined to be qualified and the application for an absentee or mail-in ballot is approved, the county board of elections **must promptly present** the voter with the voter's mail-in or absentee ballot. Under Section 1305 of the Election Code, 25 P.S. § 3146.5, a county board of elections may not deny the eligible voter's request to have the ballot presented to the voter while the voter is at the office unless there is a bona fide objection to the absentee or mail-in ballot application. Voters still need to provide proof of identification (as defined in the Election Code) to be verified by county boards of elections to vote an absentee or mail-in ballot. Proof of identification for civilian absentee and mail-in voting include a valid driver's license number, the last four digits of the voter's social security number or other valid photo identification.

Voters who receive a mail-in or absentee ballot in person must be provided an opportunity to privately and secretly mark their ballot. **Note:** The marking of the ballot in secret does not have to take place in the election offices. It can be provided in a nearby location.

2.2.1 Satellite County Election Offices

County election boards may provide for mail-in and absentee application processing and balloting at more than one location within county borders.

Counties may establish additional business hours for CEOs; hours do not have to be limited to weekdays or to typical business hours. Counties are encouraged to offer business hours outside of these time frames, including weeknights or weekend hours to enable maximum flexibility and convenience for voters.

When a county decides to provide additional mail-in and absentee balloting by establishing additional CEOs, the county must account for all of the following:

- Each CEO must be staffed by appointed elections personnel in municipal or county-owned or leased locations selected by the county board of elections for processing applications and in-person voting of both mail-in and absentee ballots.
- Each CEO must have a secure county network connection that is capable of connecting to the Statewide Uniform Registry of Electors (SURE), and staff trained and approved to access SURE. NOTE: The Department will work with counties to establish secure connections; the county network extension must be approved by the Department.
- Each CEO must either have copies of all ballot styles available to be voted in the county, or an on-demand ballot printer capable of printing all ballot styles available to be voted in the county.
- Each CEO must have a secure ballot collection receptacle to store voted mail-in or absentee ballots submitted at the location. County boards of election are required to keep voted ballots in a sealed or locked container until the time of pre-canvassing.
- Please see the Department of State's August 19, 2020 Absentee and Mail-In Ballot Return Guidance for more information and guidance on choosing a location for a CEO.

2.3 ONLINE REQUESTS

A voter may submit either an absentee or mail-in ballot request online via the Department's online portal at PA Voter Services.

Online applications must be processed according to the same statutory requirements as an application submitted by-mail or in person, including the proof of identification requirements defined in the Election Code.

3 Delivery of Mail-in and Absentee Balloting Materials

Counties must begin delivering mail-in or absentee ballots as soon they are certified and available. Counties may await the outcome of pending litigation that affects the contents of the ballots, but in any event the county must begin delivering mail-in or absentee ballots no later than the 2nd Tuesday prior to Election Day.

Once the counties begin delivering their ballots, as additional applications are received and approved, the county must deliver or mail ballots to such additional voters within forty-eight (48) hours of receipt of approved applications.

3.1 BALLOTING MATERIALS

The absentee and mail-in balloting materials must include the following:

- 1. The voter's proper ballot style based on the voter's registration address.
- 2. A white, inner (or "secrecy") envelope that indicates official ballot.

3. A pre-addressed outer ballot-return envelope that contains a declaration which the voter must sign and date.

The ballot must be returned within the inner envelope, which must be placed in the pre-addressed outer envelope.

With regard to the inner envelope:

- The Pennsylvania Supreme Court held on September 17, 2020, that any ballot that is not returned in the official ballot envelope (secrecy envelope) must be set aside and declared void. These ballots have been referred to as "naked ballots." In accordance with that ruling, all ballots that are not returned within the inner envelope must be set aside and may not be counted. Counties are strongly encouraged to include an instructional insert which describes how the voter should mark and return their ballot and to clearly warn that ballots must be returned in the secrecy envelopes or they will not be counted. The Department encourages county boards of election to publicize the requirement that ballots must be returned within the inner envelope, including on the county's website, in their offices, at ballot collection sites, and in other locations that may assist and educate voters.
- If any voted ballot's inner (or "secrecy") envelope contains any text, mark, or symbol which reveals the identity of the voter, the voter's political affiliation (party), or the voter's candidate preference, the envelopes and the ballots inside them must be set aside, declared void and may not be counted.

With regard to the outer ballot-return envelope:

- 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.
- A ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted. Ballot-return envelopes must be opened in such a manner as not to destroy the declarations executed thereon.
- All ballot-return envelopes containing executed declarations must be retained for a period of two years in accordance with the Election Code.

3.2 BALLOT DESIGN REQUIREMENTS

Act 12 of 2020 changed the law with respect to the surrender process for voters who request mail-in or absentee ballots.

Pursuant to Act 12 of 2020, a warning notice is required to be listed on both the absentee and mail-in ballots, which states:

WARNING: If you receive an absentee or mail-in ballot and return your voted ballot by the deadline, you may not vote at your polling place on election day. If you are unable to return your voted absentee or mail-in ballot by the deadline, you may only vote a provisional ballot at your polling place on election day, unless you surrender your absentee or mail-in ballot and envelope to the judge of elections to be voided to vote by regular ballot.

4.1 VOTER MUST RETURN OWN BALLOT

A voter must return his or her own completed absentee or mail-in ballot by 8:00 pm on Election Day to the county board of elections or other county-designated drop-off location. Third-person delivery of absentee or mail-in ballots is not permitted, and any ballots delivered by someone other than the voter are required to be set aside. The only exceptions are voters with a disability who have designated in writing an agent to deliver their ballot for them. Agency forms may be found at VotesPA.com. Emergency absentee ballots also may be delivered by a designated agent.

4.2 COLLECTION OF MAIL-IN AND ABSENTEE BALLOTS

In addition to the main CEO and satellite CEOs, counties may provide for other secure ballot collection locations that the county deems appropriate to accommodate in-person return of voted mail-in and absentee ballots. *Please refer to the Department's August 19, 2020 Absentee and Mail-In Ballot Return Guidance for more information and guidance regarding ballot collection locations and procedures.*

County boards of election are required to keep absentee and mail-in ballots in a sealed or locked container(s) until the time of pre-canvassing.

4.3 Surrender Process for Voters Who Request Mail-In or Absentee Ballots

Once a voter requests a civilian absentee or mail-in ballot, they should vote and return that mail-in or absentee ballot by mail, or deliver it in person to a county elections office (CEO) or other designated drop-off location prior to 8:00 P.M. on Election Day.

However, if a voter has not voted their mail-in or absentee ballot, they may take it to their polling place on election day to surrender it. (NOTE: This is a different procedure than was in place for the June 2020 primary. Act 12 of 2020 changed the procedures for voters who request mail-in or absentee ballots, but later appear at their polling place. These changes take effect for the first time in the November 2020 General Election.)

Specifically, a voter who requests a mail-in or absentee ballot and who is not shown on the district register as having voted the ballot may vote at their polling place on Election Day if (1) the voter surrenders the original mail-in or absentee ballot and its outer envelope to the judge of elections to be spoiled, and (2) the voter signs a statement subject to the penalties under 18 Pa. C.S. § 4904 in substantially the following form:

I hereby declare that I am a qualified registered elector who has obtained an absentee ballot or mail-in ballot. I further declare that I have not cast my absentee ballot or mail-in ballot, and that instead I remitted my absentee ballot or mail-in ballot and the envelope containing the declaration of the elector to the judge of elections at my polling place to be spoiled and therefore request that my absentee ballot or mail-in ballot be voided.

If the voter turns in (surrenders) his or her ballot and outer envelope and signs the statement, the voter is permitted to vote by regular ballot at the polling place.

If a voter whose record in the district poll book indicates that the voter requested a mail-in or absentee ballot but the voter does not surrender their ballot and declaration envelope and sign the required statement, the voter should be provided a provisional ballot. Even if the voter asserts that they did not cast a mail-in or absentee ballot and is eligible to vote, the voter should only be provided a provisional ballot.

5 ABSENTEE AND MAIL-IN VOTING PROCESSES FOR COUNTY ELECTION OFFICIALS

5.1 POLL BOOK PROCESSES

The poll books will be divided into two sections.

The main section will include a) voters who have not requested a mail-in or absentee ballot for this election and b) voters who requested an absentee or mail-in ballot but who did not return their ballot by the date the pollbooks were printed. There will be a special watermark in the poll book indicating that voters who did not return their ballot by the date the pollbooks were printed must either surrender their ballot as described in Section 4.3 above or vote provisionally if they appear at the polling place on Election Day.

The secondary section of the pollbook will contain a list of voters who have both requested and returned their ballot (cast their vote) by the time the poll book was printed.

Voters who requested but have not returned their absentee or mail-in ballot may vote in person at their polling place on election day ONLY if they surrender their ballot and the declaration envelope that accompanies it, as described in Section 4.3 above. The poll worker shall take the surrendered ballot and declaration envelope and mark them as "VOID." There is a location in the poll book where the poll worker must indicate that the items were surrendered. The voided ballot and declaration envelope, and the signed surrender declaration should be placed in a secure envelope or container and returned to the county election office with other polling place materials at the end of the voting day. The surrendered ballot materials must be preserved.

As noted above, the poll book record for voters whose cast absentee or mail-in ballot has already been received will indicate that the voter's ballot was cast and they are not eligible to vote at the polling place. This will aid poll workers when checking in voters to easily determine that these voters are not eligible to vote on the voting equipment but may vote provisionally if the voter believes they are eligible to vote.

The watermarks in the poll books as listed above also apply to voters with a permanent flag on their voter record. In either case, the poll worker will be able to determine the appropriate course of action when reviewing the poll book on election day.

5.2 Pre-Canvassing and Canvassing Absentee and Mail-in Ballots

The Act 12 of 2020 amendments provide for a pre-canvass period beginning on the morning of Election Day to canvass all ballots received prior to the pre-canvass meeting. The amendments further provide for a canvass meeting beginning no earlier than the close of polls to canvass all ballots not included in the pre-canvass meeting.

Pre-canvass Meeting

- The **pre-canvass** may begin no earlier than 7:00 AM on Election Day. County boards of election must provide notification of the time and location of a pre-canvass meeting at least 48 hours prior to the meeting by posting notice on its website.
- The county board of elections must provide a list of the names of the voters whose absentee or mail-in ballots are to be pre-canvassed.
- One authorized representative for each candidate and one authorized representative for each
 political party must be permitted to remain in the room where the pre-canvass meeting occurs.
- Persons observing, attending or participating in the pre-canvass meeting MAY NOT disclose the result of any portion of the pre-canvass prior to the close of polls on Election Day.
- The Department strongly urges all counties to begin pre-canvassing at the earliest time allowed to ensure that results can be tabulated promptly.

Canvass Meeting

- The canvass of mail-in and absentee ballots may begin no earlier than the close of polls and no
 later than the 3rd day following the election. County boards of election must provide
 notification of the time and location of the canvass meeting at least 48 hours prior to the
 meeting by posting notice on its website.
- The county board of elections must provide a list of the names of the voters whose absentee or mail-in ballots are to be canvassed.
- The canvass process must continue through the 8th day following the election to include valid military and overseas ballots received by 5:00 PM on the 7th day following the election.
- One authorized representative for each candidate and one authorized representative for each political party must be permitted to remain in the room where the canvass meeting occurs.
- The Department strongly urges all counties to begin canvassing at the earliest time allowed to ensure that results can be tabulated and reported promptly.

Pre-canvass and Canvass Procedures

At the pre-canvass or canvass, as the case may be, the county board of elections should:

- Segregate the unopened ballots of voters whose applications were challenged by the challenge deadline (5:00 PM on the Friday before the election).
 - These ballots must be placed in a secure, sealed container until the board of elections holds a formal hearing on the challenged ballots.
 - Ballot applications can only be challenged on the basis that the applicant is not qualified to vote.
- Set aside the ballot of any voter who was deceased before election day.

- Set aside any ballots without a filled out, dated and signed declaration envelope.
- Set aside any ballots without the secrecy envelope and any ballots in a secrecy envelope that include text, mark, or symbol which reveals the identity of the voter, the voter's political affiliation (party), or the voter's candidate preference.

The Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis.

No challenges may be made to mail-in or absentee ballot applications after 5:00 pm on the Friday before the election.

No challenges may be made to mail-in and absentee ballots at any time based on signature analysis.

NOTE: For more information about the examination of return envelopes, please refer to the Department's September 11, 2020 *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes*.

Version History:

Version	Date	Description
1.0	9.28.2020	Initial document
		release

Appendix 6

Voting by mail-in or absentee ballot is safe, secure, and easy.

How to return your mai...



In Pennsylvania, you have two options for mail ballots.

- Mail-in ballot Any qualified voter may apply for a mail-in ballot. You may simply request this ballot without a reason.
- Absentee ballot If you plan to be out of the municipality on election day or if you have a disability or illness that prevents you from going to your polling place on election day, you can request this ballot type, which still requires you to list a reason for your ballot. In order to request either ballot type, you must be registered to vote.

Check Your Registration Status

(https://www.pavoterservice s.pa.gov/Pages/voterregistrati onstatus.aspx)

to review your registration information.

Quick links

Deadlines for the November 8 Election

 November 1, 2022 at 5 p.m. - APPLICATIONS for a mail-in or absentee ballot must be received by your

 $(https://www.votespa.com/Resources/Pages/Contact-Your-Electi\\ \underline{\textbf{county election board}} \text{ on-Officials.aspx})$

 November 8, 2022 at 8 p.m. – VOTED BALLOTS must be RECEIVED by your county election office - postmarks are not enough.

<u>emergency</u>

Missed the deadline? If you have an (such as an unexpected illness or disability or last-minute absence from your municipality) you may still be able to get a ballot after the deadline. Find information about how to emergency absentee ballot get an .

How do I request a mail-in or absentee ballot?

Any registered voter

(https://www.pavoterservices.pa.gov/OnlineAbsenteeApplicatio may request a mail-in ballot n/#/OnlineAbsenteeBegin)

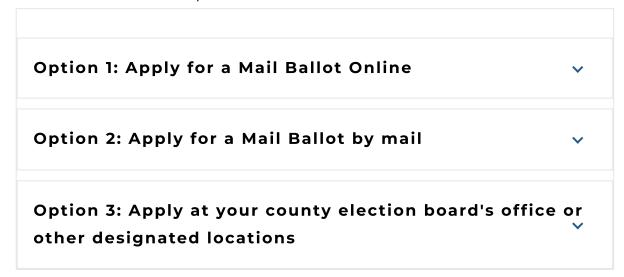
.

Absentee ballots can be requested

(https://www.pavoterservices.pa.gov/OnlineAbsenteeApplicatio n/#/OnlineAbsenteeBegin)

by voters with disabilities or an illness that prevents them from going to their polling place on election day, or those who will be absent from their municipality on Election Day. **Request forms must be received by your county election board by 5 pm on November 1, 2022**.

Expand All



What's the annual mail-in ballot request?

You now have the option to request to be added to the annual mail-in ballot request list where **you'll** receive an application to renew your mail-in ballot request each year. Once your request is approved, you will automatically receive ballots for the remainder of the year, and you **do not** need to submit an application for each election.

Learn more about the

annual mail-in ballot request

(https://www.vote.pa.gov/Voting-in-PA/Page s/Annual-Mail-in-Voter-List.aspx)

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Third Party Ballot Delivery for Mail Voting

If you have a disability that prevents you from applying in person for your mail ballot or delivering your mail ballot, you may designate an agent to deliver your ballot materials for you. You must

designate the agent in writing using this form

(/Resources/Documents/Authorize-Designated-Agent-for-Mail-in-or-Absentee-Ballot.pdf)

or a form provided by your county.

Accessible Remote Ballot Marking Solution for Mail Voting

The Department of State is committed to increasing accessibility for voters with disabilities. Pennsylvania voters with disabilities now have the opportunity to mark their absentee or mail-in ballot electronically.

Learn more about the accessible remote ballot marking solution

(/Voting-in-PA/Pages/Accessible-Remote-Ballot-Marking-Solution-for-Mail-Voting.aspx)

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How do I vote and return my mail-in or absentee ballot?

Below are general steps on how to vote, prepare, and return your mail ballot. Be sure to follow the instructions included with your ballot. Contact your county election office if you have any questions.

Under Pennsylvania law, voters must return their own ballots. The only exceptions to this are for voters with a disability who have designated someone in writing to deliver their ballot.

Step 1:

Read the instructions carefully and mark your ballot. Be sure to complete the front and back of each page.

Step 2:

Seal your ballot in the inner secrecy envelope that indicates "official election ballot." Do not make any marks on the inner secrecy envelope.

Your ballot must be enclosed and sealed in the inner secrecy envelope that indicates "official election ballot" or it will not be counted.

Step 3:

Seal the inner secrecy envelope in the preaddressed outer return envelope. Complete, 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.

Step 4:

Return your voted ballot to the county election board. Absentee and Mail-in Ballots must be received by 8 pm on election day at your county election board. To ensure your ballot is received by the deadline, return the ballot as soon as possible.

1. You can mail your ballot.

- Using the return envelope supplied with your ballot, make sure you use the proper postage (if needed) and that it arrives to your county election board by 8 pm on election day. Postmarks do not count. If your ballot is not received by the county election board by 8 pm on election day, it will not be counted
- 2. **You can hand-deliver your ballot** before 8 pm on election day to your:

county election office

(/Resources/Pages/Contact-Your-Election-Of

ficials.aspx)

or

other officially designated site

- (/Voting-in-PA/Pages/Return-Ballot.aspx)
- Some counties are providing

(/Voting-in-PA/Pages/Return-Ball

drop-boxes ot.aspx)

for mail

ballots.

Where do I return my ballot?

Voters may return their voted mail-in or absentee ballot to their county election board of election office during that office's business hours, or another officially designated location. Ballots must be received by your county election board before 8 pm on Election Day.

Voting early in-person by mail-in or absentee ballot

If you are a registered Pennsylvania voter, you can use the early in-person voting option.

As soon as ballots are ready, you can request, receive, vote and cast your mail-in or absentee ballot all in one visit to your

(/Resources/Pages/Contact-Your-Election-Officials.as

county election board px)

or

other officially designated site

(/Voting-in-PA/Pages/Return-Ballot.aspx)

With this option, there is no need for mail at all, and you can cast your vote at your convenience. Learn more about

voting early in-person by mail-in or absentee ballot

(https://www.vote.pa.gov/Voting-in-PA/Pages/Early-Voting.aspx)

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Identification for Mail Voting

In order to apply for an absentee or mail-in ballot, you must supply proof of identification.

Uniformed and overseas citizens

(https://www.vote.pa.gov/Voting-in-PA/Pages/Military-and-Overs eas-Voters.aspx)

and voters who qualify under the

Voting Accessibility for the Elderly and Handicapped ACT

(https://www.vote.pa.gov/Your-Rights/Pages/Voting-Rights-and-the-law.aspx)

do not need to show ID. All other voters must use one of the following options.

Option 1

Include one of these ID numbers on your absentee or mail-in ballot form:

- Current and valid Pennsylvania driver's license
- PennDOT photo ID card

Option 2

If you don't have one of the documents listed under option 1, you can include the last 4 digits of your Social Security number on your absentee or mail-in ballot form.

Option 3

If you don't have one of the documents listed under option 1 or a Social Security number, you can provide a photocopy of one of the following IDs with your absentee or mail-in ballot application. The photocopy must show name, a photo, and an expiration date that is current.

- U.S. Passport
- U.S. Military ID (active duty and retired military ID may designate an expiration date that is indefinite). Military dependents' ID must contain a current expiration date.
- Employee photo identification issued by Federal, Pennsylvania,
 Pennsylvania county, or Pennsylvania municipal government.
- Photo identification issued by an accredited Pennsylvania public or private institution of higher learning.
- Photo identification issued by a Pennsylvania care facility, including longterm care facilities, assisted living residences and personal care homes.

Frequently Asked Questions

What if I requested a mail-in or absentee ballot but I didn't receive a

ballot, lost my ballot, or changed my mind and want to vote in-person?

- If you already submitted a mail-in or absentee ballot, you cannot vote at your polling place on Election Day.
- If you did not return your mail-in or absentee ballot and you want to vote in person, you have two options:
 - 1. Bring your ballot and the pre-addressed outer return envelope to your polling place to be voided. After you surrender your ballot and envelope and sign a declaration, you can then vote a regular ballot.
 - 2. If you don't surrender your ballot and return envelope, you can only vote by provisional ballot at your polling place. Your county election board will then verify that you did not vote by mail before counting your provisional ballot.

How do I know if my ballot was accepted and counted?

Under current Pennsylvania law, your mail-in ballot can't be opened until Election Day. Therefore, if there's a problem with your mail-in ballot, you won't have the opportunity to correct it before the election. Still, as long as you followed all the instructions and mailed your completed, signed, dated, and sealed in the inner secrecy envelope, ballot by Election Day, you don't have to worry.

Why are there two envelopes with my mail-in ballot?

The smaller secrecy envelope is intended to protect the anonymity of your vote. After you fill out your ballot, you must place it in the secrecy envelope and seal it.

Do not make any marks on this envelope. If you fail to place and seal your ballot in this envelope or if you make marks on this envelope, your ballot will not be counted.

The second, larger envelope is the mailing and declaration envelope. You must use it, even if you are dropping your ballot off at a drop box. Place your secrecy envelope (with your ballot inside) into the mailing and declaration envelope. You must seal it and sign and date the declaration before you can return your ballot.

Both of these envelopes must be used in order for your vote to count.

What if I miss the application deadline? Last Minute Emergencies

In emergency situations (such as an unexpected illness, disability or last-minute absence from your municipality), you can

<u>request an Emergency Absentee Ballot</u>

(https://www.vote.pa.gov/Resources/Documents/PADOS_EmergencyAbsenteeBallotApplication_English.pdf)

after 5 pm on the Tuesday before the election.

The deadline to submit your Emergency Absentee Ballot Application to the County Election Board is 8 pm on Election Day.

Emergency Application for Absentee Ballot (PDF)

(https://www.vote.pa.gov/Resources/Documents/PADOS_Emerg

encyAbsenteeBallotApplication_English.pdf)

<u>Authorized Representative for Emergency Absentee Ballot Form</u>

(https://www.vote.pa.gov/Resources/Documents/PADOS_Author

izeRepresentativeforEmergencyAbsenteeBallot.pdf)

Do not miss voting deadlines!

Sign up to receive emails about mail ballot deadlines, voting processes, new voting system, and more sent directly to your inbox.

TLP: WHITE



GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES

Date: May 24, 2022

Version: 2.0

May 24, 2022

Background

On May 19, 2022, the U.S. Court of Appeals for the Third Circuit issued a judgment and order in *Migliori, et al. v. Lehigh County Board of Elections, et al.*, No. 22-1499. Citing the "materiality" provision of the federal Civil Rights Act of 1964 (52 U.S.C. § 10101(a)(2)(B)), the Court of Appeals held that undated ballots cast in Lehigh County in the November 2021 election must be counted. It held that there is no basis to refuse to count the undated ballots because "inasmuch as there is no dispute that ballots that have the wrong date were counted in the [Lehigh] election, the dating provisions contained in the [Pennsylvania Election Code] are immaterial." Subsequent to that judgment, on May 19, the Department of State (Department) asked counties to segregate undated or incorrectly dated ballot return envelopes in anticipation of further guidance from the department.

Though the *Migliori* judgment was issued in the context of the November 2021 election in Lehigh County, it has been the Department's position that ballots that appear to have "incorrect" dates must be counted. Now, in light of the conclusion of the Third Circuit in *Migliori* it is the Department's position that ballots with an undated return envelope must also be counted for the May 17, 2022, Primary. However, out of an abundance of caution the Department advises, that those ballots should be segregated and remain segregated from all other voted ballots during the process of canvassing and tabulation. In other words, those ballots with undated ballot return envelopes or with incorrectly dated ballot return envelopes that have been set aside, should continue to be maintained, preserved, and appropriately logged pending litigation, which we anticipate will be undertaken on an expedited basis. A determination on whether the segregated tabulations will be used in certifying elections has not yet been made, given the ongoing litigation.

Counties should further segregate the ballots in question into two categories:

- 1. Undated.
- 2. Dated with an "incorrect" date.

Like the pre-canvass and canvass of absentee and mail-in ballots last week, the canvass of the undated ballot return envelopes and any incorrectly dated ballot return envelopes that were set aside must be conducted in an open meeting:

- One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the ballots are canvassed.
- No challenges by authorized representatives or any third party are permitted during canvass of the mail-in and absentee ballots.
- To facilitate transparency and ensure that all validly cast ballots are counted, it is critically
 important that county boards maintain accurate records of the disposition of ballots received
 during this period as directed below.

Canvass Procedures

The guidance concerning mail-in and absentee ballots previously provided by the Department on September 28, 2020, continues to apply unless otherwise specified herein.

The county board of elections shall canvass segregated absentee and mail-in ballots that were previously set aside due to being undated or incorrectly dated.

The canvass meeting shall continue until all segregated absentee and mail-in ballots have been canvassed.

The county board of elections shall examine the voter declaration on each envelope to ensure that it is signed and verify that the voter's name appears on the approved list of mail-in and absentee voters.

Please keep in mind that the county board of elections should continue to set aside and not open or count any of the following:

- Ballots cast by any voter who died prior to the opening of the polls on May 17, 2022.
- Ballots that were received after 8:00 p.m. on May 17, 2022.
- Ballots with a missing signature on the Declaration Envelope.
- Ballots that lack the inner secrecy envelope.
- Ballots where the inner secrecy envelope contains any text, mark, or symbol which reveals the identity of the voter or the voter's candidate preference.

Additionally, the county board of elections should not open or count any ballots pending ID verification as follows:

 If proof of identification for an absentee or mail-in voter was not received or could not be verified, the ballot should not be counted unless the elector provided proof of identification, that can be verified by the county board, by the sixth calendar day following the Primary or on or before Monday, May 23rd.

Other than ballots falling into one of the categories set forth above, mail-in and civilian absentee ballots that comply with the Election Code and the Department's prior guidance shall be canvassed as follows:

- Ballots on which the Declaration Envelopes are signed are valid and must be counted.
- Ballots that are signed and either undated or incorrectly dated are valid and must be counted.
- County boards of elections must maintain separate counts for undated and incorrectly dated ballots.

From: Marks, Jonathan <<u>imarks@pa.gov</u>>
Sent: Friday, June 17, 2022 11:46 AM
To: Marks, Jonathan <<u>imarks@pa.gov</u>>

Subject: RE: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Good morning again everyone.

I apologize for the oversight. I forgot to copy summary of events into my earlier email. Please see the summary below.

SUMMARY

1

- 5/20/2022 U.S. Court of Appeals for the 3rd Circuit issues judgment in Migliori acknowledging that the handwritten dates on absentee and mail-in ballots are immaterial. Later that same day, the department instructed counties to segregate undated/wrongly dated ballots and secure them until we could provide further guidance.
- 5/23/2022 Dave McCormick for U.S. Senate files suit in Commonwealth Court seeking, among other things, an injunction that would require counties to count undated ballots.
- 5/24/2022 DOS sends guidance to counties on the segregation, canvassing and tabulation of undated and wrongly dated ballots asking counties to canvass and tabulate those ballots separately from all other ballots.
- 5/24/2022 DOS sends a supplemental statewide reporting form on which counties can report undated ballot vote totals for statewide offices
- 5/26/2022 Secretary of the Commonwealth issues order for the automatic statewide recount of the U.S. Senate contest in the Republican Primary.
- 5/31/2022 Justice Alito issues an administrative stay of the 3rd Circuit's judgment in Migliori.
- 6/2/2022 The Commonwealth Court of Pennsylvania issues an opinion and order in the McCormick matter directing counties to canvass and tabulate undated/wrongly dated ballots and to report two separate vote totals (vote totals with undated ballots and vote totals without undated ballots).
- 6/3/2022 To ensure counties comply with the Commonwealth Court's 6/2 order, DOS sends updated guidance instructing counties to canvass, tabulate and report vote totals from undated ballots and to keep those ballots and vote totals segregated from all other ballots.
- 6/9/2022 The U.S. Supreme Court denies the application for stay in the Migliori case and vacates Justice Alito's administrative stay.

Kind Regards,

Jonathan Marks Deputy Secretary for Elections & Commissions Pennsylvania Department of State 401 North Office Building Harrisburg, PA 17120

Email: jmarks@pa.gov / Phone: (717) 783-2035

From: Marks, Jonathan

Sent: Friday, June 17, 2022 9:08 AM **To:** Marks, Jonathan < <u>imarks@pa.gov</u>>

Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

Dear County Election Official,

This email is provided for clarification on which vote totals are to be submitted to the Department of State (DOS) for the May 17th Primary election and the due date for those submissions.

As you are aware, over the last several weeks federal and state courts have determined that a missing handwritten date on the declaration envelope is immaterial in determining whether the

ballot is *valid and timely returned*. (Please see below a summary of events since our last update on May 20th on the litigation.) As a result of that litigation, counties have been instructed that it will be necessary to certify vote totals that include the votes from undated/wrongly dated ballots. **Those certified vote totals for the May 17 Primary are due to DOS no later than Thursday**, **June 23rd**.

Attached is a certification page that you can use to certify your county's tabulation of the May 17th results.

If you have not already canvassed, tabulated, **and certified** the votes from undated/wrongly dated ballots in an open meeting during the official canvass, it is strongly recommending that you schedule such a meeting and provide at least 48 hours' notice as you would for the Board's regular canvassing meetings. It is also recommended that you share this email with your solicitors.

Given the unprecedented nature of these events, it is expected that there will be questions. Please direct any follow up questions to Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov). In other words, please direct your questions to all three of us.

Thank you as always for your patience and continued hard work, particularly in these unprecedented times.

Kind Regards,

Jonathan Marks
Deputy Secretary for Elections & Commissions
Pennsylvania Department of State
401 North Office Building
Harrisburg, PA 17120

Email: <u>imarks@pa.gov</u> / Phone: (717) 783-2035

Click <u>here</u> to report this email as spam.

From: Riegner, Paige <PRiegner@countyofberks.com>

Sent: Thursday, June 23, 2022 12:43 PM

To: Marks, Jonathan

Cc: Mathis, Jessica; Dauberman, Elissa

Subject: RE: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Hello,

Please see this article: Berks will cover mail ballots postage, add ballot drop box (pottsmerc.com)

Specifically, the section about the undated ballots.

Per the Commissioners, Berks County will not be submitting an additional certification at this time.

Thank you, Paige

Paige Riegner, MPA

Director of Election Services | County of Berks 633 Court Street, 1st Floor Reading, PA 19601 P: 610-478-6490 X5577 PRiegner@countyofberks.com

From: Marks, Jonathan <<u>imarks@pa.gov</u>> Sent: Friday, June 17, 2022 9:08 AM To: Marks, Jonathan <<u>imarks@pa.gov</u>>

Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

County of Berks Warning: This is an external email. Please exercise caution.

Dear County Election Official,

This email is provided for clarification on which vote totals are to be submitted to the Department of State (DOS) for the May 17th Primary election and the due date for those submissions.

As you are aware, over the last several weeks federal and state courts have determined that a missing handwritten date on the declaration envelope is immaterial in determining whether the ballot is *valid and timely returned*. (Please see below a summary of events since our last update on May 20th on the litigation.) As a result of that litigation, counties have been instructed that it will be necessary to certify vote totals that include the votes from undated/wrongly dated ballots. **Those certified vote totals for the May 17 Primary are due to DOS no later than Thursday**, **June 23rd**.

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Thank you as always for your patience and continued hard work, particularly in these unprecedented times.

Kind Regards,

Jonathan Marks
Deputy Secretary for Elections & Commissions
Pennsylvania Department of State
401 North Office Building
Harrisburg, PA 17120
Email: jmarks@pa.gov / Phone: (717) 783-2035

2. Train. Jinarkse pa.gov / Trione. (717) 700 2000

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Thank you.

From: Marybeth Kuznik <mbkuznik@fayettepa.org>

Sent: Monday, June 27, 2022 12:58 PM

To: Marks, Jonathan; Mathis, Jessica; House, Kori

Cc: 'Jack Purcell'; sherylheidlaw@gmail.com; Dave Lohr; Scott Dunn; mark@zeblaw.com

Subject: [External] RE: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the <u>Report Phishing button in Outlook.</u>

Dear Deputy Secretary Marks,

The Board of Elections of Fayette County has voted not to open or count the undated ballots from the May 17, 2022, General Primary. For this reason, I am unable to provide the information you request in your email below.

Dated ballots with the "wrong" date were counted and were already included in Fayette's original certification of the Primary and subsequent Recount.

Sincerely,

Marybeth Kuznik

Marybeth Kuznik Director Fayette County Election Bureau 2 West Main Street, Suite 111 Uniontown, PA 15401 724-430-1289, ext. 101, phone

724-430-4948, fax



From: Marks, Jonathan <jmarks@pa.gov> Sent: Monday, June 27, 2022 12:17 PM To: Marks, Jonathan <jmarks@pa.gov>

Subject: FW: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

CAUTION

This message originated from an external source. Verify the legitimacy before clicking links or opening attachments.

Dear County Election Official,

If you are receiving this email, you are among the group of counties who have either not yet certified vote totals from undated ballots or have not provided the Department with information about when you will be able to do so. I understand that this recent Primary has been unusual due to post-election litigation, but the recent rulings in the Commonwealth Court of Pennsylvania and the U.S. Court of Appeals for the 3rd Circuit makes it clear that we will have to certify vote totals that include the vote totals from undated ballots.

As a result, the Department needs you to send certified vote totals that include the votes from undated/wrongly dated ballots as soon as possible. If for some reason you are not able to do so by Wednesday, June 29, then please respond indicating the date on which you plan to do so.

In order to avoid any additional delays in finalizing our certification of the results of the General Primary, the Department may have no choice but to take action to compel certain counties to certify vote totals with undated/wrongly dated ballots in the event we do not receive those certifications before the end of this week.

As noted in my original email, please send copies of your certifications and any questions or responses **to all three of the following DOS staff members**: Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov).

Thank you for your urgent attention to this matter.

Kind Regards,

Jonathan Marks Deputy Secretary for Elections & Commissions Pennsylvania Department of State 401 North Office Building Harrisburg, PA 17120

Email: <u>imarks@pa.gov</u> / Phone: (717) 783-2035

From: Marks, Jonathan

Sent: Friday, June 17, 2022 9:08 AM
To: Marks, Jonathan < imarks@pa.gov>

Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

Dear County Election Official,

This email is provided for clarification on which vote totals are to be submitted to the Department of State (DOS) for the May 17th Primary election and the due date for those submissions.

As you are aware, over the last several weeks federal and state courts have determined that a missing handwritten date on the declaration envelope is immaterial in determining whether the ballot is *valid and timely returned*. (Please see below a summary of events since our last update on May 20th on the litigation.) As a result of that litigation, counties have been instructed that it will be necessary to certify vote totals that include the votes from undated/wrongly dated

ballots. Those certified vote totals for the May 17 Primary are due to DOS no later than Thursday, June 23rd.

Attached is a certification page that you can use to certify your county's tabulation of the May 17th results.

If you have not already canvassed, tabulated, **and certified** the votes from undated/wrongly dated ballots in an open meeting during the official canvass, it is strongly recommending that you schedule such a meeting and provide at least 48 hours' notice as you would for the Board's regular canvassing meetings. It is also recommended that you share this email with your solicitors.

Given the unprecedented nature of these events, it is expected that there will be questions. Please direct any follow up questions to Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov). In other words, please direct your questions to all three of us.

Thank you as always for your patience and continued hard work, particularly in these unprecedented times.

SUMMARY

- 5/20/2022 U.S. Court of Appeals for the 3rd Circuit issues judgment in Migliori acknowledging that the handwritten dates on absentee and mail-in ballots are immaterial. Later that same day, the department instructed counties to segregate undated/wrongly dated ballots and secure them until we could provide further guidance.
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- 6/9/2022 The U.S. Supreme Court denies the application for stay in the Migliori case and vacates Justice Alito's administrative stay.

Kind Regards,

Jonathan Marks Deputy Secretary for Elections & Commissions
Pennsylvania Department of State
401 North Office Building Harrisburg, PA 17120 Email: <u>imarks@pa.gov</u> / Phone: (717) 783-2035

From: Pfursich, Jacquelyn E < <u>JEPfursich@co.lancaster.pa.us</u>>

Sent: Monday, June 27, 2022 2:08 PM **To:** Marks, Jonathan < imarks@pa.gov>

Cc: Miller, Christa < MChrista@co.lancaster.pa.us >

Subject: [External] FW: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the <u>Report Phishing button in Outlook.</u>

Mr. Marks,

Your email dated June 27, 2022 was forwarded to me from the Lancaster County Board of Elections and Registration Commission Chief Clerk for response. On June 6, 2022 the Lancaster County Board of Elections submitted its certified vote tallies for the 2022 Primary Election. At the same time, Lancaster County also provided to the Department of State a second set of vote tallies that included 82 undated mail in ballots per the Commonwealth Court Order in the McCormick case, Docket No. 286 M.D. 2022. The Commonwealth Court Order specifically indicates that the County provide the vote tallies to the Department of State in that manner so that when a "final decision on the merits of whether the ballots that lack a dated exterior envelop must be counted or not" the Department of State will have the necessary reports. To date, there is no such decision on the merits of this question that would apply to Lancaster County or the 2022 Primary Election. Therefore, the Lancaster County Board of Elections has complied with the Pennsylvania Elections Code as well as the Commonwealth Court Order.

Please continue to use the certified vote tallies previously provided by the Lancaster County Board of Elections and reference the second set of vote tallies as needed.

Regards

Jacquelyn E. Pfursich Lancaster County Solicitor 150 N. Queen Street Suite #714 Lancaster, PA 17603 717-209-3208 Fax 717-293-7208 jepfursich@co.lancaster.pa.us



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From: Marks, Jonathan < imarks@pa.gov > Sent: Monday, June 27, 2022 12:17 PM
To: Marks, Jonathan < imarks@pa.gov >

Subject: [EXTERNAL] FW: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

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As noted in my original email, please send copies of your certifications and any questions or responses **to all three of the following DOS staff members**: Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov).

Thank you for your urgent attention to this matter.

Kind Regards,

Jonathan Marks
Deputy Secretary for Elections & Commissions
Pennsylvania Department of State
401 North Office Building
Harrisburg, PA 17120

Email: <u>imarks@pa.gov</u> / Phone: (717) 783-2035

From: Marks, Jonathan

Sent: Friday, June 17, 2022 9:08 AM **To:** Marks, Jonathan < <u>imarks@pa.gov</u>>

Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

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Thank you as always for your patience and continued hard work, particularly in these unprecedented times.

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Kind Regards,

Jonathan Marks
Deputy Secretary for Elections & Commissions
Pennsylvania Department of State
401 North Office Building
Harrisburg, PA 17120
Email: jmarks@pa.gov / Phone: (717) 783-2035

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From: Leinbach, Christian Y < CLeinbach@countyofberks.com>

Sent: Tuesday, June 28, 2022 12:32 PM **To:** Marks, Jonathan <jmarks@pa.gov>

Cc: Riegner, Paige <PRiegner@countyofberks.com>; Kauffman, Cody <CKauffman@countyofberks.com>; Yocom-Grill, Anne-Marie <AGrill@countyofberks.com>; Ischaefer <Ischaefer@pacounties.org>; awhite <awhite@pacounties.org>;

Daryl Miller (millerd@mail.bradfordco.org) <millerd@mail.bradfordco.org>

Subject: Certification of undated ballots

Importance: High

Jonathan

Please help me understand where the clear court guidance is regarding certification on undated ballots. I do not see it. "rulings in the Commonwealth Court of Pennsylvania and the U.S. Court of Appeals for the 3rd Circuit makes it clear that we will have to certify vote totals that include the vote totals from undated ballots." I believe the rulings are anything but clear. At best the issue is not settled.

I look forward to your response.

Sincerely,

Christian Y. Leinbach
Chairman - Berks County Commissioners

633 Court Street Reading, PA 19601-4310

Phone: 610-478-6136 Ext. 3 / Ext. 6127

Fax: 610-478-6139

Email: <u>CLeinbach@CountyofBerks.com</u> Website: www.CountyofBerks.com

1



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From: Marks, Jonathan < <u>imarks@pa.gov</u>>
Sent: Monday, June 27, 2022 12:17 PM
To: Marks, Jonathan < <u>imarks@pa.gov</u>>

Subject: FW: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

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Dear County Election Official,

If you are receiving this email, you are among the group of counties who have either not yet certified vote totals from undated ballots or have not provided the Department with information about when you will be able to do so. I understand that this recent Primary has been unusual due to post-election litigation, but the recent rulings in the Commonwealth Court of Pennsylvania and the U.S. Court of Appeals for the 3rd Circuit makes it clear that we will have to certify vote totals that include the vote totals from undated ballots.

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As noted in my original email, please send copies of your certifications and any questions or responses to all three of the following DOS staff members: Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov).

Thank you for your urgent attention to this matter.

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Jonathan Marks Deputy Secretary for Elections & Commissions Pennsylvania Department of State 401 North Office Building Harrisburg, PA 17120

Email: <u>imarks@pa.gov</u> / Phone: (717) 783-2035

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Thank you.



Paige Riegner
Director, Berks County Election Services
Berks County Services Center
633 Court Street, 1st Floor
Reading, PA 19601

priegner@countyofberks.com

June 29, 2022

Dear Ms. Riegner,

As Chief Counsel to the Department of State I write on behalf of Acting Secretary of the Commonwealth Leigh M. Chapman and the Department regarding the failure of your County Board of Elections to certify the results of the May 17, 2022, Primary Election based on a computation of *all* legally cast votes.

By statute, all counties must canvass, compute, certify, and submit election results to the Acting Secretary. See 25 P.S. § 2642(k). The Acting Secretary has the authority and duty to receive those results and to finally certify statewide election results. See 25 P.S. § 2621(f).

On June 17, 2022, and again on June 27, 2022, the Department of State reminded all county election officials of their obligation to canvass, tabulate, and certify the votes from *all* valid absentee and mail-in ballots that were timely received on or before May 17, 2022, at 8 P.M. *See* 25 P.S. § 3146.8.

It is now clear that the lack of a handwritten date on the exterior envelope of a timely received absentee or mail-in ballot cannot be the basis for invalidating a ballot and disenfranchising eligible voters. Both the Commonwealth Court, while resolving a dispute about the very ballots your county refuses to include in its certification, and the Third Circuit recently held as much. *See* Memorandum Opinion, *McCormick v. Chapman*, No. 286 M.D. 2022 (Pa. Commw. Ct. June 2, 2022); *see also Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir. 2022) (holding that failure to date a ballot return envelope cannot justify denying the right to vote). The County is therefore legally obligated to certify election results that include timely received absentee and mail-in ballots that lack a voter's handwritten date.

Re: Certification of Undated Ballots

June 29, 2022

Page 2

The failure of your county to submit accurate certified results disenfranchises voters in your county and is preventing the Acting Secretary from certifying *all* legally cast votes. Please respond indicating that you intend to send the Department certified vote totals that include votes from *all* legally valid absentee and mail-in ballots. If we do not hear from you by July 1, the Acting Secretary intends to pursue all necessary and appropriate legal action, including seeking a writ of mandamus, emergency relief, injunctive and declaratory relief, and other remedies.

Sincerely,

Timothy E. Gates Chief Counsel

Pennsylvania Department of State

Cc:

Leigh M. Chapman, Acting Secretary



COUNTY OF BERKS, PENNSYLVANIA

Office of the Solicitor

Services Center, 13th Floor 633 Court Street Reading, PA 19601

Christine M. Sadler - Solicitor

Christian Y. Leinbach, Chair Kevin S. Barnhardt, Vice Chair Michael S. Rivera, Commissioner Cody L. Kauffman, Esquire Direct Dial 610.478.6105, Ext. 6111 Email: ckauffman@countyofberks.com

Via Electronic Mail Only

Mr. Timothy E. Gates Chief Counsel, Pennsylvania Department of State 306 North Office Building Harrisburg, PA 17120 tgates@pa.gov

July 1, 2022

Dear Mr. Gates,

Thank you for your June 29th, 2022, correspondence sent to Ms. Paige Riegner, Director of the Berks County Office of Election Services. Pursuant to a majority vote of the Berks County Board of Elections, the County of Berks will not be recertifying the results of the May 17th, 2022, Primary Election as requested in your correspondence.

Sincerely,

Cody L. Kauffman, Esq.

First Assistant County Solicitor

For The Berks County Board of Elections

From: Gates, Timothy <tgates@pa.gov>
Sent: Tuesday, July 5, 2022 4:30 PM

To: Pfursich, Jacquelyn E

Subject: RE: [External] RE: Certification of Undated Ballots

Good afternoon Jacquelyn -

We believe that the county can certify the election results for the undated ballots separately without having to decertify the results that have already been certified. That being said, I appreciate your response explaining that Lancaster County's position has not changed.

Many thanks,

--Tim

Timothy E. Gates | Chief Counsel Office of Chief Counsel | Department of State 306 North Office Building | Harrisburg, PA 17120 Phone: 717.783.0736 | Fax: 717.214.9899 tgates@pa.gov | www.dos.state.pa.us

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From: Pfursich, Jacquelyn E < JEPfursich@co.lancaster.pa.us>

Sent: Tuesday, July 5, 2022 4:17 PM **To:** Gates, Timothy <tgates@pa.gov>

Subject: [External] RE: Certification of Undated Ballots

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Good afternoon Tim,

The Lancaster County Board of Elections is in receipt of your letter dated June 29, 2022 as well as your email dated July 5, 2022. On June 27, 2022, I provided to Mr. Marks the County's position regarding the unsigned mail in-ballots and the status of the litigation regarding this issue. The County's position has not changed. Furthermore, the County believes that certifying an election twice without decertifying the first certification is not consistent with the Pennsylvania Election Code.

Appendix 16

From: Gates, Timothy <tgates@pa.gov>
Sent: Friday, July 8, 2022 6:31 PM

To: 'Marybeth Kuznik'; jackpurcell146@gmail.com **Subject:** Re: [External] RE: Certification of Undated Ballots

Following up again. Please advise on your response as requested. Fayette County is the ONLY county that I have not yet heard from.

Many thanks,

—Tim

From: Gates, Timothy <tgates@pa.gov> Sent: Tuesday, July 5, 2022 2:32 PM

To: 'Marybeth Kuznik' <mbkuznik@fayettepa.org>; jackpurcell146@gmail.com <jackpurcell146@gmail.com>

Subject: RE: [External] RE: Certification of Undated Ballots

Jack -

Following up on my email/letter from last week.

If you do not provide the requested information by 5pm today the Acting Secretary intends to pursue all necessary and appropriate legal action.

--Tim

Timothy E. Gates | Chief Counsel Office of Chief Counsel | Department of State 306 North Office Building | Harrisburg, PA 17120 Phone: 717.783.0736 | Fax: 717.214.9899 tgates@pa.gov | www.dos.state.pa.us

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From: Gates, Timothy

Sent: Wednesday, June 29, 2022 1:56 PM **To:** Marybeth Kuznik <mbkuznik@fayettepa.org>

Subject: RE: [External] RE: Certification of Undated Ballots

Many thanks.

--Tim

From: Marybeth Kuznik < mbkuznik@fayettepa.org>

Sent: Wednesday, June 29, 2022 1:53 PM **To:** Gates, Timothy <tgates@pa.gov>

Subject: [External] RE: Certification of Undated Ballots

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Dear Tim --

A few moments ago I forwarded your message and letter to the Fayette County Board of Elections and to the county solicitors.

Marybeth

Marybeth Kuznik Director Fayette County Election Bureau 2 West Main Street, Suite 111 Uniontown, PA 15401 724-430-1289, ext. 101, phone 724-430-4948, fax



From: Gates, Timothy < tgates@pa.gov>
Sent: Wednesday, June 29, 2022 12:56 PM
To: Marybeth Kuznik < mbkuznik@fayettepa.org>

Subject: Certification of Undated Ballots

Importance: High

CAUTION

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Dear Marybeth Kuznik -

Please see the attached letter regarding certification of undated ballots by your county board of elections.

Note that I have requested a response from you by this Friday, July 1, 2022.

--Tim

Timothy E. Gates | Chief Counsel Office of Chief Counsel | Department of State 306 North Office Building | Harrisburg, PA 17120 Phone: 717.783.0736 | Fax: 717.214.9899 tgates@pa.gov | www.dos.state.pa.us

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Appendix 17

1	MR. HOLLAND: Please raise your right hand.
2	Whereupon,
3	JONATHAN MARKS,
4	having been duly sworn, testified as follows:
5	MR. HOLLAND: Please be seated. Thank you.
6	MR. KING: Excuse me. May it please the
7	Court. Your Honor, with respect to these witnesses, will
8	the parties be bound by the declarations made to the Court
9	in the form of a proffer that was included in the
10	memorandum filed? So, for example, would the Commonwealth
11	be bound by the proffer of what this witness is about to
12	testify about?
13	JUDGE COHN JUBELIRER: Is there any
14	objection to that?
15	MR. FISCHER: No objection, Your Honor.
16	We've laid out in general terms what we'd like to ask this
17	witness, but I don't intend to go much beyond that. If Mr.
18	King on cross elicits other points, then we certainly
19	reserve the right on redirect to respond.
20	MR. KING: That's fine, Your Honor. I just
21	wanted to make sure what the rules were before we got into
22	the game here.
23	JUDGE COHN JUBELIRER: Sure. Thank you very
24	much.
25	MR. KING: Yes, ma'am. Thank you.

1	DIRECT EXAMINATION
2	BY MR. FISCHER:
3	Q. Good morning, Mr. Marks.
4	A. Good morning.
5	Q. What is your current position, sir?
6	A. Currently I am the Deputy Secretary for Elections
7	and Commissions at the Pennsylvania Department of State.
8	Q. How long have you been employed by the
9	Pennsylvania Department of State?
10	A. Employed by the Pennsylvania Department of State
11	27 years, 28 years. I started in the Corporation Bureau
12	before I came to Elections.
13	Q. How long have you worked in the Elections Bureau?
14	A. I've worked in Elections in a variety of
15	positions for over 18 years, since late 2003.
16	Q. And how long have you held your current position?
17	A. Since February of 2019.
18	Q. Thank you. I'd just like to ask you briefly
19	about the administration of elections in Pennsylvania.
20	What governmental entity or entities is responsible for
21	administering elections on a day-to-day basis?
22	A Primarily the county Boards of Elections. They
23	are statutorily given that duty to administer the
24	day-to-day on election administration. Of course, the
25	Department of State plays an important role as well in

- 1 election administration at the State level.
- Q. Generally speaking, what are the responsibilities
- 3 of the county boards?
- 4 A. Generally speaking, you know, it's to instruct
- 5 poll workers, to procure and staff polling places
- 6 throughout their county. It also includes receiving and
- 7 tabulating both Election Day votes as well as votes cast by
- 8 absentee or through the mail.
- 9 Q. And what are the responsibilities broadly
- speaking of the Department of State with respect to
- 11 elections?
- 12 A. Our duties are primarily ministerial in nature.
- 13 We do provide guidance to the counties; but as it relates
- 14 to elections or a given election, you know, our
- responsibility primarily is to certify the results of the
- 16 election upon receipt of the certified election returns
- from the various 67 county Boards of Elections.
- 18 Q. Now, you mentioned guidance issued by the
- 19 Department of State. Is the Department of State's guidance
- 20 binding on the counties?
- 21 A. Guidance, no, it is not binding on the counties.
- The Secretary of the Commonwealth does have the authority
- 23 to issue directives in some cases. But when we use the
- 24 term guidance, we're talking about something that is what
- 25 the name implies. It's guidance that counties we expect

- will follow but as we learned not always.
- 2 Q. Thank you. And who in Pennsylvania has the final
- 3 say over disputed questions relating to the administration
- 4 of elections?
- 5 A. The final say, I would think the final say would
- 6 be the Court, you know, a competent Court, whatever that
- 7 Court happens to be.
- 8 Q. Does the Department make an effort to see that
- 9 its guidance is consistent with relevant decisions from the
- 10 Courts?
- 11 A. We do, yes.
- 12 Q. So I'd like to ask you a little about the process
- 13 of certifying elections which you mentioned and then
- 14 specifically relating to the May, 2022 primary. First of
- all, can I ask a question? What does it mean to canvass
- 16 the votes cast?
- 17 A. Canvass really means the entire process of, you
- 18 know, the viewing and tabulating of the election returns.
- 19 So canvass, the county Board of Elections comes together
- 20 and they will review the returns submitted by the various
- 21 precincts in their counties. It also includes adding those
- totals from absentee and mail-in balloting which are done
- centrally by the county Board of Elections.
- So that precanvass that we have that begins on
- 7:00 a.m. on Election Day as well as the official canvass

- 1 that continues thereafter, all of that is part of the
- 2 canvass. So it's not just the tabulation of votes. It's
- 3 also everything that precedes that during the official
- 4 canvassing.
- 5 Q. But it's fair to say that canvassing includes
- 6 counting votes and tabulating votes?
- 7 A. It does, yes.
- 8 Q. Thank you. And what does certification of the
- 9 election refer to?
- 10 A. Certification is essentially an act, a
- 11 ministerial act that occurs once the canvass is completed
- and you've tallied up all the results. The county will
- 13 then certify those results to the Secretary of the
- 14 Commonwealth, and subsequently the Secretary will certify
- the final results after she compiles them.
- 16 Q. So both the counties and the Secretary certify
- 17 results; is that correct?
- 18 A. Correct. Yes.
- 19 Q. Does the Secretary strive to make sure that her
- 20 certification is accurate and complete?
- 21 A. She does, yes.
- Q. Sir, I'd like to ask you specifically now about
- mail-in and absentee ballots, and I'm going to hand you
- 24 what's been marked as Joint Exhibit 1.
- 25 (Whereupon, the document was marked as

Joint Exhibit Number 1 for 1 2 identification.) THE WITNESS: Thank you. 3 BY MR. FISCHER: 5 Q. Sir, are you familiar with this document? 6 Α. I am, yes. 7 What is this document? Ο. This is the declaration envelope template drafted 8 Α. by the Department of State. A declaration envelope meaning that outside envelope that the voter inserts their ballot 10 inside the secrecy envelope and they sign the declaration. 11 Could you just explain again? You mentioned two 12 different envelopes. Could you just explain the function 13 14 of the two envelopes? So the secrecy envelope or I believe the 15 Α. Sure. statute identifies it as official ballot envelope is just a 16 plain envelope with the wording official election ballot on 17 it that the voter inserts their voted ballot into. 18 19 declaration envelope then is the envelope that that inner 20 envelope, that secrecy envelope is inserted into, sealed, and then signed by the elector. And that is then returned 21 to the county Board of Elections for canvassing. 22 23 So what we're looking at as Joint Exhibit 1 Ο. 24 appears on the outer envelope; is that your testimony? 25 Α Correct. Yes.

- 1 Q. Now, there's a place for the voter to sign and
- 2 mark, sign or mark and then a line below that for the date.
- 3 Do you see that?
- 4 A. I do, yes.
- 5 Q. Could you explain under the Election Code when do
- 6 mail-in and absentee ballots need to be returned to the
- 7 counties?
- 8 A. A mail-in or absentee ballot must be returned to
- 9 the county by 8:00 p.m. on Election Day.
- 10 Q. And was that true with respect to the May, 2022
- 11 primary?
- 12 A. It was, yes.
- 13 Q. And was this certification form in use for the
- 14 May, 2022 primary?
- 15 A. It was, yes.
- 16 Q. Now, with respect to the November, 2020 general
- 17 election, was the deadline 8:00 p.m. on Election Day?
- 18 A. No. The deadline was not 8:00 p.m. on Election
- 19 Day November, 2020. Pursuant to the order of the
- 20 Pennsylvania Supreme Court, that deadline for receipt was
- 21 extended to Friday after election.
- Q. How do counties determine whether mail-in and
- absentee ballots were submitted by the deadline?
- 24 A. Typically the counties will date-stamp or
- 25 otherwise put some indicia on the outer envelope indicating

- 1 that it was timely received by the county Board of
- 2 Elections.
- 3 Q. Do the counties use the date written by the voter
- 4 on the outer envelope to determine timeliness?
- 5 A. Not that I'm aware of, no.
- 6 Q. Are you aware of any purpose for which the
- 7 counties use the date as written on the outer envelope?
- 8 A. I cannot think of any administrative purpose.
- 9 Q. Do voters occasionally omit to write a date on
- 10 the outer envelope?
- 11 A. Yes, they do.
- 12 Q. And if I refer to those ballots as undated
- ballots, do you understand what I'm referring to?
- 14 A. I do.
- 15 Q. And do voters sometimes write a date that is
- 16 obviously incorrect?
- 17 A. Yes. Voters, anecdotally we've heard from
- 18 counties where voters will, you know, either put their
- birth date on there as they misunderstand what's being
- requested or they'll put a date with the wrong year or the
- 21 wrong month.
- Q. Outside those situations where the date is
- obviously incorrect, do the counties have a mechanism of
- verifying whether the date is accurate?
- A. No, they do not.

Now, earlier you testified about guidance issued 1 Ο. by the Department. Has the Department issued guidance 2 relating to undated ballots or wrongly dated ballots as you 3 describe them? 5 Α. Since early June -- well, actually since May 20th I believe when the Third Circuit ruled in the 6 7 Migliori case, we issued guidance to the counties at that point indicating that the counties should -- well, sorry. 8 I want to make sure I get the timeline correct; but, yes, we've issued guidance prior to the primary. We obviously 10 issued guidance subsequent to that in light of various 11 12 Court rulings. So let me drill down a little bit on that. 13 Ο. 14 of all, are you an attorney for the Department? I am not, no. 15 Α. You had mentioned the Department issued guidance 16 17 before and after. Let me ask you specifically about 18 wrongly dated ballots. What is the Department's guidance 19 as to wrongly dated ballots such as a ballot where the voter lists his or her birth date? 20 It has been our guidance since I believe Α. 21 September of 2020 that counties cannot and should not set 22 23 aside ballots that are wrongly dated, meaning a ballot that 24 has an incorrect date whether it's a birth date or some 25 other error by the voter.

1 Ο. And has the Department's guidance with respect to 2 wrongly dated ballots only changed over that time? It has not. 3 Α. 4 Q. Now, with respect to undated ballots, has the 5 Department's guidance changed over time? It has, yes. 6 Α. And what has prompted those changes? 7 Ο. Rulings by the Court, this Court as well as the 8 Α. Third Circuit. So leading up to the May, 2022 primary, what was 10 the Department's guidance with respect to undated ballots? 11 12 Α. It was the Department's guidance leading up to the May, 2022 primary that those ballots could not be 13 counted and based on our analysis of the 2020 decision by 14 the Pennsylvania Supreme Court. 15 I'm going to hand you what's been marked as Joint 16 17 Exhibit 6. (Whereupon, the document was marked as 18 Joint Exhibit Number 6 for 19 20 identification.) 21 THE WITNESS: Thank you. Your Honor, is my volume okay? I tried to 22 23 24 JUDGE COHN JUBELIRER: I think so. Thank 25 you.

- 1 Any problem?
- THE REPORTER: No.
- 3 BY MR. FISCHER:
- 4 Q. Mr. Marks, do you recognize this exhibit?
- 5 A. I do, yes.
- 6 Q. Is this an e-mail that you sent?
- 7 A. It is, yes.
- 8 Q. Now, I notice you are the only individual listed
- 9 in the recipient line. Did you only send this e-mail to
- 10 yourself?
- 11 A. No. I blind copied several counties. I believe
- 12 nine counties received this e-mail.
- 13 Q. Is that your typical practice when you're
- 14 e-mailing multiple counties?
- 15 A. Yes. We typically blind copy everyone, and I'll
- send a copy to myself.
- 17 Q. Now, if I could direct you to the second page of
- 18 the document, the top half of that page there's a list of
- 19 dates.
- 20 A. Yes. I'm sorry. I want to correct one thing. I
- 21 was confused on the dates. I believe I sent this e-mail to
- all county Boards of Elections, June 17th e-mail.
- 23 Q. Thank you for that clarification. What is the
- summary of events that you have here?
- 25 A. This was basically a summary of, you know,

- 1 relevant events, mostly, you know, rulings by the Court and
- other events in between that led to the Department's
- determination as to what counties were required to do.
- 4 Q. Now, I'd like to direct you to the bottom
- 5 e-mail-in this exhibit dated June 17th, 2022, at 9:08 a.m.
- 6 Do you see this e-mail?
- 7 A. I do, yes.
- 8 Q. And did you write and sign this e-mail?
- 9 A. I did, yes.
- 10 Q. And what were you trying to communicate to the
- 11 counties in this e-mail?
- 12 A. We were trying to communicate -- I was trying to
- 13 communicate that if counties had not already done so that
- 14 they should canvass, tabulate, and certify votes from
- undated or wrongly dated ballots as the case may be. And,
- 16 you know, it's our belief that that should be done in an
- 17 open meeting if it had not already been done and that
- 18 subsequently they should certify those totals to the
- 19 Department of State.
- 20 O. And what had prompted that change in the
- 21 Department's guidance to counties?
- 22 A. Well, it was not only the decision of the Third
- 23 Circuit but also the June 2nd opinion of this Court as well
- 24 as I believe the last item on this list of events is an
- 25 action by the U.S. Supreme Court denying an application for

- 1 stay in the Migliori case.
- 2 Q. Now, you mentioned the June 2nd decision of this
- 3 Court. Did that involve litigation regarding the
- 4 republican senate primary?
- 5 A It did, yes.
- 6 Q. And that was actually brought by Mr. McCormick,
- 7 one of the candidates, correct?
- 8 A. Correct.
- 9 Q. Sir, I'm going to hand you what's been marked as
- 10 Joint Exhibit 11.
- 11 (Whereupon, the document was marked as
- Joint Exhibit Number 11 for
- identification.)
- 14 BY MR. FISCHER:
- 15 Q. Have you seen this document before?
- 16 A. I have, yes.
- 17 O. And what is the date on this letter?
- 18 A. This letter is dated June 29th of 2022.
- 19 O. And who is it sent from?
- 20 A. It's sent by Chief Counsel of the Department of
- 21 State, Timothy Gates.
- Q. Now, the letter is directed to the Director of
- 23 the Berks County Election Services. Do you recall if this
- letter was sent to any other county officials?
- 25 A. Yes. My recollection is this letter was sent to

- 1 I believe four counties, Berks, Bradford, Fayette, and
- 2 Lancaster.
- 3 Q. And what was the purpose of this letter?
- 4 A. The purpose of this letter was to reiterate the
- 5 Department's position that counties were required, in light
- of relevant rulings by the Courts, the counties were
- 7 required to canvass, tabulate, and certify vote totals cast
- 8 on undated or wrongly dated ballots as the case may be.
- 9 And it outlines how the Department arrived at that
- 10 conclusion, briefly summarizes it.
- 11 Q. And in between your June 17th e-mail and this
- 12 June 29th letter, had you been in communication with any
- 13 counties about those certifications?
- 14 A. Yes. I certainly received questions, had some
- phone conversations with various counties about the June
- 16 17th e-mail.
- 17 Q. I'm going to hand you what's been marked as Joint
- 18 Exhibit 8 and also give you the next two to save time but
- 19 I'll let you know when we're ready for those.
- 20 (Whereupon, the document was marked as
- Joint Exhibit Number 8 for
- identification.)
- 23 BY MR. FISCHER:
- Q Do you recognize Joint 8?
- 25 A. I do, yes.

- 1 Q. And this is an e-mail sent to you from Marybeth
- 2 Kuznik, am I saying that right?
- 3 A. Kuznik.
- 4 Q. Kuznik, with the Fayette County Election Bureau,
- 5 correct?
- 6 A. Correct. Yes.
- 7 Q. Dated June 27th?
- 8 A. That's correct, yes.
- 9 Q. And what is Ms. Kuznik saying in her e-mail?
- 10 A. So Ms. Kuznik, I'm actually going to read it if
- 11 that --
- 12 Q. Certainly.
- 13 A. -- pleases the Court. The Board of Elections of
- 14 Fayette County has voted not to open or count the undated
- ballots from the May 17th, 2022 general primary. For this
- 16 reason, I am unable to provide the information you
- 17 requested in your e-mail below. Dated ballots with the
- 18 wrong date were counted and were already included in
- 19 Fayette's original certification of the primary and
- 20 subsequent recount, referring to the recount, statewide
- 21 recount for U.S. Senate.
- 22 Q. So now let's look at your e-mail that she was
- responding to which begins on the bottom of the first page
- and carries over into the second page. Do you recall
- 25 sending this e-mail?

- 1 A. I do, yes. This was sort of my final reminder to
- 2 the counties who at that point had not yet certified vote
- 3 totals for undated and wrongly dated ballots.
- 4 Q. Did this go to all 67 counties?
- 5 A. It did not. This one went to nine counties
- 6 including Bradford, Berks, Fayette, and Lancaster.
- 7 Q. How had you selected those nine counties to
- 8 receive the e-mail?
- 9 A. They were selected based on whether we received
- from those counties a certification per my original request
- of June 17th.
- 12 Q. All right. Thank you. I'd like to now direct
- 13 you to Joint Exhibit 9 which is the next document up there.
- 14 (Whereupon, the document was marked as
- Joint Exhibit Number 9 for
- identification.)
- 17 BY MR. FISCHER:
- 18 Q. This is another e-mail sent to you from Jacquelyn
- 19 Pfursich. Am I saying that correctly?
- 20 A. I don't know. This is the first time I actually
- 21 had any interaction with Jacquelyn, so I believe that's
- 22 correct but don't quote me on that. I'm sure one of the
- 23 Commissioners from Lancaster County can tell you the
- 24 correct pronunciation.
- MR. D'AGOSTINO: Pfursich.

- 1 MR. FISCHER: Pfursich, thank you.
- 2 BY MR. FISCHER:
- 3 Q. What is Ms. Pfursich's position?
- 4 A. I believe she is the Lancaster County Solicitor.
- 5 Q. And this e-mail is dated June 27th?
- 6 A. It is, yes.
- 7 Q. And I won't ask you to read the entire e-mail,
- 8 but is it fair to say that in this e-mail Ms. Pfursich says
- 9 that Lancaster County will not be including undated ballots
- in its certified totals?
- 11 A. Yes, that is correct.
- 12 Q. And now I'd like to go to Joint Exhibit 10.
- 13 (Whereupon, the document was marked as
- Joint Exhibit Number 10 for
- identification.)
- 16 BY MR. FISCHER:
- 17 Q. This is another e-mail sent to you from Christian
- 18 Leinbach. Do you know who Mr. Leinbach is?
- 19 A. I do, yes. I believe he is the Chair of the
- 20 Berks County Commissioners.
- 21 Q. And this is sent on June 28th, correct?
- 22 A. Correct. Yes.
- Q. And in this e-mail Mr. Leinbach says please help
- 24 me understand where the clear Court guidance is regarding
- 25 certification on undated ballots. I do not see it. Do you

- 1 see that?
- 2 A. I do, yes.
- 3 Q. So is it fair to say that you understood this
- 4 e-mail to be communicating that Mr. Leinbach did not agree
- 5 with the Department's position?
- 6 A. Yes, I think that's a fair --
- 7 Q. I'm going to hand you the next three exhibits
- 8 which are 12, 13, and 14. I want to direct you to Joint
- 9 Exhibit 12 first.
- 10 (Whereupon, the document was marked as
- Joint Exhibit Number 12 for
- identification.)
- 13 BY MR. FISCHER:
- Q. Now, this is the letter from the Berks County --
- 15 First Assistant Berks County Solicitor to Mr. Gates,
- 16 correct?
- 17 A. Yes, that's correct.
- 18 Q. And dated July 1st?
- 19 A. Yes.
- 20 O. And in this letter Mr. Kauffman, the Assistant
- 21 County Solicitor, says in the second sentence, pursuant to
- 22 a majority vote of the Berks County Board of Elections, the
- 23 County of Berks will not be recertifying the results of the
- 24 May 17th, 2022 primary election as requested in your
- 25 correspondence?

- 1 A. Correct.
- Q. And what correspondence is Mr. Kauffman referring
- 3 to there?
- 4 A. He's referring to the June 29th letter from our
- 5 Chief Counsel, from Mr. Gates to the Election Director in
- 6 Berks County.
- 7 Q. I'd like to direct you to Joint Exhibit 13 and
- 8 specifically the second e-mail in the chain which is from
- 9 Ms. Pfursich to Mr. Gates.
- 10 (Whereupon, the document was marked as
- Joint Exhibit Number 13 for
- identification.)
- 13 BY MR. FISCHER:
- 14 Q. Have you seen this e-mail before?
- A. Are you referring to the July 5th, 4:17 p.m.?
- 16 O. Yes, that's correct.
- 17 A. I have, yes.
- 18 Q. And is it fair to say Ms. Pfursich is reiterating
- what she previously said to you which is that Lancaster
- 20 County will not be including undated ballots in its total?
- 21 A. That is correct. Yes.
- Q. Now, finally I'd like to direct you to Joint
- 23 Exhibit 14.
- 24 (Whereupon, the document was marked as
- Joint Exhibit Number 14 for

- identification.)
- 2 BY MR. FISCHER:
- 3 Q. This is an e-mail from Mr. Gates to Ms. Kuznik.
- What is the date on this e-mail?
- 5 A. This e-mail is -- are you referring to the one at
- 6 the top of the chain --
- 7 Q. Yes.
- 8 A. -- which is July 8th, 2022, at 6:31 p.m.?
- 9 Q. Thank you. Can you just read what Mr. Gates says
- in this e-mail?
- 11 A. Following up again. Please advise on your
- response as requested. Fayette County is the only county
- 13 that I have not yet heard from.
- 14 Q. And with respect to the subject that Fayette
- 15 County did not report to Mr. Gates on, do you have an
- 16 understanding of what that refers to?
- 17 A. Yes. Following all the way back to the beginning
- of this thread, it is follow-up from the June 29th e-mail
- 19 from Mr. Gates where he attaches the letter, the June 29th
- 20 letter, the one to the four counties regarding
- 21 certification of undated ballot vote totals.
- Q. And do you see the second e-mail in the chain
- 23 dated July 5th, 2022?
- 24 A. I do, yes.
- 25 Q. Now, this is sent to two e-mail addresses, Ms.

- 1 Kuznik and jackpurcell146@gmail. Do you know who Mr.
- 2 Purcell is?
- 3 A. I don't. I believe Mr. Purcell may be counsel
- for Fayette County or I'm really not sure.
- 5 Q. And in this e-mail Mr. Gates says, Jack,
- 6 following up on my e-mail and letter last week. If you do
- 7 not provide the requested information by 5:00 p.m. today,
- 8 the Acting Secretary intends to pursue all necessary and
- 9 appropriate legal action, Tim. Did I read that correctly?
- 10 A. You did, yes.
- 11 Q. Now, I believe earlier you mentioned that Mr.
- 12 Gates' letter went to four counties; is that correct?
- 13 A. Yes, I believe that's correct.
- 14 Q. Did any of those counties ultimately comply with
- the Department's request to include undated ballots in
- 16 their certified totals?
- 17 A. Yes, Bradford County.
- 18 Q. Bradford did. With respect to the other three,
- 19 did they ultimately comply?
- 20 A. No.
- 21 O. In the Department's view have those three
- 22 counties complied with their obligation to certify the
- results of the May, 2022 primary?
- 24 A. No.
- 25 Q. Now, we've talked a little bit about undated

- 1 ballots and wrongly dated ballots earlier. Are you aware
- of any county that excluded wrongly dated ballots from its
- 3 certified total?
- 4 A. I am not aware of any county other than these
- 5 three that have excluded -- I'm sorry. You said wrongly
- 6 dated ballots?
- 7 Q. Wrongly dated ballots.
- 8 A. No. I'm not aware of any county that excluded
- 9 wrongly dated ballots.
- 10 Q. But in the submissions from these three counties,
- it is your understanding that undated ballots were not
- 12 included?
- 13 A. That is correct. Yes.
- 14 Q. Thank you.
- MR. FISCHER: Thank you. We have no further
- 16 questions, Your Honor.
- 17 JUDGE COHN JUBELIRER: Thank you very much.
- 18 Which of you would prefer to go first?
- MR. BUKOWSKI: I'll go first, Your Honor.
- 20 JUDGE COHN JUBELIRER: Okay. And if you can
- 21 either come up here or --
- MR. BUKOWSKI: I'll come up.
- JUDGE COHN JUBELIRER: Okay.
- 24 CROSS-EXAMINATION
- 25 BY MR. BUKOWSKI:

- 1 Q. Good morning, Mr. Marks.
- 2 A. Good morning.
- 3 Q. I introduced myself to the Court earlier. My
- 4 name is Jeff Bukowski. I'm representing the Election
- 5 Boards from Berks County and Lancaster County in this
- 6 action. Thank you for being here this morning and giving
- 7 your testimony.
- 8 Let's go back to -- you still have the exhibit
- 9 binder in front of you?
- 10 A. I do.
- 11 Q. You were asked about Joint Exhibit 1 which is the
- 12 form of the --
- 13 A. Yes.
- 14 Q. -- outer envelope?
- 15 A. I'm putting them in order. I have a pile of
- paper.
- 17 Q. Okay. Take your time.
- 18 A. I have it. You're referring to this
- 19 (indicating) --
- 20 O. Yes.
- 21 A. -- ballot envelope template?
- Q. And that's the form of voter declaration on the
- outer envelope that's circulated by the Department to the
- 24 Boards of Elections; is that right?
- 25 A. It is, yes.

- 1 Q. Okay. And on that form it's two pages. I'm not
- 2 sure what the difference is. Maybe one's if it's different
- 3 for an absentee or a mail-in ballot, but I did not discern
- 4 a difference other than one has a nice blue line at the
- 5 top. Are they the same?
- 6 A. The declaration is substantively the same, yes.
- 7 Q. Okay. And the notes, the bold lettering on the
- 8 side running from the left side of the page, so if you turn
- 9 it sideways, that says -- the first line in all caps and
- 10 bold says your ballot will not be counted unless, correct?
- 11 A. That's correct. Yes.
- 12 Q. And then it has two bullet points or little
- 13 blocks that have the two things that tell the voter what
- would result in their vote not being counted?
- 15 A. Correct. Yes.
- 16 Q. Okay. And the first block says you sign and date
- 17 the voter's declaration in your own handwriting; is that
- 18 right?
- 19 A. That is correct.
- 20 Q. So this form promulgated by the Secretary and the
- 21 Department includes clear instructions to the voter that
- their vote on the ballot will not be counted unless the
- 23 ballot is signed and dated, the voter's declaration is
- 24 signed and dated in the voters's own handwriting; is that
- 25 right?

- 1 A. That's correct.
- Q. Okay. And now looking at the voter's declaration
- 3 and the signature block, so turning it back right side up,
- 4 the voter's declaration states I hereby declare that I am
- 5 qualified to vote in this election, correct?
- 6 A. Correct.
- 7 Q. Then it goes on to say that I have not already
- 8 voted in this election, correct?
- 9 A. That's correct.
- 10 Q. And I further declare that I marked my ballot in
- 11 secret, correct?
- 12 A. Correct.
- 13 Q. And I am qualified to vote the enclosed ballot?
- 14 A. Correct.
- 15 Q. It further declares I understand I am no longer
- 16 eligible to vote at my polling place after I returned my
- 17 voted ballot?
- 18 A. Correct.
- 19 Q. However, if my ballot is not received by the
- 20 county, I understand I may only vote by provisional ballot
- 21 at my polling place unless I surrender my balloting
- 22 materials to be voted to the Judge of Elections at my
- polling place; is that right?
- 24 A. To be voided to the Judge of Elections at my
- 25 polling place.

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- 1 Q. To be voided, I apologize. The last one is I
- 2 understand I may only vote by provisional ballot at my
- 3 polling place unless I surrender my balloting materials to
- 4 be voided to the Judge of Elections at my polling place?
- 5 A. That's correct.
- 6 Q. And below that is a block with a big X that says
- 7 voter sign or mark here, right?
- 8 A. Correct.
- 9 Q. And in parentheses in bold text it says required?
- 10 A. That's correct.
- 11 Q. And below that there's a blank, and below the
- line on that blank it says in bold text today's date?
- 13 A. Correct.
- 14 Q. And next to that it says in parentheses in bold
- 15 text required?
- 16 A. Correct.
- 17 Q. Is there anything on this that would indicate to
- 18 the voter that the date is not required on this?
- 19 A. No, nothing that would indicate to the voter that
- the date is not required.
- 21 Q. And there's nothing -- and the date in question
- says pretty plainly, you would agree, wouldn't you, it's
- today's date, the date you sign it?
- 24 A. I would. I'm one of those people that still puts
- 25 the wrong year, though, on checks four months into the

- following year, so I understand how it happens.
- Q. It's a good thing we vote in the primary in May
- 3 then?
- 4 A. Yes.
- 5 Q. Thank you. Now, the next exhibit -- well, before
- 6 we get into the next exhibit, you had discussed guidance
- 7 issued by the Department; is that right?
- 8 A. That is correct. Yes.
- 9 Q. And you conceded that that guidance is not
- 10 binding on county boards of election?
- 11 A. Correct. Yes.
- 12 Q. And the guidance at issue -- well, the guidance
- 13 that was promulgated by the Department prior to the May,
- 14 2022 general primary election were two pieces of guidance.
- There's one that's Joint Exhibit 2 which is guidance issued
- 16 September 11th, 2020; is that right?
- 17 A. I don't have Joint Exhibit 2 in front of me, but
- 18 the timeline sounds correct.
- MR. BUKOWSKI: Do you have that?
- 20 MR. BOYER: These are all the exhibits.
- 21 (Documents handed to Mr. Bukowski.)
- MR. BUKOWSKI: Here's a set of all 14 so
- I'll direct you. Here you go.
- THE WITNESS: Thank you.
- 25 BY MR. BUKOWSKI:

- 1 Q. Do you have Joint Exhibit 2 now in front of you?
- 2 A. I do, yes.
- 3 Q. Okay. And Joint Exhibit 2 is guidance issued by
- 4 the Department on September 11th, 2020?
- 5 A. That is correct. Yes.
- 6 (Whereupon, the document was marked as
- 7 Joint Exhibit Number 2 for
- 8 identification.)
- 9 BY MR. BUKOWSKI:
- 10 Q. Okay. And now would you turn to Joint Exhibit 3?
- 11 That's similar guidance. It's guidance issued by the
- 12 Department of State dated September 28th, 2020?
- 13 A. Correct, yes.
- 14 (Whereupon, the document was marked as
- Joint Exhibit Number 3 for
- identification.)
- 17 BY MR. BUKOWSKI:
- 18 Q. So a couple weeks after the prior guidance?
- 19 A. Right.
- 20 Q. And the title page of Joint Exhibit 3 says
- 21 Guidance Concerning Civilian Absentee and Mail-in Ballot
- 22 Procedures, correct?
- 23 A. Correct.
- 24 Q. And then if you turn to page 5 of Joint Exhibit
- 3, let me know when you're there.

- 1 A. I am there.
- Q. Okay. In the middle of the page above the bullet
- 3 points, the second set of bullet points, it says, with
- 4 regard to the outer ballot return envelope. And then there
- 5 are three bullet points; is that right?
- 6 A. That's correct. Yes.
- 7 Q. And the first bullet point says -- so I'll read
- 8 the intro and then the bullet point says, with regard to
- 9 the outer ballot return envelope, a ballot return envelope
- 10 with a declaration that is filled out, dated, and signed by
- 11 an elector who was approved to receive an absentee or a
- 12 mail-in ballot is sufficient and counties should continue
- 13 to precanvass and canvass these ballots, correct?
- 14 A. Correct.
- 15 Q. The next bullet says, a ballot return envelope
- 16 with a declaration that is not filled out, dated, and
- 17 signed is not sufficient and must be set aside, declared
- 18 void, and may not be counted. Ballot return envelopes must
- be opened in such a manner as not to destroy the
- 20 declarations executed thereon; is that right?
- 21 A. That's correct.
- Q. Now, the language in this, filled out, dated, and
- 23 signed, that stems from the Election Code provision that
- 24 requires absentee and mail-in voters to fill out, date, and
- 25 sign their ballots, right?

1	A. Yes. I think that's fair.
2	Q. Okay. And the language in the second bullet,
3	sufficient, a ballot return envelope with a declaration
4	that is not filled out, dated, and signed is not sufficient
5	and must be set aside. That word sufficient comes from the
6	language of the Election Code that directs Boards of
7	Elections to determine if the voter's declaration is
8	sufficient; isn't that right?
9	MR. FISCHER: Your Honor, I'm just going to
10	object to the extent that there's a call for a legal
11	conclusion here since Mr. Marks is not an attorney.
12	MR. BUKOWSKI: He's testified about how
13	their guidance complies with the Election Code in cases
14	interpreting the Election Code. I think he can at least
15	answer his understanding of my question.
16	JUDGE COHN JUBELIRER: So I will, yes, kind
17	of sustain in part that I recognize that he is not an
18	attorney. He is not giving a legal conclusion; but if he
19	has an opinion in his position, he can give that.
20	MR. FISCHER: Thank you.
21	THE WITNESS: I don't have the Election Code
22	in front of me so I don't recall if that exact word is
23	used, but I think certainly it implies that an envelope is
24	insufficient if those items are not completed.
25	MR. BUKOWSKI: Okay. And we'll provide the

- 1 Court in our argument later with some of the specific
- 2 language. So thank you.
- 3 BY MR. BUKOWSKI:
- 4 Q. Now, and this guidance, Joint Exhibit 3, I guess
- 5 is guidance to the Boards of Elections on how they should
- 6 canvass and count these absentee and mail-in ballots,
- 7 correct?
- 8 A. Correct. Yes.
- 9 Q. Do you recognize and does the Department
- 10 recognize that the canvassing and counting or canvassing
- 11 and computing of absentee ballots is discretionary, is a
- 12 discretionary act?
- 13 A. Well, I think certainly the mechanics of it
- 14 certain are discretionary. Whether or not to count legally
- 15 cast ballots I don't believe is discretionary. I think
- 16 that's a duty.
- 17 Q. Let me rephrase my question. Determining whether
- 18 a ballot is legally cast is an act of discretion by the
- county boards of election and subject to interpretation;
- 20 isn't that right?
- 21 A. I think I would disagree with you there. I think
- the statute, you know, provides direction as to which
- 23 ballots should be counted; and the statute in this case as
- 24 interpreted by the Courts I believe that's ultimately the
- 25 authority on which ballots should be counted and which ones

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- 1 shouldn't.
- Q. And when you say interpreted by the Courts, are
- 3 you talking about the 2020 In Re: Canvass Pennsylvania
- 4 Supreme Court decision?
- 5 A. Well, again you're getting a layman's
- 6 interpretation here, but it would be that as well as recent
- 7 decisions including the Third Circuit's decision in
- 8 Migliori as well as the Commonwealth Court's decision on
- 9 June 2nd.
- 10 Q. Okay. Let's limit it to decisions before
- 11 Election Day 2022. Before May 17th, 2022, the only
- 12 decision that the Department believes is relevant is In Re:
- 13 Canvass by the Supreme Court in November of 2020, correct?
- 14 A. I believe that's fair, yes.
- 15 Q. Right. Because this Court's decision in
- 16 McCormick was June 2nd, 2022, right?
- 17 A. Correct.
- 18 Q. And then the Migliori decision was -- and we'll
- 19 argue about that -- but it was issued -- it came out May
- 20 20th --
- 21 A. Yes.
- 22 Q. -- and then was stayed and then became effective
- 23 ultimately June 9th, 2022, when the Supreme Court vacated
- 24 the decision?
- 25 A. Correct. I'll concede the timing is not perfect.

- 1 Q. Okay. So up through -- and is there any
- 2 Departmental guidance between September 28th, 2020, and
- 3 Election Day May 17th, 2022, regarding how to handle
- 4 civilian absentee and mail-in ballots?
- 5 A. Generally perhaps but on the question of undated
- 6 ballots if that's what you're asking, there was no change
- 7 in our guidance during that period of time.
- 8 Q. So the guidance going into Election Day from the
- 9 Department to the boards was if it's not signed and dated,
- 10 those ballots should be set aside and not counted; is that
- 11 fair?
- 12 A. Yes. That was certainly our guidance prior to
- the Third Circuit's ruling in Migliori.
- 14 Q. And the Department believes that that guidance is
- consistent with In Re: Canvass, the 2020 PA Supreme Court
- 16 decision?
- 17 MR. FISCHER: Again, Your Honor, I'll
- 18 object. It calls for a legal conclusion.
- MR. BUKOWSKI: I'll withdraw the question.
- 20 JUDGE COHN JUBELIRER: Okay. Thank you.
- 21 BY MR. BUKOWSKI:
- 22 Q Now, going forward to your correspondence, so I
- think that might be in the binder if you had a binder. I
- 24 think the first correspondence from --
- 25 A. It might be --

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- 1 Q. -- from you, sir, is Joint Exhibit 6. Do you
- 2 have that?
- 3 A. I do. This is the e-mail dated June 17th at 9:08
- 4 a.m.?
- 5 Q. Right. That's from you to the various county
- 6 Boards of Elections, correct?
- 7 A. Correct.
- 8 Q. June 17th, 2022. Now, you did talk about later
- 9 -- and I'll get to that -- but when you talked about the
- 10 boards, these particular boards who are parties here,
- 11 Berks, Lancaster, and Fayette, you had testified earlier
- 12 that at least as of, you know, June 27th through July 1st
- 13 of 2022 they had not certified final results and sent those
- 14 to the Secretary, that that included votes from undated
- mail-in or absentee ballots; is that right?
- 16 A. Yes. I believe it was June 29th. It was
- 17 counties that had not done it by June 29th was held against
- 18 the date of the letter from our counsel.
- 19 Q. So the fact that they had not done that, that
- 20 spurred Mr. Gates to send his letter?
- 21 A. Correct.
- Q. Okay. But prior to that on June 6th, June 7th,
- and June 8th, respectively, each of these three counties
- 24 had submitted final certified results to the Secretary; is
- 25 that right?

- 1 A. I believe yes. My recollection is that each of
- 2 these counties had submitted a certification of election
- 3 results to the Secretary.
- 4 Q. Okay. And you had testified previously that the
- 5 Secretary's role in the process is ministerial, correct?
- 6 A. Yes. That's correct.
- 7 Q. And her role is to take in the certified results
- 8 from the 67 county Boards of Elections, right, and tabulate
- 9 all those from the statewide votes and to tabulate those
- 10 results and then certify the results of those statewide
- 11 elections?
- 12 A. Correct.
- 13 Q. Okay. And has the Secretary done that for the
- 14 2022 primary?
- 15 A. The Secretary has done a partial certification
- 16 pending resolution in these three counties.
- 17 O. What's the partial certification that the
- 18 Secretary has done?
- 19 A. The partial certification would be certifying
- 20 results for all those offices that are not impacted by this
- 21 litigation.
- Q. Okay. So for example?
- 23 A. Some congressional districts, some senatorial,
- and state house districts for example.
- 25 Q. All right. And the statute tells, you know,

- 1 describes which elections she tabulates and certifies. So
- 2 you're saying if it's a county that didn't involve any of
- 3 these three counties and there's a congressional race, that
- 4 result was certified?
- 5 A. Right. It's our position that these three
- 6 counties have not completed certification; and, therefore,
- 7 we've certified results for all those races in the other 64
- 8 counties.
- 9 Q. Okay. And so the Secretary has not certified a
- 10 single race in which -- statewide race that she would
- 11 otherwise be required to certify in which any voter in
- these three counties, Berks, Lancaster, and Fayette, has
- 13 voted; is that right?
- 14 A. Correct.
- 15 Q. And her rationale is that her interpretation of
- 16 what the Election Code requires differs from the
- 17 interpretation of the independent county Boards of
- 18 Elections of each of those three counties?
- 19 A. I don't think it's her interpretation of what the
- 20 Election Code requires. I think it's the Court's
- 21 interpretation of what the Election Code requires.
- 22 Q. Let's talk about the deadline and timing. The
- 23 Election Code provides for deadlines for certification by
- 24 county boards, doesn't it?
- 25 A. It does, yes.

- 1 Q. And would you agree that this year the deadline
- 2 because there was a statewide recount ordered for the U.S.
- 3 Senate race, that that deadline was June 8th, 2022?
- 4 A. That sounds correct. It's June 8th I believe is
- 5 correct.
- 6 Q. And isn't it true that on June 6th Lancaster
- 7 submitted its certified results?
- 8 A. I don't have a copy of that certification in
- 9 front of me, but the timeline roughly sounds correct.
- 10 Q. And I'll rely on our stipulated facts, so I don't
- 11 need to explore that with you.
- MR. BUKOWSKI: But the stipulated facts,
- 13 Your Honor, do say that Lancaster submitted certified
- results on June 6th, 2022. Berks did a partial
- certification on June 6th, 2022. It had another issue
- 16 regarding provisional ballots. Berks later submitted
- 17 certified results, updated certified results that included
- the provisional on June 8th, 2022. And Fayette was in
- 19 between the two and submitted its certified results on June
- 20 7th, 2022.
- 21 BY MR. BUKOWSKI:
- Q. So Berks was the last of those three to certify,
- and there's no issue of timeliness in this case. As of
- June 8th, 2022, you would agree the Third Circuit's order
- in Migliori was not in effect?

- 1 MR. FISCHER: Objection again to the extent
- 2 there's a legal --
- 3 THE WITNESS: I'm not sure I'm best
- 4 qualified to make that determination.
- 5 MR. BUKOWSKI: The order vacating the stay
- 6 was issued June 9th. I think that's in the stipulated
- facts. If it's not we'll present it for argument, Your
- 8 Honor.
- 9 THE WITNESS: It is in the timeline in my
- 10 e-mail and that date is correct.
- 11 BY MR. BUKOWSKI:
- 12 Q. Okay. From Joint Exhibit 6 that's what your
- e-mail says?
- 14 A. Correct.
- Okay. So all of the -- your e-mail came June
- 16 17th which is, depending on which county, nine to 11 days
- 17 after the Secretary had received their certified results;
- is that right?
- 19 A. Yes. That amount sounds correct.
- 20 Q. Okay. And the Secretary chose not to challenge
- 21 in Court the certified results of those three counties that
- she had received on June 6th, 7th, and 8th; isn't that
- right, within two days?
- A. Up until that point, no.
- 25 Q. Okay. Would you describe your e-mail to the

county boards a directive? 1 I don't know that I would describe it as a 2 Again, though, I believe that it is, you know, 3 it was our determination, the Department's determination 5 that, you know, based on the case law counties had a duty to certify results that included vote totals from undated 6 ballots and that failing to do so essentially would in 7 effect mean that the counties have not completed their 8 statutory duty to certify vote totals from all legally cast ballots. 10 And it's my layman's, probably not the most 11 articulate but that's --12 No, that's fine. And does the Department and the 13 Ο. 14 Acting Secretary leave room for any reasonable disagreement as to the state of the law on certification of undated 15 ballots as of, you know, the deadline for this election? 16 17 No. Again I think our position is that without including those vote totals from undated ballots which this 18 19 Court had previously asked counties to tabulate, segregate and tabulate, tabulate, that without including those that 20 the certification was not complete, that all legally cast 21 ballots in this case would not be counted, you know. 22 23 that's really our position that the certification is 24 incomplete in light of the case law. 25 And you're aware that the June 2nd, 2022 order Q.

- from this Court did not say certified ballots, correct?
- 2 A. It did not use the term certified, correct.
- 3 Q And, in fact, the order said I'm ordering you to
- 4 do this, tabulate them, report the totals, and if and when
- 5 a final decision on the merits is made, then we'll have the
- 6 information and you can proceed quickly. Do you agree with
- 7 that?
- 8 A. Yes. I believe generally that's the language
- 9 used in this Court's ruling.
- 10 Q. Now, you got in response to your June 17th e-mail
- which was Joint Exhibit 6, you received responses from all
- 12 three of these counties, Fayette, Lancaster, and Berks;
- isn't that right?
- 14 A. Yes.
- Q. And I won't go through chapter and verse of their
- 16 responses, but in essence all three of these counties said
- 17 we disagree and we're not going to do that. We're not
- 18 going to certify results that count undated ballots because
- 19 we view that as not being required; is that fair?
- 20 A. Yes, I think it's fair.
- 21 Q. So the dates of their communications, you know,
- Joint Exhibit 7 is the Berks County Director's response.
- 23 That was June 23rd, so less than a week after your e-mail,
- 24 correct?
- 25 A. Correct.

- 1 (Whereupon, the document was marked as
- 2 Joint Exhibit Number 7 for
- 3 identification.)
- 4 BY MR. BUKOWSKI:
- 5 Q. And then Joint Exhibit 8 was the one from Ms.
- 6 Kuznik in Fayette. That was June 27th 2022, correct?
- 7 A. Correct.
- 8 Q. And then Attorney Pfursich from Lancaster also
- 9 responded in Joint Exhibit 9 on June 27th, 2022, correct?
- 10 A. That's correct.
- 11 Q. So by June 27th you knew all three of these
- 12 counties had stated they were not going to do what you had
- 13 requested in your e-mail, correct?
- 14 A. Correct.
- 15 Q. Now, I want to specifically point out Joint
- 16 Exhibit 10 which is the e-mail you received in response
- 17 from Christian Leinbach, the Chairman of the Berks County
- 18 Commissioners. Do you have that?
- 19 A. I do, yes.
- 20 Q. That's the e-mail he sent in response to your
- June or June 17th e-mail, and his response is dated June
- 22 28th, 2022, at 12:32 p.m.?
- A. Correct.
- 24 Q. And you had read into the record the part where
- 25 he said please help me understand where there is clear

- guidance. The last sentence of Mr. Leinbach's e-mail says
- I look forward to your response. Do you see that?
- 3 A. Yes.
- 4 Q. Did you respond to Mr. Leinbach's e-mail?
- 5 A. Well, ultimately the Department responded the
- 6 next day when Mr. Gates sent the June 29th letter to the
- 7 counties who had not yet certified.
- 8 Q. But you did not respond to Mr. Leinbach?
- 9 A. I did not personally respond. I consulted with
- 10 our counsel, and it was my understanding that a letter
- would be going out to each of these counties within the
- 12 next 24 to 48 hours.
- 13 Q. And you didn't respond saying stay tuned, our
- 14 Chief Counsel is going to send you a letter?
- 15 A. I did not, no.
- 16 O. Okay. And the letter, the one -- and I
- 17 understand this is an example of the letter -- it's the one
- 18 addressed to Berks County's Director of Election Services,
- that's Joint Exhibit 11. So if I understood your
- 20 testimony, the response to Christian Leinbach's and the
- 21 other county officials' e-mail responses was the letter
- 22 from Attorney Gates?
- 23 A. Yeah. Certainly the counties that asked for
- 24 clarification. As I testified earlier, the letter provides
- a summary of why the Department believed that that was the,

- 1 you know, the mandate from the Courts.
- Q. Okay. And on July 1st Berks County's Assistant
- 3 Solicitor, First Assistant County Solicitor Cody Kauffman,
- 4 responded to Mr. Gates and reiterated Berks County's
- 5 position?
- 6 A. Correct. Yes.
- 7 Q. Similarly Attorney Pfursich from Lancaster County
- 8 reiterated Lancaster's prior response, and she did so by
- 9 her response e-mail Joint Exhibit 13 which was July 5th?
- 10 A. You're referring to?
- 11 Q. Joint Exhibit 13 is Ms. Pfursich -- I'm sorry.
- 12 Hers is, yeah, it's July 5th but it's Joint Exhibit 13
- 13 which starts with Mr. Gates' follow-up thanking her for
- 14 clarifying or responding.
- 15 A. Sorry. I'm flipping through all this. Yes, July
- 16 5th, correct.
- 17 Q. Okay. And Attorney Kauffman's response, Joint
- 18 Exhibit 12, I think I said was July 1st?
- 19 A. That's correct. Yes.
- 20 Okay. So you knew I guess for the second time
- 21 the Department was aware that Berks and Lancaster were not
- going to comply because they told Mr. Gates, Attorney Gates
- that in response to his letter they disagreed, and
- 24 therefore they were sticking with the certifications that
- 25 they had previously submitted; is that right?

- 1 A. Correct. Yes.
- Q. Okay. You testified about Bradford County that
- 3 they complied. Complied with what exactly?
- 4 A. They complied with our request for them to
- 5 certify vote totals that included undated ballots.
- 6 Q. And I think the language is important. It was a
- 7 request, wasn't it, to the boards to do?
- 8 A. Well, it was request based on, you know, what we
- 9 believe was clear guidance from the Court as to what
- 10 counties were required to certify.
- 11 Q. And the Department issued additional guidance
- after the May 17th, 2022 election which was issued May
- 13 24th; is that right? That's Joint Exhibit 6. You should
- 14 have that, if not in your binder the one that I gave you.
- 15 A. Yes.
- 16 Q. Yeah. I'm sorry. It's --
- 17 A. Joint Exhibit 5.
- 18 Q. -- Joint Exhibit 5. Joint Exhibit 5?
- 19 A. Correct.
- 20 (Whereupon, the document was marked as
- Joint Exhibit Number 5 for
- identification.)
- 23 BY MR. BUKOWSKI:
- 24 Q. And at that point this Court had not issued its
- order in the McCormick case, correct?

- 1 A. That's correct. Yes.
- 2 Q. So the only thing that had happened before
- 3 issuing that May 24th guidance was the issuance by the
- 4 Third Circuit panel of its decision in the Migliori v.
- 5 Cohen case; is that fair?
- 6 A. Yes.
- 7 Q. Okay. And this guidance, the guidance in Joint
- 8 Exhibit 5 does a 180 on the instructions to the counties
- 9 and says you must count undated ballots, absentee ballots,
- 10 and mail-in ballots provided there are no other
- 11 deficiencies, correct?
- 12 A. Correct.
- 13 Q. And that, you know, May 24th is the week after
- 14 Election Day; is that right?
- 15 A. Yes. Again the timing not ideal.
- 16 Q. Now, were you aware of this Court's
- 17 administrative order issued May 27th stating that because a
- 18 statewide recount had been ordered that appeals from any of
- 19 the decisions -- any of the certified results from the
- 20 recount were to be filed in the Commonwealth Court as
- opposed to the courts of common pleas?
- 22 A. I am familiar with that. I don't have a copy in
- front of me, but I do recall that; and we circulated that
- order to the campaigns as well as the counties.
- 25 Q. Okay. And counsel for Petitioners asked you if

- 1 you were aware of any counties that had refused or not
- 2 certified votes from absentee or mail-in ballots that
- 3 included wrong or incorrect dates, and I think your
- 4 testimony was you were not aware that any of the counties
- 5 had excluded votes from those types of ballots; is that
- 6 right?
- 7 A. Correct.
- 8 Q. Now, doing that is consistent with the guidance
- 9 issued by the Department -- doing that -- let me strike
- 10 that. Restart over. Certifying votes from incorrectly
- 11 dated voter declarations is consistent with the
- 12 Department's guidance; is that right?
- 13 A. It is, yes.
- 14 Q. Do you know whether there was any contest or
- challenge in any of the 67 counties but more specifically
- 16 these three counties, Berks, Lancaster, and Fayette, as to
- 17 the canvassing and counting of an absentee or mail-in
- 18 ballot that included an incorrect date?
- 19 A. I'm not aware of any.
- 20 O. Okay.
- 21 MR. BUKOWSKI: That's all I have for Mr.
- Marks at this time. Thank you very much, sir.
- THE WITNESS: Thank you.
- JUDGE COHN JUBELIRER: Thank you.
- 25 MR. KING: Thank you, Your Honor. May it

- 1 please the Court.
- I'll wait until you're done with the water.
- 3 THE WITNESS: Sorry.
- 4 MR. KING: I once observed a witness pour
- 5 water all over his shirt during cross-examination. It
- 6 wasn't a good thing.
- 7 THE WITNESS: That would be something I'd be
- 8 known to do, yes. Water is okay. I've poured coffee on
- 9 myself frequently enough.
- 10 MR. KING: Thank you very much.
- 11 CROSS-EXAMINATION
- 12 BY MR. KING:
- 13 Q. Mr. Marks, my name is Thomas W. King, III, as you
- 14 know and I want to thank you for your service to the
- Commonwealth. You've spent many, many years in the Bureau
- of Elections; am I correct?
- 17 A. I have. It's dating me now so --
- 18 Q. Do you know of anyone who spent more time in the
- 19 Bureau of Elections than you have?
- 20 A. Actually we do have one employee I think who's
- 21 been a year or two longer than I am.
- 22 Q. Let me go back just so the record is clear on
- this because we had this discussion about whether you're a
- lawyer or you're not a lawyer or you're, you know,
- 25 seemingly whether you're an expert or not. You have

- 1 expertise with respect to the Pennsylvania Election Code,
- 2 do you not?
- 3 A. I've been accused of being an expert on it, yes.
- 4 Q. Have you testified as an expert in cases
- 5 involving the Pennsylvania Election Code?
- 6 A. I have testified in a multitude of Court cases
- 7 regarding election matters over the years, yes.
- 8 Q. Have you ever been rejected as an expert in any
- 9 case that you were called to testify in?
- 10 A. No, I don't believe so.
- 11 Q. And the Courts that you've testified in including
- 12 you've testified all the way to the Lycoming County Court
- of Common Pleas where Mr. Breth examined you a couple weeks
- 14 ago --
- 15 A. Yes.
- 16 O. -- to the Commonwealth Court to the federal
- 17 district courts, and your testimony has been accepted in
- 18 the Supreme Court of Pennsylvania and your testimony has
- made its way to the United States Supreme Court at some
- 20 point; is that true?
- 21 A. That's correct. Yes.
- Q. All right.
- MR. KING: Your Honor, I don't want to
- 24 belabor this, but there is nobody that knows more about the
- 25 Election Code. Ask any of the jurists in this

1	Commonwealth, ask the lawyers, ask anybody. Mr. Marks is
2	the person they all know.
3	So I'd like to ask him questions about the
4	pleading and about the statute. He is the most
5	knowledgeable person perhaps other than Mr. Tabas who I
6	consider to be the foremost expert, but Mr. Marks would be
7	if Tabas is number 1A, Marks is 1B. So I would like to
8	examine him in those areas. So I'll go on and I guess
9	somebody can object.
10	MR. FISCHER: Your Honor, we have no
11	objection to Mr. Marks being asked about his understanding,
12	but he is not the Department's attorney. He can't speak
13	for the Department's legal position, and frankly the
14	Department's legal positions are not at issue in what is a
15	factual examination. Legal questions obviously are beyond
16	the scope of this examination.
17	So I don't object to him again being asked
18	about his understanding of things, but he's not the
19	Department's lawyer. He's not speaking for the Department
20	as to its legal positions.
21	MR. KING: I respectfully don't agree with
22	any of that because first of all, Your Honor, Mr. Marks is
23	the person who verified this complaint. He signed on and
24	verified the complaint. I'll ask him that, but you can see
25	it from the pleading.

1	Secondly, there is nothing involved here
2	except statutes and regulations and that's what he does.
3	That's what he communicates to these Commissioners who are
4	sitting in your courtroom. That's what he communicates to
5	the candidates. That's what he communicates to the public.
6	That's what he communicates to the Courts. He knows these
7	statutes. He knows whether there are statutes that would
8	provide authority for certain things.
9	So that would be the nature of my inquiry.
10	But I didn't want to get into this down the road. I wanted
11	to say it up front, so
12	MR. FISCHER: Your Honor, the statutes say
13	what they say. You know, we're not disputing the language
14	of the statutes, and I'm not sure what Mr. Marks
15	MR. KING: I'll make that clear when I ask
16	the questions.
17	JUDGE COHN JUBELIRER: I was just going to
18	say why don't we allow for the questioning, and when you
19	hear a question that you have an objection to you can raise
20	that objection.
21	MR. FISCHER: Thank you.
22	JUDGE COHN JUBELIRER: Thank you.
23	MR. KING: Thank you, Your Honor. I didn't
24	mean to get off track, but I did want to make it clear.
25	JUDGE COHN JUBELIRER: Thank you.

- 1 MR. KING: Thank you, Your Honor.
- 2 BY MR. KING:
- 3 Q. So, Mr. Marks, let's go back for a moment. What
- 4 is your educational background beyond high school?
- 5 A. I have basically two years of college.
- 6 Q. From where?
- 7 A. From Ashford University.
- 8 Q. Okay. And after you got out of college, when did
- 9 you begin to work for the Commonwealth of Pennsylvania,
- 10 Department of State?
- 11 A. Actually I took those college courses while I was
- working for the Department of State.
- Q. Oh, you did?
- 14 A. So prior to -- yes. Prior to that I was working
- for the Department with just a high school diploma.
- 16 Q. All right. And at some point you moved. Within
- 17 the Department of State you moved into the elections arena,
- 18 correct?
- 19 A. I did. I started back in the early 2000s as a
- 20 legal assistant assigned to the Bureau of Elections, became
- 21 the Chief of the Division of Elections, then the Chief of
- the Division of SURE, the Statewide Registry, then the
- 23 Commissioner of the Bureau of Elections, and ultimately
- this position as Deputy Secretary.
- 25 Q. So literally there is no position within that

- 1 Department or in that Bureau that you haven't held in terms
- of the chain moving up to where you are; is that correct?
- 3 A. That's not entirely true; but, yes, I've worked
- 4 in a lot of the positions --
- 5 Q. All right.
- 6 A. -- leadership positions related to elections,
- 7 yes.
- 8 Q. Were you -- whenever litigation is filed in the
- 9 Department, are you consulted? Are you involved in a
- 10 general sense when litigation is indicated and commenced?
- 11 A. Litigation related to elections, yes.
- 12 Q. Is that -- are you -- do you oversee litigation
- 13 within -- in that context within the Department?
- 14 A. I don't, no. The Office of Chief Counsel
- oversees litigation within the Department. I'm --
- 16 Q. Well, what would your role --
- 17 A. -- consulted as program area expert, yes.
- 18 Q. I apologize. I don't mean to interrupt you.
- 19 What would your role be, for example, in the current
- 20 litigation? This litigation is before Judge Jubelirer.
- 21 What would your role be?
- 22 A. Well, you know, primarily my role is client. You
- know, the Department of State is client of our counsel;
- 24 but, you know, we are -- the Acting Secretary of the
- 25 Commonwealth is the chief election official in

- 1 Pennsylvania, and I work directly for the Acting Secretary.
- 2 So that's why I signed those verifications for these
- 3 various things that are filed with the Courts.
- 4 Q. Mr. Bukowski earlier said that language is
- 5 important here. Language is important here in this arena;
- 6 is that correct?
- 7 A. Yes. I believe language is always important. I
- 8 believe communication is important.
- 9 Q. Okay. And were you involved in the Ziccarelli
- 10 case?
- 11 A. I don't recall that I was involved directly in
- 12 the Ziccarelli case, but I certainly was consulted. This I
- 13 believe is a case out in Western Pennsylvania from 2020 if
- 14 I recall.
- Q. Well, Ziccarelli determined whether Nicole
- 16 Ziccarelli was going to be the senator from Westmoreland
- 17 and Allegheny --
- 18 A. Correct.
- 19 Q. -- or Senator Brewster was going to be the
- 20 senator from Allegheny and Westmoreland; is that correct?
- 21 A. Correct. Yes.
- Q. You remember that case?
- 23 A. I do, yes.
- 24 Q. And in that Ziccarelli case, the Secretary took
- 25 certain positions. The Secretary was involved in that

- 1 case, correct?
- 2 A. Yes.
- 3 Q. And the Secretary had counsel in that case, the
- 4 Aronchick firm in Philadelphia, correct?
- 5 A. That's my recollection, yes.
- 6 Q. And generally in many of the election cases, the
- 7 Aronchick Hangley firm has been counsel to the Secretary;
- 8 is that correct?
- 9 A. Yes. We've used outside counsel for various
- 10 cases.
- 11 Q. Did you read the papers in this case? Did you
- read the briefs that we filed?
- 13 MR. FISCHER: I'm going to object just to
- 14 the extent that this calls for the substance of discussions
- with counsel. Certainly that's protected by
- 16 attorney-client privilege here. As Mr. Marks has
- testified, his role is that of client in these cases.
- 18 MR. KING: I didn't ask him that.
- 19 THE WITNESS: I reviewed the filings. I
- 20 also reviewed other documents including the exhibits that
- 21 we've been going through today.
- 22 BY MR. KING:
- Q. All right. Did you see the quote that we put in
- 24 our brief and in our papers from the Ziccarelli case where
- 25 the Secretary took the position that in Ziccarelli, however

- 1 Westmoreland decided to count these ballots which were
- 2 again undated ballots, however Westmoreland decided to
- 3 count them and however Allegheny decided to count them,
- 4 that that was none of the Secretary's business?
- 5 A. I think you're paraphrasing.
- 6 Q. I am paraphrasing.
- 7 A. It might be helpful to have a copy of it in front
- 8 of me. I mean I know what quote you're talking about, but
- 9 I don't have the exact wording in front of me.
- 10 Q. But you know that the result was that
- 11 Westmoreland counted them one way and Allegheny counted
- them a different way, correct?
- 13 A. Yes, that is my understanding. Correct.
- 14 Q. And had the Secretary been able to force one of
- those two counties to count differently, the result may
- 16 have been different. For example, if the Secretary had the
- 17 ability to say to Westmoreland you have to count these
- 18 undated ballots and Westmoreland counted them, Ziccarelli
- would be a senator today and not Brewster, correct?
- 20 A. Well, I'm not going to, you know.
- 21 Q. The possibility exists?
- 22 A. Certainly if, you know, the Courts had ruled
- differently, the possibility exists that the outcome would
- 24 be different, but --
- 25 Q. You are the person. This is your signature I

- 1 take it.
- 2 MR. KING: May I approach, Your Honor?
- JUDGE COHN JUBELIRER: Yes.
- 4 (Document shown to the witness.)
- 5 THE WITNESS: Yes. Sloppy as it is, that is
- 6 my signature.
- 7 MR. KING: I was thinking it looked pretty
- 8 good.
- 9 MR. FISCHER: May I just ask what document
- it is that was shown to him?
- 11 MR. KING: It's the verification to the
- 12 complaint -- to the petition.
- MR. FISCHER: Thank you.
- 14 BY MR. KING:
- 15 Q. So you're the person who verified the petition in
- this instance, correct?
- 17 A. Correct.
- 18 Q. So would you tell the Court the petition
- basically asks for two things, right? You want a mandamus.
- 20 You understand the term mandamus?
- 21 A. I do, yes. We're basically trying to compel some
- action we believe is -- that the entity is duty-bound to
- 23 do.
- Q. Or mandate, correct?
- A. Mandate, correct.

You want to force these three counties that are 1 Ο. here in the courtroom, you want to force them to do 2 something, correct? 3 Α. Again, I'm not counsel but my understanding of 5 mandamus is that the person who brings the action believes that that entity has failed to do some duty that they're 6 7 mandated to do and that's why they come before the Court. When is the last time that you're aware of that 8 Ο. the Department brought an action to mandate any county Board of Elections? 10 It has been a very long time. I believe there 11 Α. was one occasion and do not ask me to tell you what the 12 I believe Allegheny County had to -- no. 13 case was. 14 sorry. I'm wrong about that actually. Allegheny County filed a mandamus against the Secretary asking that the 15 Secretary at that time accept an amended certification of 16 election results. 17 I don't recall at least in my tenure at the 18 19 Department that the Department pursued a mandamus against a 20 county. Well, let me ask you this. You want to order 21 0. these folks, these Commissioners to do several things I 22 23 suspect. You tell me if I'm wrong, please. You want them 24 to go back home from here today, and you want them to have 25 to advertise and hold a meeting of their Boards of

- 1 Elections; is that true?
- 2 A. To the extent that they did not already do that
- 3 as part of the canvass and canvass the undated ballots,
- 4 yes, I think that's fair.
- 5 Q. So you want Her Honor to, you want her to order
- 6 them to go back and run an ad in the paper and hold a
- 7 meeting, correct?
- 8 A. If it's necessary for them to do that to complete
- 9 certification, then I believe that's fair, yes.
- 10 Q. Now, would you be kind enough to tell me where --
- listen, you're familiar with this Election Code. You think
- 12 about it every day, don't you?
- 13 A. I do.
- 14 Q. Every day, Sundays, too?
- 15 A. True, yes.
- 16 O. So tell me the section and tell Her Honor where
- 17 is it in the Election Code that says that the Secretary of
- 18 the Commonwealth can order county commissioners who serve
- as Boards of Elections, who perform quasi-judicial
- 20 functions according to the Supreme Court of Pennsylvania to
- 21 go back home and have to schedule a new meeting when
- they've already certified the election in their counties.
- Where does it say that in the statute?
- 24 MR. FISCHER: Objection, Your Honor. This
- is a purely legal question.

1	MR. KING: Listen, Your Honor, if we can't
2	get the answer to that from this gent I think we can.
3	And I think Your Honor knows he is an expert. He's also
4	the moving party here. He verified the complaint. And the
5	threshold question here for Your Honor to answer is what
6	authority in the world does the Secretary have to do this?
7	There's never been a case brought like this
8	before that. Mr. Marks would know of it if there was one.
9	There hasn't been one, and there hasn't been one for good
10	reason. There's no authority to do this.
11	JUDGE COHN JUBELIRER: Well, the question of
12	whether there is authority or is not authority is
13	ultimately a question of law for the Court to decide.
14	MR. KING: Yes, ma'am.
15	JUDGE COHN JUBELIRER: So whether Mr. Marks
16	is aware of the section or not aware of the section, his
17	counsel will make arguments on behalf of his client and the
18	Court will make the decision.
19	MR. KING: Yes, ma'am.
20	JUDGE COHN JUBELIRER: So if
21	MR. KING: I just want to know if he knows.
22	JUDGE COHN JUBELIRER: If he is aware
23	MR. KING: Yes, ma'am.
24	JUDGE COHN JUBELIRER: of a section.
25	Counsel, would you object to him giving his

opinion as well I guess based on his experience as to
whether he's aware of a section or
MR. FISCHER: If he just testifies as a fact
witness about his awareness, I would be okay. I don't
think he's giving opinion testimony frankly on anything.
JUDGE COHN JUBELIRER: Right. I don't think
he was qualified as an expert, and that would anyway be a
little questionable with regard to legal opinions. We
don't typically have those offered as testimony.
MR. KING: I'm just asking, Your Honor, if
he knows. I'm asking what we're here in front of Your
Honor. We're taking up a lot of your time today. You
followed a very difficult case we've all followed in the
news yesterday. So we appreciate the fact that you're with
us today.
But the question for him is what's the basis
for this action? What is the basis? He's the person who
signed the complaint. He's involved in these discussions.
He said that. He's a truthful man. He'll answer it
truthfully to us.
MR. FISCHER: Again, sorry. Mr. King is
trying to ask him a legal question. I'm sorry. That is a
purely a legal question.
JUDGE COHN JUBELIRER: Right, and we don't
want a legal opinion. But I think as a fact witness if

- 1 he's aware of a section, he can answer that subject to the
- 2 qualifications I've given.
- MR. KING: Thank you very much, Your Honor.
- 4 BY MR. KING:
- 5 Q. Back to you, Mr. Marks.
- 6 A. Okay.
- 7 Q. Do you want me to repeat the question or do you
- 8 know it?
- 9 A. No. I believe I understand your question to be
- 10 am I aware of a provision in the Election Code --
- 11 Q. Yes.
- 12 A. -- that gives the Secretary the authority to do
- what she's doing in this case?
- Q. Well, yeah. Yes.
- 15 A. I'm not aware of anything. You know, I'll
- 16 qualify my answer. I'm clearly not an expert on civil law
- 17 and civil procedure; but I'm not aware of anything in the
- 18 Election Code that would enable the Secretary to, you know,
- 19 mandate her discretion on the counties if that makes sense.
- 20 Q. All right. I think that's fair enough. So are
- 21 you aware of Section 3159 of the Code, and if you're not
- 22 let me --
- MR. KING: If you don't mind, Your Honor,
- I'll hand it to him.
- 25 BY MR. KING:

- 1 Q. Are you aware of this section of the Code, 3159?
- 2 MR. KING: This is from our papers.
- 3 (Document shown to Mr. Fischer.)
- 4 MR. FISCHER: Yes.
- 5 BY MR. KING:
- 6 Q. So would you read 3159, please. It's at the top
- 7 of the page.
- 8 A. Upon receiving the certified returns of any
- 9 primary or election from the various county boards, the
- 10 Secretary of the Commonwealth shall forthwith proceed to
- 11 tabulate, compute, and canvass the votes cast for all
- 12 candidates enumerated in Section 140 and upon all questions
- 13 voted for by the electors of the state at large and shall
- 14 thereupon certify and file in his office the tabulation
- 15 thereof.
- 16 Q. Thank you. Now, Mr. Marks, you're familiar with
- 17 that section. You were familiar before you read it; am I
- 18 correct?
- 19 A. Yes.
- 20 Q. You live this section of the Code, don't you?
- 21 A. I hope I'm not that boring. I don't live the
- 22 election.
- Q. In a manner of speaking?
- 24 A. In a manner of speaking.
- 25 Q. All right. So this section says, upon receiving

1	the certified returns of any primary or election from the
2	various county boards, the Secretary of the Commonwealth
3	shall forthwith proceed to tabulate, compute, and canvass
4	the votes cast for all candidates, correct? And then it
5	goes on. That's the language you read.
6	So when the county boards submit their
7	certifications to the Secretary, what does forthwith
8	generally mean? How long does it generally take you to
9	compute, tabulate, and forthwith certify these results?
10	MR. FISCHER: Objection. Again this is a
11	purely legal question.
12	JUDGE COHN JUBELIRER: Yes. At this point
13	you're making legal arguments which I think will be better
14	suited for the legal arguments that will come later as to
15	what the statute means. If you want to ask how the
16	Secretary tabulates ballots
17	MR. KING: Yes.
18	JUDGE COHN JUBELIRER: or other questions
19	of fact regarding an issue, facts that would be relevant
20	here, that's one thing; but I don't think that tying it to
21	the statute is within the scope of appropriate questioning.
22	MR. KING: Yes, ma'am. I'll ask the
23	question that the Court just posed.
24	BY MR. KING:
25	Q. So the question that the Court said I could ask I
l	

- 1 think is --
- JUDGE COHN JUBELIRER: Let's see. Unless
- 3 there is an objection. I didn't mean to overstate. I was
- 4 just wanting to create a factual question, and maybe I
- 5 overstepped my discretion.
- 6 MR. KING: I don't mean to overstep my
- 7 bounds either. So I'll withdraw that statement and I'll
- 8 just --
- JUDGE COHN JUBELIRER: Before you go
- 10 further, is there an objection? I mean I'm not --
- 11 MR. FISCHER: No, Your Honor, not to the way
- 12 the Court phrased the question.
- 13 JUDGE COHN JUBELIRER: Okay.
- 14 MR. KING: Now at least we're all on the
- same page.
- 16 BY MR. KING:
- 17 Q. So, Mr. Marks, let's say that the certifications
- 18 come in from 67 counties in the primary election, any
- 19 primary election. The 67 counties send you -- what do they
- 20 send you, a form?
- 21 A. They do. They basically send a report that has
- the signatures and the seal, signatures of the Board of
- 23 Elections, at least two of them.
- 24 Q. Are they uniform across the state?
- 25 A. The format of the attestation is uniform across

- 1 the state. Sometimes the reports may vary a little bit
- based on, you know, the county's voting system, etc.
- 3 Q. So it's up to the county board that you want the
- 4 results, right?
- 5 A. We want the results, yes.
- 6 Q. And the form is up to them?
- 7 A. We do provide a form through our system; but if
- 8 a county sends a slightly different form, as long as it is
- 9 signed and certified by, you know, a majority of the
- 10 members of the Board of Elections and it contains the
- election results for all the state-level offices, we will
- 12 accept it.
- 13 Q. All right. So you get these forms in from the 67
- 14 counties. You look at them. You make sure they're
- 15 legitimate. What do you do next?
- 16 A. Well and, you know, we're looking at them to make
- 17 sure that they're -- you use the word legitimate. We're
- 18 looking at them to make sure they're complete, that there
- 19 are no obvious errors.
- 20 On the certification report there are occasions
- 21 where a county will miss something or they'll put a vote
- total that, you know, based on our review against
- 23 unofficial returns that we had received from the counties
- 24 previously, you know, appears to be incorrect. You know,
- 25 we'll reach out to the county before we finalize our

1	certification to make sure that they didn't make a clerical
2	error when they certified.
3	But once we've gone through that process, then
4	we'll compile results. How long it takes depends on the
5	individual election. It depends on how many offices are up
6	for election, how many write-in votes were cast for the
7	various offices. But we will, you know, do that as soon as
8	possible; and once we compile those results, we'll certify
9	the final compiled official results.
10	Q. So basically if we were analogizing this to a
11	hockey game which I'm prone to do you are the
12	scorekeeper, not the referee?
13	MR. FISCHER: Your Honor, I'm going to
14	object to that as vague and frankly beyond the scope.
15	MR. KING: It's the issue here. That's the
16	whole issue.
17	JUDGE COHN JUBELIRER: Well, it's the legal
18	issue
19	MR. KING: Yes, ma'am.
20	JUDGE COHN JUBELIRER: which is before
21	the Court.
22	MR. KING: Yes. All right. Can he answer
23	the question?
24	JUDGE COHN JUBELIRER: You've objected.
25	MR. KING: I'll withdraw it, Your Honor. I

don't need to prolong. 1 2 JUDGE COHN JUBELIRER: Yes. Thank you. MR. KING: I'll withdraw it but I do like 3 the hockey analogy. 5 THE WITNESS: Are you wearing an orange and black tie because you're a Flyers fan or --6 7 MR. KING: My son played professional hockey so I'm a big fan. No, I'm a Penguins fan. 8 BY MR. KING: So when you do certify the election, then what do 10 you do with that? 11 In the case of a primary, you know, we don't 12 certify it necessarily to any individual or body. It 13 14 essentially -- you know, the Secretary will put her signature and seal on the official results and that becomes 15 the, you know, official list of nominees for the November 16 17 election. In the case of a November election, once the 18 19 Secretary certifies, there are documents that have to be 20 certified to whether it's the Governor or the legislature, you know, those have to be certified to certain individuals 2.1 or bodies so that they can swear in their members. 22 23 All right. This Ziccarelli case, I want to go 24 back to it because you're aware of the result from the 25 Supreme Court of Pennsylvania with respect to that case,

- 1 are you not?
- 2 A. I am, yes.
- 3 Q. And you're aware that the Ziccarelli case
- 4 likewise ended up in federal court in Pittsburgh, correct?
- 5 A. That's my recollection, yes.
- 6 Q. Were you involved in both of those matters, the
- 7 state court and the federal court actions?
- 8 A. Yes. I would have been consulted, you know, at
- 9 least during that period of time when the Secretary of the
- 10 Commonwealth is involved in the litigation.
- 11 Q. I want to ask you to look at the brief filed by
- 12 your office in the Ziccarelli case in federal court.
- 13 MR. KING: It's part of the papers that we
- filed in this matter, Your Honor.
- 15 BY MR. KING:
- 16 Q. I want you to read from your own brief. First
- 17 I'd like you to look at it and tell me it is your own
- 18 brief, your own being the Department, of course, not you.
- 19 I'm going to ask you to look at this section, the second
- 20 section right below the yellow line.
- 21 (Counsel approached the witness.)
- MR. KING: Are you with me on this one?
- 23 Do you gentlemen know where --
- MR. FISCHER: Yes.
- MR. KING: Thank you.

MR. FISCHER: Could you clarify, Mr. King, 1 2 what page you're on? 3 MR. KING: Sure. 4 Can I see that for a minute, Mr. Marks? 5 THE WITNESS: Sure. MR. KING: I'm at what's marked Exhibit D 6 and it doesn't look like Mr. Wiygul -- yes, he did. 7 page 5 of the Memorandum of Law in Support of the Motion of 8 Secretary of the Commonwealth of Pennsylvania, Kathy Boockvar, to Dismiss the Amended Complaint or, in the 10 Alternative, to Grant Summary Judgment. It's in the United 11 States District Court, Your Honor, in Pittsburgh, in the 12 Western District. 13 14 (Whereupon, the document was marked as Fayette Exhibit Number D for 15 identification.) 16 17 BY MR. KING: Would you look at the second paragraph, second 18 Ο. 19 full paragraph of your brief? The paragraph that begins with the Election Code 20 also gives? 2.1 Could you read that into the record for me, 22 Ο. 23 please. 24 The Election Code also gives the Secretary Α. 25 powers and duties including the duty to, in quotes, receive

1	from county Boards of Elections the returns of primaries
2	and elections, to canvass and compute the votes cast, to
3	proclaim the results of such primaries and elections, and
4	to issue certificates of election to the successful
5	candidates, end quotes, and then provides two citations to
6	the statute, 25 P.S. Section 2621(f) as well as 25 P.S.
7	Section 3159.
8	Do you want me to read the whole paragraph?
9	Q. Yes, I do.
10	A. Then there's a parenthetical and in quotes within
11	that, upon receiving the certified returns of any primary
12	or election from the various county boards, the Secretary
13	shall forthwith proceed to tabulate, compute, and canvass
14	the votes cast, end quote and end of the parenthetical.
15	The next sentence says, while the Secretary
16	issues guidance to the county boards, nothing in the
17	Election Code gives her the authority to refuse to accept
18	returns or to decide which ballots are to be counted and
19	which are not.
20	Then another quote, the Secretary has no
21	authority to declare ballots null and void. Moreover, the
22	Secretary has no authority to order the 67 county Boards of
23	Elections take any particular action with respect to the
24	receipt of ballots. And then it cites the November 3rd,
25	2020 case In Re: Canvass of Absentee and Mail-in Ballots of

November 3rd, 2020 General Election. 1 2 Thank you. So what you just read was the brief filed by your own lawyers, correct? 3 Α. That's correct. Yes. 5 Q. You're aware that the Secretary has no such 6 powers, aren't you? 7 MR. FISCHER: Objection. JUDGE COHN JUBELIRER: Yes, I think --8 9 MR. KING: He's the affiant, Your Honor. He's the affiant to this complaint. The whole case depends 10 on whether the Secretary has such powers. He's the person 11 bringing this case. 12 13 JUDGE COHN JUBELIRER: Counsel? 14 MR. FISCHER: He is not the person bringing the case, and also he verified the facts. The law is for 15 the Court to ultimately decide, and his opinion simply 16 17 isn't relevant. MR. KING: Your Honor? 18 19 JUDGE COHN JUBELIRER: Yes. 20 I'm sorry. MR. KING: 21 JUDGE COHN JUBELIRER: No, go ahead.

MR. KING: A person appearing before Your

Honor needs to come in here and say whether they believe

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that the law provides for what they're telling the Court it

Strehlow and Associates/LEXITAS

ought to do. This gentleman --

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1	JUDGE COHN JUBELIRER: And that's part of
2	the question, too, is what they're asking the Court to do.
3	MR. KING: Yes.
4	JUDGE COHN JUBELIRER: And as I understood
5	it, the mandamus is requesting the Court to issue the
6	order. It's not that the individual who's requesting the
7	relief has the authority to issue the order.
8	MR. KING: Yes.
9	JUDGE COHN JUBELIRER: So I want to make
10	sure that we're all looking at all of the different legal
11	issues and potential interpretation. So he's read the
12	brief; and, you know, I tend to agree with counsel that
13	what you're asking is for legal opinion from him.
14	MR. KING: I'll withdraw the question, Your
15	Honor.
16	JUDGE COHN JUBELIRER: Thank you.
17	MR. KING: Yes, ma'am.
18	BY MR. KING:
19	Q. Mr. Marks, I want to ask you. This may be
20	somewhat redundant but I want to make sure that I have it
21	in the record as to Fayette County at least. As to Berks
22	County, Lancaster County, or Fayette County, are you aware
23	of any citizen who has filed within the statutory periods
24	any challenge to the certification of this election in
25	their county?

- 1 A. I am not, no.
- 2 Q. Is there a time limit set to file such a
- 3 challenge under the Election Code?
- 4 A. There are time limits for, you know, for filing a
- 5 request for recounts or contesting an election, yes.
- 6 Q. And what would those time limits be?
- 7 A. My recollection is that it's 20 days after the
- 8 date of the primary election.
- 9 Q. So there's a two-day, I believe there's a two-day
- section in the Code and there's a 20-day section, correct?
- 11 MR. FISCHER: I'll object. That asks for a
- legal conclusion. I think Mr. Marks can testify about his
- 13 understanding of the challenge process. I think that's
- 14 fine, but he's not speaking authoritatively on the law
- 15 here.
- 16 MR. KING: This is the case, Your Honor, so
- 17 I'll abide by whatever the Court tells me to do.
- 18 JUDGE COHN JUBELIRER: With that
- 19 qualification he can answer the question.
- MR. KING: Thank you.
- 21 THE WITNESS: I believe the two-day that
- 22 you're referencing is -- there is a provision wherein an
- individual who is aggrieved by a determination made by the
- 24 Board of Elections can appeal that determination to the
- appropriate court of common pleas.

- 1 BY MR. KING:
- Q. All right. So the two-day you're not aware of
- anybody having done that in these three counties?
- 4 A. I'm not aware of anyone doing that.
- 5 Q. Are you aware of anybody having done the 20-day
- 6 challenge?
- 7 A. The election contest, no.
- 8 Q. All right. So June 6, 7, and 8 I think Mr.
- 9 Bukowski asked you this but I want to make sure it's clear.
- 10 June 6, 7, 8 these three counties, I don't know which
- 11 order, but the three of them -- it's in the stipulated
- 12 facts -- those three counties on three consecutive days in
- 13 early June certified the elections in their counties and
- they sent them to you, correct?
- 15 A. Correct.
- 16 Q. That's what happened here?
- 17 A. Yes.
- 18 Q. All right. So when you got them, you got these
- 19 three certified results. What did you do with the forms
- 20 that came in? Physically what did you do?
- 21 A. Well, you know, as I said, ultimately we compile
- 22 all the results and certify them once we compile them. So
- we put those -- a lot of what we're doing now we certainly
- 24 have paper files, but a lot of files are now electronic.
- 25 So we have a central repository where we store copies of

- all of the documents submitted by the county Boards of
- 2 Elections related to both unofficial and official returns.
- 3 And then our staff begins to work on the compilation of the
- 4 election results.
- 5 Q. So when these came in from Berks, Lancaster, and
- 6 Fayette Counties, did somebody input them onto a
- 7 spreadsheet or electronically?
- 8 A. So the counties actually -- the way our system
- 9 works, we have a statewide election and campaign finance
- 10 system. The vast majority of counties data enter them into
- 11 that system directly, and then they print out the
- 12 certification report. So if a county has done that and
- 13 most counties do that, our staff it's a matter of just
- 14 verifying that what's on the hard copy signed by the Board
- of Elections matches what was entered into the database.
- 16 O. Okay. So is that what happened when these three
- 17 results came in? Were they inputted into the system?
- 18 A. To the extent that the data was not already
- inputted into the system, yes, that's what would happen.
- That's what our staff would do.
- 21 Q. What you want to do here I think -- you tell me
- if I'm wrong -- is you want to ask the Court to ask, to
- 23 tell these counties, to mandate these counties to recertify
- these elections because they've already certified them
- once, right?

- 1 A. I believe that's fair. I think we're asking the
- 2 Court. We believe that these three counties have not
- 3 completed certification. They have not completed, you
- 4 know, their duty in terms of certifying the election; and
- 5 we're asking that the Court mandate that they do so.
- 6 Q. But they have certified them. They've certified
- 7 them to you on -- the stipulated facts say that. They were
- 8 certified on the 6th, 7th, and 8th of June of 2022,
- 9 correct?
- 10 A. I mean, respectfully, I think that's why we're in
- this courtroom today. We do not believe that these three
- counties have completed certification, and that's really
- the issue before the Court.
- 14 Q. I'd respectfully disagree and I'm going to ask
- 15 you this. You say that they need to complete
- 16 certification. Did you not receive certifications from
- 17 each of these counties in hand?
- 18 A. We received certifications from each of the three
- 19 counties. Our position is that if those counties do not
- 20 include vote totals from the undated ballots that those
- 21 certifications are incomplete, and that's really the crux
- of this argument.
- Q. And so not a single voter, not a single
- 24 candidate, no candidate filed any objection to this, did
- 25 they?

- 1 A. I'm not aware of any candidate other than the
- 2 case related to McCormick before this Court regarding
- 3 undated ballots generally.
- 4 Q. All right. And that case was ultimately --
- 5 MR. KING: And Your Honor handled that case.
- 6 BY MR. KING:
- 7 Q. So that case was ultimately dismissed, correct?
- 8 A. I believe that was the outcome, yes.
- 9 Q. And but no candidate filed a challenge to the
- 10 certification of these three counties' certificates of
- 11 election?
- 12 A. I'm not aware of any candidate doing that, no.
- 13 Q. And you would be aware of that if it happened,
- 14 wouldn't you?
- 15 A. I would think so, yes.
- 16 Q. If anybody would be aware, you would be aware,
- 17 correct?
- 18 A. Yes.
- 19 Q. All right.
- 20 A. There are local party offices, so that's why I,
- 21 you know, I don't want to say for absolutely. Those have
- not necessarily come to the Department of State.
- Q. You mentioned guidance, and the stipulated facts
- here say that the guidance that you've issued in this case,
- 25 the guidance that's referred to in this case and in your

- 1 pleading is not mandatory. It's not binding on the
- 2 counties, correct?
- 3 A. Correct. When we use the term guidance, it is
- 4 not mandatory.
- 5 Q. And there was never a directive issued in this
- 6 case?
- 7 A. No, there was no directive issued by the
- 8 Department.
- 9 Q. Are you familiar with the case of Fulton County
- 10 Board of Elections decided by Judge Leavitt?
- 11 A. I am, yes.
- 12 Q. All right. And you're aware that with respect to
- 13 these issues, that the Secretary has limited powers with
- 14 respect to these matters?
- MR. FISCHER: Objection, Your Honor. This
- is legal territory again, and it's simply not relevant to
- this case.
- 18 MR. KING: I'm just asking him if he's
- 19 aware.
- 20 JUDGE COHN JUBELIRER: If he's aware of?
- 21 MR. KING: Of the limited powers. He's the
- Deputy Secretary so it's important that he knows. He knows
- what his powers are. I'm just asking him if he's aware
- 24 that --
- 25 JUDGE COHN JUBELIRER: It's his

1	understanding.
2	MR. KING: Yes.
3	JUDGE COHN JUBELIRER: Clearly there's
4	counsel for the Department as well that would
5	MR. KING: Yes, ma'am. I'll ask it that
6	way.
7	JUDGE COHN JUBELIRER: All right. But wait.
8	Are you?
9	MR. FISCHER: I don't object. If the
10	question is about his understanding, I think that's
11	permissible. I also think we've covered this ground
12	multiple times, and there's no dispute that the guidance
13	issued by the Department isn't mandatory. That's not an
14	issue in dispute here. So I'm not sure what the purpose of
15	this is, but I don't object to the question about his
16	understanding.
17	MR. KING: It was the subject of direct
18	examination. This is cross-examination, Your Honor. May I
19	ask a question?
20	JUDGE COHN JUBELIRER: Yes.
21	MR. KING: Thank you.
22	BY MR. KING:
23	Q. Mr. Marks, do you know the question at this
24	point?
25	A. I do. I believe you're asking if there are

- limits to the Secretary of the Commonwealth's power, and
- 2 the answer is yes.
- 3 Q. All right. And isn't it true as is stated in
- 4 your brief in Ziccarelli and what's been said by this
- 5 Department on numerous occasions that in Pennsylvania 67
- 6 counties Boards of Elections have primacy with respect to
- 7 the conduct of these elections, correct?
- 8 A. I believe that's correct within the confines of
- 9 election law of course.
- 10 Q. In those Boards of Elections, you're familiar
- 11 with numerous challenges I suspect? You tell me if I'm I
- 12 wrong. You're familiar with numerous challenges over the
- 13 years that have been made in those Boards of Elections,
- 14 correct?
- 15 A. Correct. Yes.
- 16 O. And there's a reference to the Boards of
- 17 Elections as performing a quasi-judicial function. Do you
- 18 understand what that means?
- 19 A. I do, yes. I mean they're engaging in, you know,
- 20 a function where they're making determinations that could
- 21 result in further judicial review. I mean it's almost like
- 22 an administrative court if you will.
- Q. Right. Thank you. That's your understanding.
- 24 The Judge knows what --
- 25 A. That's my understanding.

- 1 Q. Among all people on Earth, this Judge knows what
- 2 quasi-judicial means. But that's your understanding,
- 3 right?
- 4 A. Yes.
- 5 Q. I think it's pretty appropriate.
- 6 A. Yeah. I mean, I would liken them to an
- 7 administrative court where they're making administrative
- 8 determinations then that could be reviewed by a court of
- 9 law.
- 10 Q. So, for example -- and I don't want to get into
- 11 too much minutiae -- but, for example, those county Boards
- 12 of Elections, they will look at ballots that are challenged
- 13 by candidates or voters or parties or people who live there
- or watchers. They'll determine whether a circle is
- 15 completely filled in or if someone put an X instead of a
- 16 circle. They decide issues like that, correct?
- 17 A. Yeah. I think where there's ambiguity it
- certainly is the power of the Board of Elections to make
- those determinations, and they're subject to judicial
- 20 review.
- 21 Q. And that judicial review -- so you went through
- your knowledge of the two-day, the 20-day deadlines in the
- 23 Election Code. So if someone -- and you tell me if you
- 24 know this or not -- if someone wanted to challenge the
- 25 decision of the Board of Elections, I think you just said

- they would go to court, right?
- 2 A. Yes. They would go to the court of common pleas
- 3 in that county.
- 4 Q. That would be 30 days from that date; is that
- 5 correct?
- MR. FISCHER: Objection again.
- 7 MR. KING: If he knows.
- 8 BY MR. KING:
- 9 Q. If you know.
- 10 A. I'm not sure. Again, there are a couple of
- 11 different mechanisms, but yes --
- 12 Q. If you hypothetically assume that it's 30 days
- 13 from the decision of a Board of Elections. So what was the
- 14 date that the three certifications were made to you? That
- was June 6, 7, and 8, correct?
- 16 A. That's correct. Yes.
- 17 Q. What's the date of this lawsuit? What is the
- 18 date that this lawsuit was filed?
- 19 A. I don't have it in front of me so I can't give
- 20 you the exact date. It was --
- 21 Q. It's not a trick. Let me get it for you.
- MR. KING: If I might, Your Honor?
- 23 THE WITNESS: -- certainly subsequent to the
- June 29th letter, early July.
- 25 MR. KING: You want to just stipulate the

- 1 date it was filed?
- 2 MR. FISCHER: Certainly. Yes, it is the
- 3 complaint.
- 4 MR. KING: I believe it to be July 11th. We
- 5 would stipulate with counsel that the filing of this
- 6 complaint was July 11, 2022.
- 7 BY MR. KING:
- 8 Q. So July 11, 2022, is more than 30 days beyond the
- 9 date of the certifications that were given to the
- 10 Department here?
- 11 A. That's correct. Yes.
- 12 Q. Thank you. This election that we're talking
- 13 about today, the Department has not currently certified the
- winners of the race for Governor of Pennsylvania; is that
- 15 correct?
- 16 A. We have not certified the results of the primary
- 17 for Governor or U.S. Senate or Lieutenant Governor for that
- 18 matter, none of the statewide races.
- 19 Q. The winners of the gubernatorial primary, Mr.
- 20 Shapiro, Mr. Mastriano, neither of them are certified as we
- 21 stand hereby today?
- 22 A. That's correct. Yes.
- 23 Q. The winners of the United States Senate races,
- 24 Dr. Oz and Mr. Fetterman, Lieutenant Governor Fetterman,
- 25 they're not certified either?

- 1 A. Correct.
- Q. And people running for Congress in any of those
- 3 three counties, none of them are certified along with
- 4 members of the Pennsylvania House and Senate. You haven't
- 5 certified any of those elections in those counties?
- 6 A. Correct.
- 7 Q. You made a comment in response to somebody's
- 8 question, I don't recall who, about these undated ballots
- 9 and you said I think -- you correct me if I'm wrong and I'm
- 10 paraphrasing -- but I think you said that you couldn't
- 11 think of any good reason why they would be dated; is that
- 12 correct?
- 13 A. I couldn't think of any administrative reason why
- 14 the counties would need them to be dated --
- Q. Why is that?
- 16 A. -- by the electors. Well, in determining whether
- 17 they're legally cast and in determining whether they're
- 18 timely, I don't know that the date inserted by the voter is
- relevant in making that determination. It's the date that
- 20 the county receives the ballot from the voter that is
- 21 relevant.
- Q. You're familiar with Justice Dougherty in the
- 23 Supreme Court of Pennsylvania suggesting that the dating
- 24 does have merit with respect to preventing fraud; is that
- 25 correct?

- 1 A. I believe that was -- again, you know, I have not
- 2 read that opinion recently; but that was I believe that's
- 3 the long and short of Dougherty's opinion, yes.
- 4 Q. You think what I said is a fair analysis of Mr.
- 5 Justice Dougherty's comments?
- 6 MR. FISCHER: Objection. This is plainly
- 7 outside the scope of --
- 8 MR. KING: Oh, I'm going to get to it.
- JUDGE COHN JUBELIRER: I'm going to -- is
- 10 there --
- 11 MR. KING: I'll be brief.
- JUDGE COHN JUBELIRER: Okay. I'm going to
- 13 allow him to answer this --
- MR. KING: Yes, ma'am.
- 15 JUDGE COHN JUBELIRER: -- but the Court can
- 16 read the opinion and know what it said, and I'm sure you'll
- 17 be arguing about that as well.
- 18 MR. KING: I'll be brief. The only reason I
- ask is there was a gratuitous comment, and I don't mean
- 20 that in a bad way. It was just a gratuitous comment about
- 21 dating.
- 22 BY MR. KING:
- 23 Q. So with respect to the dating and I think you did
- 24 say it the first time, too, you couldn't think of any good
- 25 administrative reason for it, correct?

- 1 A. Correct.
- 2 Q. You can think of reasons why about it might need
- 3 to -- these right mail-in ballots might need to be dated,
- 4 though, whether administrative or otherwise. There are
- 5 reasons why they would need to be dated, correct?
- 6 A. You know, I suppose there are reasons I guess.
- 7 You know, whether or not there are reasons that are
- 8 relevant to whether the ballots should be counted or not,
- 9 that's where we probably would disagree.
- 10 Q. What reasons can you think of why they might need
- 11 to be dated?
- 12 MR. FISCHER: Objection. This is calling
- for speculation. That has nothing --
- 14 MR. KING: He said he knows reasons why.
- JUDGE COHN JUBELIRER: Yes. I'm going to
- 16 allow him to answer if he can.
- 17 THE WITNESS: I'm conceding that there may
- 18 be practical reasons. What I'm trying to say is that I'm
- 19 not aware -- and I think this is the Third Circuit's
- 20 assessment of the issue as well -- that I'm not aware of
- 21 any reason regarding the validity of the ballot or the
- legality of the ballot that where the date inserted by the
- 23 voter is relevant.
- 24 BY MR. KING:
- 25 Q. Are you aware of the cases -- and I believe that

1	at least one of these cases is in Lancaster County. Are
2	you aware of the cases where someone has been accused of
3	fraud with respect to a ballot that was cast by somebody
4	who died, and there's a date on that envelope. There's a
5	date on that particular envelope that says when this ballot
6	was allegedly filled out and that date was instrumental
7	with respect to whether or not the person that died on or
8	before the date that the ballot was cast.
9	You're familiar with that case, aren't you?
10	MR. FISCHER: Objection. That was about six
11	questions in one.
12	MR. KING: I'll rephrase it.
13	JUDGE COHN JUBELIRER: Thank you.
14	BY MR. KING:
15	Q. Do you know about any cases where somebody has
16	cast a ballot and been accused of fraud with respect to
17	these mail-in ballots and the date had any relevance?
18	A. Yeah. I mean there are certainly cases of fraud.
19	I think, you know, the Election Code is clear on, you know,
20	the situation where a voter is deceased before Election
21	Day. Even if that voter legally cast a ballot, if the
22	voter is deceased before Election Day, there's direction in
23	the law to the county boards of election that they should
24	not count that ballot.
25	I don't know that the date on the envelope,

though, is the relevant piece of information. It's the 1 date when the person is deceased. 2 Well, in McCormick --3 Q. Α. It's the date of the election that is relevant. 5 Q. In the McCormick case, people argued to Judge Cohn Jubelirer about this whether it was important or 6 7 So what you're talking about is you're going to know whether somebody died or not as of Election Day, right? 8 Α. Yes. But you're not going to know when that person 10 allegedly voted because we now have mail-in ballots that 11 12 get mailed in and they come in at various times before the election. So in the case that I'm talking about out of 13 Lancaster County -- and I believe there's another one if 14 I'm not mistaken -- the date on the envelope was critically 15 important to determine whether the person was alive at the 16 17 time the ballot was cast. Not as of Election Day but when the ballot was cast the date was significant, correct? 18 19 MR. FISCHER: Objection. I don't think there's been any foundation established that this witness 20 knows the details of these cases. 21 MR. KING: I think he said he did. 22 MR. FISCHER: He said he's familiar with it 23 24 generally, but I don't think he said --25 MR. KING: Well, that's what he said.

- 1 JUDGE COHN JUBELIRER: Okay. Well, if he
- 2 can answer the question with specificity and based on his
- 3 knowledge.
- 4 THE WITNESS: I'm not familiar with all the
- 5 details of the case, but I can certainly understand why
- 6 that piece of information may be relevant if you're a
- 7 district attorney who's looking into an allegation of
- 8 fraud.
- 9 BY MR. KING:
- 10 Q. Hypothetically, I'll ask you a hypothetical
- 11 then. Hypothetically Mary Jones and her mother Sally Jones
- 12 live in a house together, and Sally Jones cast a vote. And
- 13 Sally Jones died on October the 28th, but the vote was cast
- on October the 29th or the 30th. Is that hypothetically
- 15 evidence of fraud?
- 16 A. I don't like hypotheticals. I'll go off the line
- 17 with that, but yes.
- 18 Q. I have to ask it that way because otherwise I'm
- 19 going to get an objection.
- 20 A. Hypothetically the date inserted in that case
- 21 might be relevant provided there isn't some other
- 22 explanation for it.
- 23 Q. I get it. But that's an example of why -- of how
- the dating of the ballot would be significant with respect
- 25 to fraud, correct?

- 1 A. I'll accept that argument that it may be relevant
- in that narrow circumstance.
- 3 Q. I want to ask you about a case called Parnell.
- 4 Do you remember the Parnell case? It's a case in Allegheny
- 5 County. It was in federal court in the Western District.
- 6 It involved about I think 20-some thousand misprinted
- 7 ballots; do you recall that?
- 8 A. I believe so. I don't have the details and I
- 9 don't know if I'll be able to recall all the details, but
- this is related to a ballot printing error in Allegheny
- 11 County that impacted roughly 20,000 ballots.
- 12 Q. We've had in Pennsylvania several counties --
- 13 because the counties get their own ballots printed, right,
- 14 there's no uniform form? We may have a uniform setup of
- the offices, but there's no ballot form that you distribute
- or you print on a statewide basis, right?
- 17 A. Correct. It really would depend on the different
- 18 voting systems. You know, the Election Code provides for,
- 19 you know, instead of one statewide voting system a variety
- 20 of voting systems. We have about a half a dozen different
- 21 vendors that provide voting systems in Pennsylvania.
- Q. Do you remember the Parnell case, Sean Parnell
- 23 case involving the --
- 24 A. I do.
- Q. -- thousands of misprinted ballots?

1	A. I recall it. You know, whether I can recall all
2	the details or not, I don't know.
3	MR. FISCHER: Your Honor, I'm going to
4	object. This is way outside the scope of the offer of
5	proof that Mr. King offered. It's also way outside the
6	scope of direct, and I don't see what this has to with
7	MR. KING: It's not direct, Your Honor.
8	It's cross-examination related to the witness's statement
9	about the fact that he couldn't think of any good
10	administrative reason for dating.
11	JUDGE COHN JUBELIRER: Okay. We are getting
12	it's already after noon and
13	MR. KING: Sorry about that.
14	JUDGE COHN JUBELIRER: No, that's okay. I
15	want to make sure off the record.
16	(Brief discussion held off the record at
17	12:10 p.m.)
18	JUDGE COHN JUBELIRER: What I'd like to do
19	is first find out how much longer you have for this
20	witness?
21	MR. KING: I just have a few questions, and
22	I'll try to condense those during the break.
23	JUDGE COHN JUBELIRER: Should we just
24	complete it now or would you
25	MR. KING: I would think if we take a break,
1	

1	I'll try to condense this and get through it and not spend
2	everyone's time.
3	JUDGE COHN JUBELIRER: I don't want to
4	short-circuit, but I want to be mindful of everyone's
5	comfort. Then we also have other witnesses that you want
6	to present. Is there a sort of time frame that you have
7	for how long your witnesses I believe this will be the
8	end.
9	Will you have some redirect? You might have
10	some redirect?
11	MR. FISCHER: Yes, Your Honor, we will have
12	some redirect for this witness.
13	JUDGE COHN JUBELIRER: Okay. And then you
14	have your own witnesses. About how long do you think those
15	witnesses will last?
16	MR. FISCHER: Your Honor, it's actually our
17	intention to call the county witnesses as on cross, and
18	then obviously they will have redirect effectively.
19	MR. BUKOWSKI: And I think my understanding
20	of what the Commonwealth intends to do with the county
21	witnesses he can answer as to the direct I don't
22	expect much of cross, and we would cover any additional
23	topic so that they wouldn't need to be recalled in our
24	case. So I would say we'll probably be limited to the
25	cross and cover that. So I'm not sure.

1	Their offer of proof was, you know,
2	relatively straightforward and condensed. I don't want to
3	give him a time limit, but I'd suggest, you know, probably
4	a half hour at the most for each of those witnesses.
5	JUDGE COHN JUBELIRER: Okay.
6	MR. FISCHER: Your Honor, I don't expect it
7	will take that long. I mean it depends on the scope of
8	cross again. I mean we can't
9	JUDGE COHN JUBELIRER: Right.
10	MR. KING: This is one place I agree with
11	Mr. Fischer. I don't think it'll take a half an hour. I
12	think five minutes would be plenty, and I think we've
13	already covered what they would be testifying about anyway.
14	JUDGE COHN JUBELIRER: Okay. So you think
15	maybe with the three of them no more than an hour or hour
16	and a half or hour and a half to two hours?
17	MR. FISCHER: That would be our goal, Your
18	Honor.
19	JUDGE COHN JUBELIRER: Okay. And then we'll
20	have the legal arguments which I think will be substantial.
21	MR. KING: Yes, ma'am, hopefully.
22	JUDGE COHN JUBELIRER: So it's 12:15.
23	Should we take a lunch break now and then come back?
24	MR. KING: That makes sense.
25	JUDGE COHN JUBELIRER: And then we'll have
1	

1	45 minutes. Let's be back at one o'clock and see if we can
2	proceed apace. Okay. Thank you very much.
3	(Whereupon, a recess taken from 12:15 p.m.
4	to 1:00 p.m.)
5	JUDGE COHN JUBELIRER: So we are back and,
6	counsel, you were
7	MR. KING: Yes, ma'am.
8	JUDGE COHN JUBELIRER: going to finish
9	your cross-examination.
10	MR. KING: Yes, Your Honor, and I think I
11	can report at this point, too, that counsel would all agree
12	that the exhibits that were submitted in this case should
13	be admitted with the Court's permission without objection
14	from any of the parties.
15	MR. FISCHER: No objection.
16	JUDGE COHN JUBELIRER: Then hearing no
17	objections, then all of the exhibits are admitted into
18	evidence.
19	(Whereupon, the documents were marked as
20	Joint Exhibit Number 4, Petitioner's
21	Exhibits Numbers 1 and 2, Berks -
22	Lancaster's Exhibits Numbers 1 through 5,
23	and Fayette's Exhibits Numbers A, B, C,
24	and E for identification; and Joint
25	Exhibits Numbers 1 through 14,

1	Petitioner's Exhibits Numbers 1 and 2,
2	Berks - Lancaster's Exhibits Numbers 1
3	through 5, and Fayette's Exhibits
4	Numbers A through E were received in
5	evidence.)
6	MR. KING: Thank you very much. Your Honor,
7	I have three questions. I'll try to shorten this up.
8	JUDGE COHN JUBELIRER: Give me one second.
9	I dropped a
10	MR. KING: Certainly.
11	JUDGE COHN JUBELIRER: Okay.
12	MR. KING: That's usually what I'm doing.
13	JUDGE COHN JUBELIRER: Proceed.
14	BY MR. KING:
15	Q. Mr. Marks, you're still under examination and
16	under oath, so I'm going to ask you three things, generally
17	three things. So the first thing I want to ask you about,
18	as the Deputy Secretary, are you aware of whether any of
19	these undated ballots you know the totals from the three
20	counties generally speaking. I'm not going to ask you the
21	numbers, but
22	A. Generally speaking, yes,
23	Q they're in the record here. There's a few
24	hundred in one place, and there's as few as six republican
25	undated ballots in Fayette County. Could you tell the

- 1 Court whether you're aware of whether any of these undated
- 2 ballots if counted or uncounted make any difference
- 3 whatsoever in any election that you're aware of?
- 4 A. Not that I'm aware of, certainly not in any
- 5 state-level election. Those elections certified to the
- 6 Secretary.
- 7 Q. So it's not going to affect Oz or McCormick.
- 8 It's not going to make a difference in the Oz-McCormick or
- 9 the Shapiro-Mastriano elections, right?
- 10 A. I'm not aware of any state-level race where these
- 11 ballots will affect the outcome.
- 12 Q. Okay. Even the State House, State Senate,
- 13 nothing like that?
- 14 A. Correct.
- 15 Q. Thank you. Also you spoke earlier about
- 16 something called partial certification and also incomplete
- 17 certification. Are those two terms to your knowledge
- 18 contained -- is there such a definition, is there a
- definition of, quote, partial certification within the, end
- of guote, within the Election Code?
- 21 A. There is not.
- 22 Q. Is there a definition of something that you
- 23 mentioned which was, quote, incomplete certification, end
- of quote?
- 25 A. It's not defined in the Election Code. I think

- 1 it's a term of art that I would use when a certification is
- 2 not complete.
- 3 Q. It's a vernacular. It's not something that's in
- 4 the statute, right?
- 5 A. Correct.
- 6 Q. All right. I want to lastly ask you whether
- 7 you're aware as the Deputy Secretary and based on all your
- 8 credentials which are extensive, are you aware of any
- 9 provision in the Election Code that specifically or
- 10 expressly authorizes the Secretary of the Commonwealth to
- 11 reject a county's certification of election results? Is
- there some section that says that?
- 13 A. I'm not aware of anything that gives the
- 14 Secretary of the Commonwealth unilateral authority to
- 15 reject the certification from a county.
- 16 MR. KING: Thank you very much, Mr. Marks.
- 17 Appreciate it.
- I'm finished, Your Honor. Thank you.
- JUDGE COHN JUBELIRER: Thank you very much,
- 20 counsel.
- 21 MR. FISCHER: Thank you, Your Honor.
- JUDGE COHN JUBELIRER: Redirect.
- 23 REDIRECT EXAMINATION
- 24 BY MR. FISCHER:
- 25 Q. Mr. Marks, has the Department tried to

- 1 unilaterally force these three counties to include undated
- ballots in their certified totals?
- 3 A. No, I don't believe so.
- 4 Q. The Department, in fact, has sought relief from
- 5 the Court; is that correct?
- 6 A. Correct. Yes.
- 7 Q. Does the Department have the power to
- 8 unilaterally force these three counties to include undated
- 9 ballots in their totals?
- 10 A. I don't believe so, no.
- 11 Q. In your position do you work with all 67 county
- 12 boards?
- 13 A. I do, yes.
- 14 Q. Do you try to maintain cordial relationships with
- 15 all of them?
- 16 A. I do, yes.
- 17 Q. At the first hint of a disagreement with a county
- 18 board, is your response to immediately file a lawsuit?
- 19 A. No, it's not.
- 20 Q. What do you typically do when there's an area of
- 21 disagreement with a county board?
- 22 A. You know, I'm old school so I typically if I can
- I pick up the phone and I try to talk through it. You
- know, certainly, you know, when we're sending guidance out
- to all the counties I'll e-mail that guidance, you know,

- and deliver it that way. But, you know, typically if
- there's a disagreement, I usually want to talk through it
- 3 and explain the Department's position before taking any
- 4 other steps.
- 5 Q. And you've been asked a lot about the
- 6 correspondence with some of the counties here dating
- 7 roughly from the beginning of June through early July.
- 8 During that time period were you also talking to certain
- 9 counties over the phone?
- 10 A. I was. I wasn't the only one. You know, there
- 11 were a number of counties initially. So I was having some
- 12 of those conversations. Other staff for the Department was
- 13 also reaching out to counties and having those
- 14 conversations.
- Q. What was your goal with those conversations?
- 16 A. Our goal really was to explain the Department's
- 17 reasoning why we made the request; and it was our hope
- 18 that, you know, all 67 counties would comply with our
- 19 request.
- 20 O. How many did in the end?
- 21 A. Sixty-four.
- Q. Was that the case as of June 17th that all 64 had
- 23 complied?
- 24 A. No. As of June 17th I believe there were still
- 25 -- I couldn't give you the exact number but still a number

- of counties who had not yet done that.
- Q. Did some counties change their position with
- 3 respect to including undated ballots during that time
- 4 period?
- 5 A. Yes. Certainly, you know, before June 29th a
- 6 number of counties changed their position.
- 7 Q. Now, you were asked about the language on the
- 8 outer envelope stating that undated -- if the date is
- 9 omitted, the ballot will not be counted; do you recall
- 10 that?
- 11 A. I do, yes.
- 12 Q. Was that language consistent with the
- Department's guidance as of May, 2022?
- 14 A. As of the May primary, yes.
- 15 Q. You also were asked a lot about the Department's
- 16 process with respect to certification, and I believe you
- 17 testified that the Department sometimes identifies obvious
- errors in a county's certification; is that correct?
- 19 A. That's correct. Yes.
- 20 Q. What happens at that point when the Department
- 21 identifies an obvious error in the county certification?
- 22 A. You know, typically, you know, we would contact
- 23 the county to get clarification. So we would identify a
- 24 potential error, ask the county to double-check their
- 25 records and determine if what they submitted to us was

- 1 correct or if it was a clerical error.
- 2 Q. So do you believe it is your responsibility or --
- 3 JUDGE COHN JUBELIRER: Could you put the
- 4 microphone --
- 5 MR. FISCHER: Sorry.
- JUDGE COHN JUBELIRER: Thanks.
- 7 BY MR. FISCHER:
- 8 Q. Do you believe it is the Department's
- 9 responsibility to certify what a county submits no matter
- 10 what?
- 11 A. No. I think we do have a duty to --
- 12 MR. KING: I'm going to object. This is
- 13 irrelevant. This is whether his opinion is whether they
- should certify it or not -- I beg your pardon -- whether
- it's his opinion that they can certify it or not. It's
- 16 what you said to me earlier, Your Honor. It's what the law
- 17 provides for.
- 18 MR. FISCHER: I was going to ask about that
- 19 process. I'm not asking for his legal opinion.
- JUDGE COHN JUBELIRER: Yes. I think I
- 21 allowed you considerable latitude to ask him about his
- 22 opinion or let me say his --
- MR. KING: Knowledge.
- 24 JUDGE COHN JUBELIRER: Knowledge, right.
- 25 Thank you.

- 1 -- his knowledge of the process. And so to
- 2 the extent that this would call for any kind of legal
- 3 conclusion, thank you for the objection; and I will clarify
- 4 that whatever the witness answers is not at all a legal
- 5 conclusion. Obviously questions of law, issues of law are
- for the Court to decide; but this is just his experience,
- 7 within his experience.
- 8 MR. FISCHER: I'll rephrase the question to
- 9 make that clear.
- JUDGE COHN JUBELIRER: Yeah.
- 11 BY MR. FISCHER:
- 12 Q. Mr. Marks, does the Department tabulate and
- 13 certify the statewide results using the certification
- submitted by the counties no matter what?
- 15 A. No. There are occasions when we identify an
- 16 error or what we believe to be an error or an omission as
- 17 the case may be, and we'll contact the county to get
- 18 clarification.
- 19 Q. Thank you. You were asked about a hypothetical
- 20 involving a voter who died before Election Day; do you
- 21 recall those questions?
- 22 A. I do, yes.
- Q. And let me just ask you about certain different
- 24 scenarios. If a voter returned a mail-in ballot before the
- 25 election and then subsequently died the next day before the

- ballot was counted, would that ballot count?
- 2 A. Pursuant to the Election Code, no. If the voter
- 3 casts a ballot and then dies before Election Day, the
- 4 county Boards of Elections are directed to set that ballot
- 5 aside.
- 6 Q. And if somebody else fraudulently cast that
- 7 voter's ballot and back-dated it to before the voter had
- 8 died, would that ballot count?
- 9 A. It would not, no.
- 10 Q. And if the voter fraudulently cast a ballot but
- dated it on a date after the voter had died, would it
- 12 count?
- 13 A. No. Again the relevant date is the date the
- 14 voter is deceased as compared to the date of the election.
- 15 Q. So is there any situation in which the date
- 16 written on the envelope would be relevant to whether that
- 17 vote is counted?
- 18 A. I don't believe so, no.
- 19 Q. Now, I'd like to ask you a little bit about some
- of the dates involved here. So do you have Joint Exhibit
- 21 6? Maybe I can hand you another copy. This involves your
- 22 chronology.
- 23 (Document handed to the witness.)
- 24 THE WITNESS: I have it.
- 25 BY MR. FISCHER:

- 1 Q. Do you recall Mr. King asking you about the dates
- 2 that the three counties involved in this litigation
- 3 submitted their certifications to the Department?
- 4 A. I do, yes.
- 5 Q. And I believe he said they were on July 6th, 7th,
- 6 and 8th; is that correct?
- 7 A. I agreed that those dates sounded correct. I
- 8 believe those are the dates that Mr. King provided, but
- 9 those sounded correct based on my recollection.
- 10 Q. And that was stipulated to, in fact?
- 11 A. Correct.
- 12 Q. So looking at your chronology, when did this
- 13 Court issue its opinion in the McCormick case?
- 14 A. On June 2nd.
- 15 O. June 2nd. So before those certifications were
- 16 submitted.
- 17 A. Correct.
- 18 Q. And do you recall Mr. King asking you whether the
- 19 McCormick case was voluntarily dismissed?
- 20 A. I don't recall. I think he just asked whether
- 21 the case was dismissed.
- 22 Q. Thank you. I appreciate that clarification.
- 23 Could you please look at Plaintiff's Exhibit 2 which -- I'm
- sorry, Petitioner's Exhibit 2 which I put in front of you.
- 25 This is not Joint Exhibit 2. This is separate. Do you see

- 1 that this is an order entered by this Court?
- 2 A. It is, yes.
- 3 Q. And let me read it to you. It says, now, June
- 4 10th, 2022, upon consideration of the Application for
- 5 Relief in the Nature of Voluntary Discontinuance or,
- 6 Alternatively, a Dismissal for Mootness, parentheses,
- 7 Application for Discontinuance, filed by Dave McCormick for
- 8 U.S. Senate and David H. McCormick, and the answers thereto
- 9 filed by the Leigh M. Chapman as Acting Secretary of the
- 10 Commonwealth, parentheses, Secretary, Intervenors Dr. Oz
- 11 for Senate and Dr. Mehmet Oz, parentheses, Oz Intervenors,
- 12 and Republican National Committee and Republican Party of
- 13 Pennsylvania, Republican Intervenors, the Application for
- Discontinuance is granted. Do you see that?
- 15 A. I do, yes.
- 16 Q. And then the next two sentences say, the
- 17 Prothonotary shall mark this matter closed. In addition,
- 18 upon consideration of the Application to Vacate Memorandum
- 19 Opinion and Order of June 2nd, 2022, Application to Vacate
- 20 filed by Oz Intervenors in which Republican Intervenors
- 21 joined, and the answer filed by the Secretary, the
- 22 Application to Vacate is denied. Did I read that
- 23 correctly?
- A. You did, yes.
- 25 Q. And again what is the date of this order?

- 1 A. This order is dated June 10th of 2022.
- MR. FISCHER: Your Honor, I have no further
- 3 questions.
- 4 JUDGE COHN JUBELIRER: Thank you.
- 5 Any recross?
- 6 MR. BUKOWSKI: Very briefly, Your Honor.
- 7 RECROSS-EXAMINATION
- 8 BY MR. BUKOWSKI:
- 9 Q. During your counsel's questioning, he asked you
- 10 about the 64 counties who had --
- 11 JUDGE COHN JUBELIRER: Do you want to come
- to a microphone?
- 13 BY MR. BUKOWSKI:
- 14 Q. -- the 64 counties who had complied and you used
- the word complied, they complied. What were they complying
- 16 with?
- 17 A. Well, our request to certify vote totals and
- 18 include undated ballots.
- 19 Q. I mean the word comply to me means they were
- 20 required to, and you can't point to anything and have not
- 21 pointed to anything in response to Attorney King's question
- that, you know, requires them to follow the Secretary's
- 23 interpretation of the cases; isn't that right?
- MR. FISCHER: I'll object.
- 25 THE WITNESS: Correct. I mean ultimately it

- 1 boils down to what, you know, we outlined or our counsel
- 2 outlined in the June 29th letter why we believe the
- 3 counties are required to certify vote totals that include
- 4 undated ballots based on rulings from the Courts.
- 5 BY MR. BUKOWSKI:
- 6 Q. In the McCormick case, do you know what the
- 7 Department's position was regarding the voluntary
- 8 discontinuance of the case?
- 9 A. I don't recall what the Department's position
- 10 was, no.
- 11 Q. Or what the Department's position was on vacating
- the June 2nd order or not?
- 13 A. I don't recall, no.
- 14 MR. BUKOWSKI: Nothing further, Your Honor.
- 15 RECROSS-EXAMINATION
- 16 BY MR. KING:
- 17 Q. Mr. Marks, would you tell the Court is there a
- 18 difference between the term because these things are
- 19 defined in the Election Code? I think we agreed to that
- 20 earlier. Is there a difference between the terms canvass
- and certify?
- 22 A. You know, my layman's understanding, there is.
- You know, I believe the certification is basically the
- 24 memorialization of the results of the canvass where they
- 25 complete the canvass and then they certify the results of

- 1 that canvass.
- 2 Q. Two different things, right?
- 3 A. You can make an argument that they're two
- 4 different things or the certification is an extension or
- 5 the last step of the canvass.
- 6 Q. It either is or it isn't. So the canvass,
- 7 there's a definition of canvass in the Election Code,
- 8 right?
- 9 A. There is a definition in the Election Code of
- 10 canvass, yes.
- 11 Q. And there is a definition of certification?
- 12 A. Correct.
- 13 Q. Those are two different things?
- 14 A. They are but one comes obviously after completion
- of the other.
- 16 Q. I understand the chicken and the egg story, but
- they're two different things?
- 18 A. They are. They're two different actions.
- 19 Q. All right. Did you see in the opinion that you
- 20 were asked that Her Honor wrote, did you see anything that
- 21 mentioned the word certification or certify?
- 22 A. If you're referring to the June 2nd order of the
- 23 Court --
- 24 Q. Yes, sir.
- 25 A. -- the word certify was not used, correct.

1	Q. Did not appear?
2	A. Correct.
3	MR. KING: I believe that's all. Thank you
4	very much.
5	THE WITNESS: Thank you.
6	MR. FISCHER: Thank you, Mr. Marks.
7	JUDGE COHN JUBELIRER. Thank you very much,
8	Mr. Marks, for your testimony today.
9	MR. KING: Judge, could I ask one more
10	question?
11	JUDGE COHN JUBELIRER: Quick. Of this
12	witness?
13	MR. KING: Yes, ma'am. And the reason I say
14	that is we were going to call him as on cross-examination;
15	but I would be willing to say that that's not necessary,
16	that whatever testimony he produced here he would have
17	produced as on cross. So we'll save the Court's time and
18	our own time with that respect, but if I could ask him I
19	guess one more question I would appreciate it.
20	JUDGE COHN JUBELIRER: Okay.
21	Is there any objection to that?
22	MR. FISCHER: No objection.
23	JUDGE COHN JUBELIRER: Okay.
24	MR. KING: Now I can't remember.
25	BY MR. KING:

So, Mr. Marks, with respect to this question of 1 Ο. certification versus canvass, would you just tell us when 2 the counties canvass the ballots, what is the process? 3 What do they do? 5 Α. Well, the counties -- I went into a little bit earlier in my testimony -- but the counties will receive 6 7 the precinct-level results on election night; and when the official canvass begins on Friday, they'll review all of 8 those results, compile those results. They also add to those the results from the precanvass and the canvass of 10 absentee and mail-in ballots. 11 12 The canvass also includes the adjudication of provisional ballots and also a second canvass where they 13 14 canvass military and overseas ballots, so that entire process where the county is reviewing and either reviewing 15 returns submitted by precinct election officials or 16 17 reviewing the tabulation that they've done centrally of absentee and mail-in ballots as well as provisional 18 19 ballots. 20 And then the certification requires the calling of a public meeting and then there's a vote to certify, 21 correct? 22 23 Α. Correct. Yes. 24 All right. So and we were talking earlier of the Q. 25 two separate things that occur?

- 1 A. Correct. Yes.
- Q. All right.
- 3 MR. KING: I think that's all, Your Honor.
- 4 Thank you very much.
- JUDGE COHN JUBELIRER: Thank you.
- 6 You are free to depart. Thank you very
- 7 much.
- THE WITNESS: Thank you, Your Honor.
- 9 (Witness excused.)
- 10 MR. FISCHER: Your Honor, at this time we
- 11 would call Scott Dunn of the Fayette Board of
- 12 Commissioners, and we're calling Mr. Dunn as if on cross.
- 13 JUDGE COHN JUBELIRER: Okay.
- MR. HOLLAND: Please raise your right hand.
- Whereupon,
- 16 SCOTT DUNN,
- 17 having been duly sworn, testified as follows.
- MR. HOLLAND: Please be seated.
- 19 DIRECT EXAMINATION (as on Cross)
- 20 BY MR. FISCHER:
- O. Good afternoon, Mr. Dunn.
- 22 A. Hi.
- 23 Q. You are a member of the Fayette Board of
- 24 Commissioners; is that correct?
- 25 A. That is correct.

Appendix 18

- 1 A. Correct. Yes.
 2 Q. All right.
 - MR. KING: I think that's all, Your Honor.
 - 4 Thank you very much.
 - JUDGE COHN JUBELIRER: Thank you.
 - 6 You are free to depart. Thank you very
 - 7 much.
 - 8 THE WITNESS: Thank you, Your Honor.
- 9 (Witness excused.)
- 10 MR. FISCHER: Your Honor, at this time we
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- 17 having been duly sworn, testified as follows.
- 18 MR. HOLLAND: Please be seated.
- 19 DIRECT EXAMINATION (as on Cross)
- 20 BY MR. FISCHER:
- O. Good afternoon, Mr. Dunn.
- 22 A. Hi.
- 23 Q. You are a member of the Fayette Board of
- 24 Commissioners; is that correct?
- 25 A. That is correct.

Ο. And as a result of that position, do you have 1 certain responsibilities with respect to the management of 2 elections in Fayette County? 3 Α. I serve on the Board of Elections, and we 5 as Commissioners oversee the Election Bureau. And do you have any specific role on the Board of 6 Q. Elections? 7 As far as? 8 Α. Ο. Chair? Vice-chair? I think I'm the Secretary. 10 Α. Okay. Thank you. And could you briefly explain 11 Q. the boards's role in the administration of elections in 12 Fayette County? 13 14 Δ We're an overseer of the department. We have a department head. Our Election Director, Marybeth Kuznik, 15 and she oversees all facets of the election including the 16 applications for mail-in ballots, sending out the mail-in 17 ballots, receiving the mail-in ballots, training poll 18 19 workers for the day-of operations. Making sure that all of the equipment is prepared 20 and certified to go out to our 77 precincts, making sure 21 that all the equipment is delivered in a timely fashion, 22

set up, ready to go, and that the ballots are prepared in

such a way that they will -- there's a logic testing that

they make sure all the ballots are prepared that will be

23

24

25

- able to be read by the scanners.
- 2 Q. So is it fair to say as a result of your role,
- 3 you are very familiar with how elections in Fayette County
- 4 are administered?
- 5 A. Yeah. You could say, yeah, but I rely on the
- 6 Election Director to make sure that all that happens.
- 7 Q. You don't have day-to-day responsibility?
- 8 A. I do not.
- 9 Q. But you understand the processes --
- 10 A. Correct.
- 11 Q. -- generally? Thank you. And does the Board of
- 12 Elections ever make decisions about whether a specific vote
- is or is not counted?
- 14 A. We do have a meeting one week after the election
- to decide on provisional ballots, and I believe we've never
- 16 had this under my -- this is my fifth election as
- 17 Commissioner. I believe that if there were to be
- 18 questionable ballots where there were challenges, then we
- would be in charge of that as well; but at this point I've
- 20 never had that happen, just the provisional aspect.
- 21 O. And if there is a challenge to a provisional
- 22 ballot, the board resolves those in the first instance;
- isn't that correct?
- 24 A. If there's a challenge to a provisional ballot,
- 25 then we decide that in the provisional ballot meeting.

- 1 Q. And typically you decide that by a vote of the
- 2 members of the board, correct?
- 3 A. Correct.
- 4 Q. And the board's decisions with respect to
- 5 inclusion of any ballots are subject to review by Courts;
- 6 is that correct?
- 7 A. I'll leave that up to the Court. I'm not sure.
- 8 If you can re-ask that question another way, I'm not sure
- 9 exactly what you're asking.
- 10 Q. If you vote to include or not to include a
- 11 particular ballot -- and I'm not asking for your legal
- 12 assessment -- but is it your understanding that parties can
- 13 challenge that decision?
- 14 A. Yes.
- Q. And the board tries to comply with all relevant
- orders issued by Courts, correct?
- 17 A. Yes.
- 18 Q. So I'd like to just focus on absentee and mail-in
- 19 ballots. Do you agree with Mr. Marks that the deadline to
- 20 submit an absentee ballot is 8:00 p.m. on Election Day?
- 21 A. The deadline for an absentee ballot is 8:00 p.m.
- on Election Day. That's correct.
- 23 Q. Thank you. And just to clarify, that's the
- 24 deadline that the ballot must be received by the county,
- 25 correct?

- 1 A. That is correct.
- Q. So if a voter drops it in the mail at 7:00 p.m.
- on Election Day, it's probably not going to be --
- 4 A. It's not going to be at the Election Bureau in
- 5 time.
- 6 Q. Now, were you on the board in 2020?
- 7 A. Yes.
- 8 Q. And you would agree with Mr. Marks that the
- 9 deadline was extended for three days in that race?
- 10 A. Yes.
- 11 Q. But that has not happened in any subsequent
- 12 election?
- 13 A. Correct.
- 14 Q. And you take or Fayette County takes certain
- steps to verify that their ballots are received on a timely
- 16 basis, correct?
- 17 A. Yes. As the ballots are received, there is a
- 18 time and date stamp, and so the outer ballot envelope will
- 19 be stamped with that time and date.
- 20 O. And do you also enter information about the
- 21 ballots -- I'm sorry. Let me withdraw that. Do the
- 22 election administers, do they enter information about the
- 23 ballot in the SURE system when they receive it?
- 24 A. Yes. Once received there is a scanning.
- 25 Actually we call it binking for some reason -- I'm not

- 1 exactly sure why -- but it is scanned as received.
- 2 Q. And you don't use the date written on the outer
- 3 envelope to determine when the ballot was received,
- 4 correct?
- 5 A. That is correct.
- 6 Q. And you don't use that date written, assuming
- 7 there is a date, to exclude ballots?
- 8 A. We do not.
- 9 Q. Now, I'd like to focus specifically on what we're
- 10 referring to as undated ballots which are ballots, mail-in
- 11 or absentee ballots, where the voter has omitted the date
- on the outer envelope but otherwise signed and otherwise
- complied with the Election Code as far as --
- 14 MR. FISCHER: Can I use that phrase?
- MR. KING: That's fine.
- 16 BY MR. FISCHER:
- 17 Q. -- Fayette County did not include undated ballots
- in the totals it submitted to the Secretary as its
- 19 certification, correct?
- 20 A. That is correct.
- 21 Q. And, in fact, Fayette County did not even open
- 22 undated ballots, correct?
- 23 A. That is correct.
- 24 Q. And are you familiar with the litigation brought
- 25 by Mr. McCormick relating to the republican primary for

- 1 senate and the counting of undated ballots?
- 2 A. I was aware there was litigation, yes.
- 3 Q. Fayette County was actually respondent in that
- 4 litigation, correct?
- 5 A. I believe so. I'm not a legal. We start using
- 6 words like respondent, I'm not exactly sure what you're
- 7 saying. So --
- 8 Q. Well, so the McCormick campaign sued the
- 9 Secretary and a number of counties.
- 10 A. I believe all the counties.
- 11 Q. It didn't sue all the counties --
- 12 A. All the counties were included as I understand
- 13 it.
- 14 Q. I believe some were omitted, but Fayette County
- was not one that was omitted.
- 16 A. Okay.
- 17 Q. Are you aware that on June 2nd this Court entered
- an order ordering counties to canvass undated ballots and
- 19 submit two sets of totals to the Secretary, one with the
- 20 undated ballots included and one without?
- 21 A. I have to go back in my notes to actually look.
- 22 Am I allowed to look at an exhibit? There was at one point
- 23 the directive that we took was from the Department of State
- 24 saying to count the ballots, tabulate the ballots, send the
- 25 Department of State the tabulation, and then they would

- decide how to proceed from there.
- Q. But Fayette County did not count the ballots; is
- 3 that correct?
- 4 A. That is correct.
- 5 Q. Okay. So you chose not to comply with the order
- 6 entered by the Court?
- 7 A. The order as we saw it -- and again I have to go
- 8 back to the May 23rd guidance from the Department of State
- 9 which said to give the Courts the number of ballots that
- were received which we did, that were undated which we did.
- 11 The May 24th guidance from the Department stated then said
- 12 to go ahead and tabulate and submit the totals to the
- 13 Department of State.
- 14 Again I'm going by memory here so if you're going
- to look up something, I'm going to be factually incorrect.
- 16 At that point that was the day of our provisional ballot
- 17 meeting. And at the close of the meeting after the meeting
- was adjourned, our Election Director said, hey, we're going
- 19 to be asked to count, tabulate, send in the totals, and
- 20 then the Department of State will let us know the next
- 21 steps.
- 22 At that point that was where I felt this is
- uncomfortable, this is not the proper procedure that should
- 24 be applied. And I let -- you know, I said I don't feel
- 25 comfortable complying with this if that's the word, and

that's where it started. So actually it started before the 1 June 2nd date. It started May 24th with this guidance that 2 said, you know, submit and we will tell you the next steps. 3 Ο. At that meeting you just discussed, did the board 5 take a vote on this question? We did not. The meeting was adjourned, and we 6 never reconvened a meeting of the board of election to take 7 up this matter. 8 So even after this Court issued its order on June 2nd, you did not reconvene the board to address its 10 implications? 11 No. Our opinion --12 Α. MR. KING: Your Honor, this is beyond the 13 14 proffer. The proffer is pretty simple what the Attorney General said they were going to ask this witness about. 15 And because I was granted great latitude, I've let this go 16 17 somewhat. But at page 2 of the proffer the county 18 19 commissioner witnesses will be questioned about the Respondent board's practices for the 2022 general primary 20 election with respect to determining the timeliness of an 21 absentee or mail-in ballot with respect to recording the 22 date that absentee and mail-in ballots are received and 23 24 with respect to assessing the sufficiency of the 25 declaration on a ballot return envelope.

1	These questions are beyond the proffer that
2	was made in this case.
3	MR. FISCHER: Your Honor, I think this
4	really goes to the sufficiency of the evidence about
5	timeliness and particularly since we're talking about
6	JUDGE COHN JUBELIRER: It's hard to hear you
7	when you stand, so you can sit for this.
8	MR. FISCHER: I think this line of
9	questioning goes directly to the sufficiency of the
10	evidence they had to consider about timeliness. And what I
11	understand the witness to be saying is that even after the
12	Court entered an order, the county did not open these
13	ballots that were timely received.
14	MR. KING: Well, that's not what the proffer
15	says, Your Honor. You can read it yourself, of course, but
16	this is beyond that. He's asking for legal opinions
17	actually. This gentleman is a county commissioner. He's
18	not a lawyer, and he sits on a board that are advised by a
19	solicitor. That's not me. I wasn't representing the
20	county at that time when I was representing the republican
21	party in the McCormick case.
22	But on B it says we're going to ask him
23	about the practices for the '22 primary election with
24	respect to determining timeliness, with respect to
25	recording dates, and with respect to assessing sufficiency

1	of the declaration. That's what this witness was prepared
2	to come here today to testify about.
3	MR. FISCHER: And, Your Honor, if I may just
4	briefly respond, the last phrase, with respect to assessing
5	the sufficiency of the declaration on a ballot return
6	envelope, what I understand this witness to be saying is
7	that if a ballot did not include the date, they assessed
8	that that declaration was insufficient and did not count
9	it. So this is squarely within what we
10	MR. KING: He's testified to that. We're
11	now into did he intentionally violate some Court order?
12	Well, that's not part of this.
13	JUDGE COHN JUBELIRER: Okay. Why don't we
14	get the exact question that was asked because I do think
15	that in broad terms how the board approached assessing the
16	sufficiency of the declaration in this primary given all of
17	the various guidances and information is within that broad
18	scope of that particular statement.
19	But to the extent that you are making an
20	objection as well about whether he's being asked for, you
21	know, a legal opinion or an opinion on the law, that
22	obviously is something that I would sustain.
23	So if we could maybe hear the question or if
24	you want to ask the question again for the witness?
25	MR. FISCHER: Certainly. I'll ask the

- 1 question again.
- 2 BY MR. FISCHER:
- 3 Q. After this Court entered its injunction on June
- 4 2nd, did the board meet again to discuss whether undated
- 5 ballots should be counted?
- 6 A. We did not.
- 7 Q. Did the board in any way reconsider its decision?
- 8 A. There would have been a discussion between the
- 9 Election Director and the board members to say how do you
- 10 want to go forward, and at this point I believe the word
- 11 certification was still not in the -- was in the Court
- order and I could be wrong to that. And again, I still
- 13 felt, you know, the law as of Election Day said that those
- votes should not count; and that's kind of where I was
- 15 going.
- As a Commissioner and as a member of the board of
- election since 2020, we have had all kind of lawsuits filed
- 18 which make everything that we do confusing, ambiguous,
- 19 uncertain. And so what happens is, you know, you add this
- 20 to it. Now I have the Constitution of the state of
- 21 Pennsylvania which says to do one thing. Act 77 is now
- saying do another thing or, you know, the Constitution
- doesn't even cover mail-in ballots. Act 77 says one thing.
- Now I have a Court order saying, you know, forget
- 25 Act 77 which was found unconstitutional in January. So the

1	confusion and the ambiguousness if that's a word
2	THE WITNESS: Sorry if you have to type
3	that.
4	So it comes into play here where, you know,
5	you have different people telling you different things, and
6	then you have the Department of State saying hey, just
7	count them and we'll decide what to do. And so that's
8	where in my mind that's where I stopped, and I said the law
9	was the law on May 17th. That's what I'm following.
10	As a Commissioner I put my hand on my
11	daddy's bible, put my hand in the air and I swore to defend
12	the Constitution of the state of Pennsylvania and the laws
13	of the state of Pennsylvania, and that's what I'm doing.
14	BY MR. FISCHER:
15	Q. So you chose not to follow this Court's order as
16	a result?
17	A. Yes.
18	MR. FISCHER: Excuse me, Your Honor.
19	JUDGE COHN JUBELIRER: Sure.
20	MR. FISCHER: Just one minute to consult.
21	(Discussion between counsel.)
22	MR. FISCHER: Your Honor, I have nothing
23	further for this witness.
24	MR. BUKOWSKI: I have nothing.
25	MR. KING: Your Honor?

1	JUDGE COHN JUBELIRER: Yes.
2	CROSS-EXAMINATION (as on Redirect)
3	BY MR. KING:
4	Q. Mr. Dunn, in beautiful Fayette County, do you
5	understand when somebody has a reasonable disagreement with
6	respect to something, when two people have a reasonable
7	disagreement on what the law might be or what a question
8	might be, do you have an understanding of what that means?
9	A. Absolutely.
10	Q. What would your understanding be?
11	A. You know, the question of it comes to a
12	question of what's right and wrong, and a disagreement is
13	something you have to work out between people. And, you
14	know, at the same time you have to kind of hold your ground
15	a little bit to say this is my understanding of, you know,
16	this situation and this is how I'm going to go forward.
17	Q. You're aware that the Migliori case is on appeal
18	to the United States Supreme Court?
19	A. I'll leave that to the legal people and I'm
20	actually not.
21	Q. Okay.
22	A. I'm not aware of all the cases, and again I go
23	back to the confusion in all the cases all along. You
24	know, they start contradicting themselves and make it
25	confusing for us.

- 1 Q. Do you have a legitimate disagreement with
- 2 perhaps the people on the other side of the aisle from us
- 3 with respect to whether undated ballots ought to be counted
- 4 or not?
- 5 A. Yes.
- 6 Q. Okay. You still think they should not be
- 7 counted?
- 8 A. I believe they should not be counted.
- 9 Q. All right. And if so, if you're ordered to
- 10 convene a meeting of your board and you're asked to vote on
- 11 that, you understand that you're going to be asked to vote
- 12 on whether to certify an election counting undated ballots?
- 13 A. I know that we will more than likely be asked
- that, yes.
- 15 Q. All right. And I want to put on the --
- 16 MR. KING: I want to make sure this is in
- 17 the record, Your Honor, from the stipulated facts.
- 18 BY MR. KING:
- 19 Q. Fayette County's election results were certified
- 20 on June 7th?
- 21 A. That is correct.
- Q. So I'm not sure whether -- I think Berks was 6
- and Fayette was 7 and Lancaster was 8. Of course, I have
- them reversed.
- 25 MR. KING: Since I'm only Fayette, I know

1	we're in the middle, Your Honor.
2	BY MR. KING:
3	Q. So we're June 7th, correct?
4	A. That is correct.
5	Q. All right. And since that certification, have
6	you had another meeting of the Board of Elections?
7	A. No.
8	MR. KING: Thank you.
9	Thank you, Your Honor.
10	JUDGE COHN JUBELIRER: Thank you.
11	MR. FISCHER: Your Honor, nothing further.
12	JUDGE COHN JUBELIRER: Thank you very much.
13	We appreciate your testimony.
14	(Witness excused.)
15	MR. FISCHER: Your Honor, can I just consult
16	with counsel for a minute? I want to try to speed things
17	up as much as possible.
18	(Discussion among all counsel held off the
19	record at 1:43 p.m.)
20	MR. FISCHER: I apologize, Your Honor.
21	JUDGE COHN JUBELIRER: That's okay.
22	MR. FISCHER: So, Your Honor, at this point
23	we would call Ray D'Agostino with the Lancaster County
24	Board of Commissioners.
25	JUDGE COHN JUBELIRER: Okay.
1	

Appendix 19

- 1 MR. HOLLAND: Please raise your right hand.
- Whereupon,
- RAY D'AGOSTINO,
- 4 having been duly sworn, testified as follows.
- MR. HOLLAND: Please be seated.
- 6 DIRECT EXAMINATION (as on Cross)
- 7 BY MR. FISCHER:
- 8 Q. Good afternoon, Mr. D'Agostino.
- 9 A. Good afternoon. And sorry, I don't know your
- 10 name.
- 11 Q. Mr. Fischer with the Attorney General's office,
- 12 Michael Fischer.
- 13 A. Mr. Fischer, good afternoon.
- 14 Q. Thank you. You currently serve on the Lancaster
- 15 County Board of Commissioners; is that correct?
- 16 A. That is correct.
- 17 Q. And as a result you have certain responsibilities
- 18 with respect to elections in Lancaster County?
- 19 A. That is correct.
- 20 Q. And did you hear all of Mr. Dunn's testimony
- 21 earlier?
- 22 A. I did.
- Q. Would you agree that his description of how
- 24 Fayette County administers elections at least as to your
- 25 responsibilities is roughly similar to how Lancaster County

- 1 administers them?
- 2 A. I would agree we have oversight of elections. I
- 3 would just say that we have oversight of elections in
- 4 connection with and making sure that we abide by the
- 5 Election Code and all decisions of the Courts of competent
- 6 jurisdiction.
- 7 Q. And you do in that role you receive guidance from
- 8 the Department of State occasionally, correct?
- 9 A. Yes, we do.
- 10 Q. But you do not treat that guidance as binding
- 11 upon the Commissioners; is that correct?
- 12 A. That is correct.
- 13 Q. But you do treat judicial decisions as binding?
- 14 A. Judicial decisions, yes, as long as they're
- 15 applicable.
- 16 Q. Yes, certainly. Is it your understanding that
- 17 the deadline for the receipt -- I'm sorry. Let me strike
- 18 that. I want to focus now on absentee and mail-in ballots.
- 19 Is it your understanding that the deadline for receipt of
- absentee and mail-in ballots is 8:00 p.m. on Election Day?
- 21 A. Correct.
- Q. And does Lancaster County time-stamp ballots when
- they are received?
- A. We do time-stamp ballots.
- 25 Q. And do you use that time stamp to determine

- whether a ballot is timely received?
- 2 A. We do use that as one method.
- 3 Q. And if a ballot is received at the Board of
- 4 Elections at 8:01 on Election Day, would that ballot be
- 5 counted?
- 6 A. No.
- 7 Q. Would it matter when that ballot had been filled
- 8 out to the decision whether to count it?
- 9 A. Repeat the question.
- 10 Q. Certainly. If a ballot is received at 8:01,
- 11 would it matter when the voter filled it out in determining
- 12 whether to count it?
- 13 A. Potentially, yes.
- Q. And how so?
- 15 A. Well, there is the provision that the declaration
- 16 has to be dated and signed. The date which is the date
- 17 that's put on there by presumably the voter could make a
- 18 difference in whether that ballot is actually counted or
- 19 not.
- 20 O. So there are circumstances under which a ballot
- 21 received after the 8:00 p.m. deadline would nonetheless be
- 22 counted because of what that voter wrote?
- 23 A. No. That was by accident what you asked me.
- 24 Q. Okay. So just to clarify, in determining whether
- 25 a ballot was received by the deadline, you use the time

- 1 stamp on the envelope, correct?
- 2 A. We time-stamp them, yes.
- 3 Q. And do you also enter information about the
- 4 ballot into the SURE system?
- 5 A. Yes.
- 6 Q. Now, with respect to the date on the outer
- 7 envelope, in the May, 2022 election, did Lancaster County
- 8 refuse to count any ballots that had dates based on what
- 9 the date was?
- 10 A. There were -- there was one occasion where the
- 11 date -- we do check the date. We do believe that the date
- is material, that it could go to the validity and
- authenticity of the ballot received. And so depending on
- 14 the date, it may be set aside for further research and
- determination whether it should go forward and count or
- 16 not.
- 17 Q. So in May, I'm just asking about the May, 2022
- 18 primary --
- 19 A. Yes.
- 20 Q. -- did you decline to count any ballots based on
- 21 the date that was written?
- 22 A. Based on the date, we are aware of a voter fraud
- case that we did not count the ballot because of the date.
- 24 It was determined -- it was found out that the voter fraud
- occurred because of that date.

Explain to me the circumstances of that voter 1 Ο. 2 fraud case. So we received mail ballots or absentee 3 ballots. When I say mail ballots, I mean absentee and no 5 excuse mail ballots. We receive them. They are date-stamped and then they are scanned to go into the SURE 6 7 system. In this one case it happened to be our Chief 8 Clerk of the Board of Elections that scanned this particular ballot that came in the outer envelope, the 10 11 declaration; and the SURE system popped up and said that the person was deceased. Our Chief Clerk put that aside to 12 then look at later; and when the Chief Clerk looked at it 13 14 again, realized that the date that someone put on that 15 declaration was a date after the person had died. And so at that point she did more research and 16 17 actually pulled up the obituary and found out that person was deceased, referred it to our District Attorney's 18 19 office. Our District Attorney's office is now prosecuting that person and that person has admitted to voter fraud. 20 So in that case it led to a criminal 21 Ο. investigation, correct? 22 23 Α. That is correct. 24 But it did not affect whether you counted that

25

ballot, correct?

Not that one but there can be instances where it 1 Α. could be. So, for instance, if it was a person who moved 2 and is alive, we may not count that ballot because we've 3 determined that the date is different than the date they 5 may have moved out. So it is material to us, and we do treat it as such. 6 7 The plain language of the law says that obviously if -- I say obviously -- that if there's no date, you set 8 them aside. We treat those that have dates as potentially ones that can be processed; but depending on the date 10 that's put in there, it may not be. 11 So just so I understand, Lancaster County 12 election officials review every date on every mail-in 13 14 ballot that you receive? There's instances where it depends on whether the 15 Α. date looks to be something that makes sense like within the 16 17 time period of the election. It might cause our staff to then take another look. 18 19 But just to clarify my question was, you look at every date on every mail-in ballot; is that correct? 20 I'm not the one that does it, but I understand Α. 21 the staff does take it seriously. It does look at the 22 23 dates, but I can't say for certain whether every single

And with respect to a voter who moves, is it your

24

25

one.

Q.

- 1 understanding that a vote cast by a voter who moves before
- 2 Election Day can nonetheless still be counted? Moves from
- 3 the Commonwealth.
- 4 A. Say that again. I'm sorry.
- 5 Q. If a voter moves before Election Day having sent
- 6 in a mail-in ballot, is it your understanding that that
- 7 ballot can be counted?
- 8 A. I can't say unless I look at the situation and
- 9 the law itself. I can't say.
- 10 Q. Have there been any specific situations in which
- 11 Lancaster has used the date written to exclude a ballot
- 12 cast by a voter who moved?
- 13 A. I'm sorry. Say the question again.
- Q. So you testified that a voter could move before
- 15 Election Day, and you could use the date to determine
- whether the ballot was filled out before or after the voter
- 17 had moved; do you recall that?
- 18 A. Yes.
- 19 Q. Has that ever presented itself?
- 20 A. I'm not aware. It doesn't mean it didn't happen.
- 21 I'm not aware of it, though.
- 22 Q. But it is your understanding that if a voter
- 23 fills out a ballot, sends it in, and then moves from the
- 24 Commonwealth before Election Day, that vote should be
- 25 counted?

- 1 A. Again I'm not sure.
- 2 Q. So let me just get back to my earlier question.
- 3 Are you aware of any instance in the May, 2022 primary
- 4 where the date written on the ballot was used to exclude
- 5 that ballot from being counted? On the envelope, sorry.
- 6 A. To exclude it based on the date itself other than
- 7 the case I mentioned, no.
- 8 Q. Other than the fraud case?
- 9 A. Other than the fraud case.
- 10 Q. And you would agree that ballot should not have
- 11 counted regardless of the date?
- 12 A. That is correct.
- 13 Q. Because if a voter dies before Election Day, we
- can agree their ballot doesn't count?
- 15 A. Right. But our mantra in Lancaster County is our
- 16 election should be having integrity, veracity, and
- 17 transparency. And so to us that date does fit into
- integrity, veracity, and transparency of our elections
- 19 which is of utmost importance.
- 20 Q. And this person was referred for prosecution,
- 21 correct?
- 22 A. That is correct.
- Q. And Lancaster County submitted a list of
- 24 certified returns in early June; is that correct, to the
- 25 Secretary?

- 1 A. I believe it's on June the 6th.
- 2 Q. And those certified returns did not include
- 3 totals from undated ballots?
- 4 A. Certified results did not, but we did submit
- 5 separately in accordance with the Court order the results
- 6 of the undated ballots. We did do what the Court order
- 7 said.
- 8 Q. So you complied with this Court's June 2nd order
- 9 directing --
- 10 A. Yes.
- 11 Q. -- canvass of those ballots, and you counted them
- 12 and submitted two sets of returns?
- 13 A. That is correct.
- 14 Q. And just so we're clear, when we're talking about
- undated ballots, these are all ballots cast by legal voters
- 16 with no other deficiencies, correct?
- 17 A. Maybe. Again it depends on the case. I mean as
- 18 I said, the person wasn't legally allowed to cast that
- 19 ballot, so I can't say that.
- 20 O. So if for instance the voter omitted the
- 21 signature and date, there's no dispute that ballot wouldn't
- 22 be counted?
- 23 A. That's correct.
- 24 Q. Okay. And if a voter omitted the date and also
- 25 didn't use the secrecy envelope, that ballot would not be

- 1 counted, correct?
- 2 A. Correct.
- 3 Q. No dispute about that?
- 4 A. Correct.
- 5 Q. So we're not talking about those types of ballots
- 6 in this case. Can we agree on that?
- 7 A. Sure.
- 8 Q. Okay. We're talking about ballots where the only
- 9 deficiency identified is the omission of the date?
- 10 A. If the date is omitted, it will not count.
- 11 Q. Okay. And Lancaster was a party to the McCormick
- 12 case, correct?
- 13 A. Correct.
- 14 Q. Okay. And as you testified, you complied with
- the Court's order and submitted two sets of returns to the
- 16 Secretary?
- 17 A. Correct.
- 18 MR. FISCHER: Nothing further, Your Honor.
- 19 CROSS-EXAMINATION (as on Redirect)
- 20 BY MR. BUKOWSKI:
- 21 O. Good afternoon, Mr. D'Agostino. The case of the
- voter fraud that you were referring to, is that the case
- that's now pending, Commonwealth of Pennsylvania versus
- 24 Cheryl Mihaliak?
- 25 A. Correct.

1	MR. BUKOWSKI: I have the police criminal
2	complaint, Your Honor, and the Magisterial District Judge
3	docket. I'd like to add that and admit it as an exhibit
4	for the record since it came up during Mr. D'Agostino's
5	testimony. I don't need to spend time with this witness on
6	it if they agree to its admission.
7	MR. FISCHER: Your Honor, this is the first
8	we've seen this, so I haven't had time to review it. I
9	can't say it's admissible certainly. We exchanged exhibits
10	yesterday, and this was never mentioned.
11	MR. KING: I have no objections, Your Honor.
12	MR. BUKOWSKI: And we just learned of it
13	actually, you know, after we had submitted our exhibits,
14	Your Honor. We think the Court can take judicial notice of
15	it anyway. I think for completeness of the record we ought
16	to include this and we move to admit it.
17	MR. FISCHER: We would reserve the right to
18	object just based on the fact that we haven't reviewed it
19	and can't really assess relevance or anything.
20	JUDGE COHN JUBELIRER: Okay. I'll tell you
21	what. I will wait to rule on your request to admit it and
22	give counsel the opportunity. Do you have any objection?
23	Were you going to ask him any questions about it?
24	MR. BUKOWSKI: I'm actually not, Your Honor,
25	because I think the testimony covered it. I just wanted
I	

1	the Court to have the benefit of some of the details for
2	its record.
3	JUDGE COHN JUBELIRER: Sure.
4	MR. BUKOWSKI: And frankly
5	JUDGE COHN JUBELIRER: As a judicial record
6	I believe I could take judicial notice of it, but if you
7	want to give me the docket number or any of the
8	MR. BUKOWSKI: Sure. The docket number is
9	it's for Magisterial District Judge 02-2-02. So the docket
10	number is MJ-02202-CR-0000126-2022.
11	JUDGE COHN JUBELIRER: Thank you.
12	MR. BUKOWSKI: And I would just point out
13	this came into the record. The answer that Mr. D'Agostino
14	gave was in response to the question about the materiality
15	of dates on the voter declaration, and I'm sure Ms.
16	Mihaliak would agree that her putting the date on that
17	voter declaration has become very material to her.
18	But I'm not going ask questions about these
19	documents, Your Honor, and we'll let the Court take
20	judicial notice and hopefully admit it into the record.
21	BY MR. BUKOWSKI:
22	Q. Mr. D'Agostino, getting back to the Lancaster
23	County board's practices during the 2022, May, 2022 primary
24	election. You were asked questions about whether
25	incorrectly dated ballots were counted or not counted; do
1	

- 1 you recall that?
- 2 A. Yes.
- 3 Q. And how does Lancaster County handle incorrectly
- 4 dated ballots or ballots that where the date might be in
- 5 question?
- 6 A. They're set aside and then there's more research
- 7 done; and if it can be determined that there is more
- 8 follow-up to be done, that can be done. I would also note
- 9 that there's a potential of a challenge to ballots that
- 10 come in. So that's something we take notice of as well.
- 11 Q. Yeah. And that was going to my next question.
- 12 Are those incorrectly dated ballots or ballots that have
- dates that may or may not be correct, those are subject to
- challenge by voters and candidates; is that correct?
- 15 A. That is correct.
- 16 Q. Are you aware of any instance in which a voter or
- 17 candidate in the 2022 May election did challenge the date
- 18 on a ballot because it had a date that was incorrect?
- 19 A. No.
- 20 O. Okay. And in that instance when there is no
- 21 challenge, then what happens in Lancaster County?
- 22 A. If there's a date, the plain reading of the
- language of the Code is that we'll count that ballot.
- 24 Q. Okay. And is that consistent with guidance sent
- 25 to the county Boards of Elections by the Department of

State? 1 2 Α. Yes. And I think you said that the dates -- the 3 Q. undated ballots are not counted; is that right? 5 Α. That is correct. And why is that? 6 Q. 7 Again, the plain reading of the language of the Α. Code, the Election Code is that it should not be counted. 8 As a member of the Lancaster --MR. FISCHER: I have an objection. This is 10 a legal opinion. I mean if that's his understanding, 11 But that's -that's fine. 12 JUDGE COHN JUBELIRER: And thank you for the 13 clarification. 14 I don't think you intended to ask him for 15 his legal opinion. 16 17 MR. BUKOWSKI: I wasn't and although when 18 someone says the plain language of the statute says this 19 and it does, I'm not sure that's a legal opinion; but I wasn't trying to elicit a legal opinion. We'll save that 20 21 for argument. MR. FISCHER: Your Honor? 22 THE WITNESS: 23 I would say, though, that as 24 my role as a Board of Commissioner and Board of Elections

member that I can be called upon to interpret the Code.

25

- 1 That's one of our jobs that we've already stipulated and so
- 2 that my opinion on how that is one vote of three.
- 3 BY MR. BUKOWSKI:
- 4 Q. And you're guided by a solicitor; is that right?
- 5 A. That is correct.
- 6 Q. And in your role as a member of the Lancaster
- 7 County Board of Elections, do you believe you have the
- 8 discretion to ignore what you understand to be the plain
- 9 language of the Election Code?
- 10 A. No.
- 11 MR. BUKOWSKI: I have nothing further, Your
- 12 Honor.
- 13 MR. KING: Very briefly, Your Honor.
- 14 MR. FISCHER: I thought Mr. King had no
- 15 questions.
- MR. BUKOWSKI: That was me.
- 17 CROSS-EXAMINATION (as on Redirect)
- 18 BY MR. KING:
- 19 Q. Commissioner, do you know how many democratic and
- 20 republican undated ballots there were in Lancaster? I can
- 21 give you the numbers.
- 22 A. I don't know the breakdown. I'm pretty sure it
- was 82 total, but I don't remember the breakdown.
- 24 Q. I think it was 50-some and 40-some if I'm not
- 25 mistaken but somewhere in that neighborhood.

- 1 A. That sounds familiar.
- Q. That's not my question but my question is, do you
- 3 know whether if you had to go back and recertify this
- 4 election, would you have to recertify all the positions
- 5 that were on the ballot?
- 6 A. All the positions on the ballot?
- 7 Q. Well, for example, state committee post,
- 8 democrat, republican, local committee?
- 9 A. Well, sure.
- 10 Q. Those are all on the ballot?
- 11 A. Those are all on the ballot so we have to
- 12 recertify.
- 13 Q. Do you know whether if you were ordered to
- 14 recertify this election, do you know whether that would
- make any difference potentially in the down-ballot races,
- 16 committee posts? Were some of them decided by a vote or
- 17 two?
- 18 A. It could. I don't know for sure but it could.
- 19 O. What about the House races or the Senate races or
- 20 the --
- 21 A. No.
- Q. -- other races?
- 23 A. No. Those were decided handily.
- 24 Q. But they might change the result, for example, in
- 25 those down-ballot races?

- 1 A. It could. I'd have to look at it obviously but
- 2 it could.
- 3 MR. KING: Thank you.
- 4 MR. FISCHER: Thank you. Just a few more
- 5 questions, Your Honor. We do not object to the admission
- of the exhibits. We don't necessarily concede that they're
- 7 relevant, but we don't object to their admission at this
- 8 point.
- JUDGE COHN JUBELIRER: Okay.
- 10 (Whereupon, the documents were marked as
- 11 Berks Lancaster Exhibit Number 6 for
- 12 identification and received in evidence.)
- 13 REDIRECT EXAMINATION (as on Recross)
- 14 BY MR. FISCHER:
- 15 Q. Sir, when the board or when the county receives a
- 16 mail-in or absentee ballot, do you confirm that it was
- 17 submitted by a registered voter?
- 18 A. Well, I told you we do. It comes in and then
- it's scanned. It goes into the SURE system, and then it's
- 20 processed from there.
- 21 Q. And if a voter was not on the rolls, would the
- 22 SURE system reflect that fact?
- 23 A. If they were not on the rolls?
- 24 Q. Yes.
- 25 A. Well, sure. They wouldn't show up.

- 1 Q. They wouldn't show up, okay. Now, could you look
- 2 at the police criminal complaint? Do you have a copy of
- 3 that?
- 4 A. I do not have a copy of that.
- 5 (Documents handed to the witness.)
- 6 BY MR. FISCHER:
- 7 Q. I'll direct you to page 4 which is the Affidavit
- 8 of Probable Cause. Do you see that?
- 9 A. Yes.
- 10 Q. Can you take a look at paragraph 2?
- 11 A. Yes.
- 12 Q. It says Christa Miller stated she received a
- 13 mail-in ballot from Teresa J. Mihaliak signed and dated
- 14 April 26th, 2022, correct?
- 15 A. Correct.
- 16 Q. And then it says the ballot for the democrat
- 17 primary was received on April 28th, 2022, by her office?
- 18 A. Correct.
- 19 Q. And then it says, however, Christa Miller
- 20 reported that Teresa J. Mihaliak was deceased on April
- 21 14th, 2022, correct?
- 22 A. Correct.
- Q. So that's two weeks before the date the ballot
- 24 was received?
- 25 A. Correct.

Ο. Christa Miller said this was confirmed by an 1 obituary and records for the Department of Health. 2 said Teresa J. Mihaliak was removed from the voter rolls on 3 April 25th, 2022; is that correct? 5 Α. That's correct. MR. FISCHER: Nothing further, Your Honor. 6 7 MR. BUKOWSKI: I just have one brief redirect based on Mr. King's question which was Mr. 8 D'Agostino because I wasn't sure if your answer included this. 10 RECROSS-EXAMINATION (as on Further Redirect) 11 BY MR. BUKOWSKI: 12 As you know, the Secretary has refused to certify 13 Ο. the statewide election results that include votes from 14 Berks, Lancaster, and Fayette Counties. Do you have an 15 understanding of whether any of those elections would be 16 17 affected -- the outcome of any of those elections that the Secretary has to certify would be from the counting or not 18 19 counting of any of the undated absentee or mail-in ballots 20 in question? I'm not aware of any of those races that would be 2.1 affected. 22 MR. BUKOWSKI: That's all I have. 23 24 MR. FISCHER: Nothing further, Your Honor. 25 JUDGE COHN JUBELIRER: Thank you.

1	Thank you very much, Mr. D'Agostino. We
2	appreciate your time today and your testimony.
3	THE WITNESS: Thank you.
4	(Witness excused.)
5	MR. BOYER: Thank you, Your Honor. We're
6	going to call Mr. Christian Leinbach as if on cross.
7	JUDGE COHN JUBELIRER: Okay. Thank you.
8	MR. HOLLAND: Raise your right hand.
9	Whereupon,
10	CHRISTIAN LEINBACH,
11	having been duly sworn, testified as follows.
12	MR. HOLLAND: Please be seated.
13	DIRECT EXAMINATION (as on Cross)
14	BY MR. BOYER:
15	Q. Good afternoon, Mr. Leinbach.
16	A. Good afternoon.
17	Q. My name is Jacob Boyer. I'm an attorney with the
18	Office of Attorney General and represent the Department of
19	State and the Acting Secretary in this matter. Are you a
20	member of the Berks County Commissioners?
21	A. Yes, I am.
22	Q. And what's your role on that commission?
23	A. I chair the Board of Commissioners.
24	Q. Okay. As the Chair of the Board of
25	Commissioners, do you have certain responsibilities for the

Appendix 20

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20 member of the Berks County Commissioners?	
21 A. Yes, I am.	
22 Q. And what's your role on that commission?	
23 A. I chair the Board of Commissioners.	
Q. Okay. As the Chair of the Board of	
25 Commissioners, do you have certain responsibilities for the	

- 1 administration of elections?
- 2 A. No more than any other Commissioner.
- 3 Q. Forgive me.
- 4 A. With the exception of the year in which we run,
- 5 we serve as the Board of Elections.
- 6 Q. Actually I meant to ask as a Commissioner as
- 7 opposed to as the Chair, do you have responsibilities for
- 8 the administration of elections?
- 9 A. Yes, I do.
- 10 Q. Okay. And have you heard the testimony from the
- 11 prior Commissioners about their roles with respect to
- 12 elections?
- 13 A. I have.
- 14 Q. Okay. And is your role as Commissioner
- 15 relatively the same?
- 16 A. Relatively similar.
- 17 Q. Which is to say you don't have day-to-day
- 18 management responsibilities over elections, but you do have
- a say in the final decisions, for example, about whether
- 20 certain ballots should or should not be counted?
- 21 A. We adjudicate issues as they are brought to us
- 22 from our Election Director.
- Q. Okay. And that includes adjudication about
- 24 whether certain ballots meet the statutory requirements for
- 25 canvassing for example?

- 1 A. Yes, it does.
- 2 Q. Okay. I'd like to turn to what we've been
- 3 talking about which is absentee and mail-in ballots, and I
- 4 may refer to undated ballots and what I mean is ballots
- 5 that are returned by the 8:00 p.m. deadline that have no
- 6 irregularities other than the fact that they don't have a
- 7 date written on the return envelope. If I use undated
- 8 ballots, that's what I'm referring to if that makes sense?
- 9 A. Yes, it does.
- 10 Q. Okay. Do you know the deadline by which absentee
- and mail-in ballots must be received by the county in order
- to be counted in an election?
- 13 A. 8:00 p.m. on Election Day with the exception of
- military and civilian overseas ballots which are later.
- 15 Q. Thank you for that correction, yes. I'll put
- 16 those ballots aside and refer only to ballots that are not
- 17 cast by military members or their families. If a ballot is
- 18 received anytime after 8:00 p.m., again excluding military
- members and their families, will the county board receive
- it -- or excuse me, count it?
- 21 A. Excluding.
- 22 Q. Excluding those ballots.
- 23 A. I think you said including.
- 24 Q. Forgive me. I meant to say excluding.
- 25 A. If they are received after 8:00 p.m. on Election

- 1 Day, they will not be counted.
- 2 Q. Okay. And that's true even if the date written
- 3 on the return envelope is sometime before Election Day; is
- 4 that correct?
- 5 A. That is correct.
- 6 Q. Okay. Now, if the date written on the return
- 7 envelope is sometime before Election Day so, for example,
- 8 let's say it said May 10th for the 2022 primary, what does
- 9 that date mean to you? What do you assume the voter meant
- 10 by writing May 10th?
- 11 A. Let me answer that by explaining how we receive
- the ballots if that's appropriate.
- 13 Q. I'd rather you --
- 14 A. As it relates to the date --
- 15 Q. I'll ask a different question --
- 16 A. Okay.
- 17 Q. -- then instead. If a voter writes May 10th on
- 18 the ballot for let's say a May 17th election, would you
- disqualify that ballot based on the date that's written?
- A. Absolutely not.
- 21 Q. Okay. Would you investigate what the voter meant
- by May 10th meaning, for example, would you have any means
- to determine if the voter who wrote May 10th, in fact,
- signed the ballot on May 10th?
- 25 A. That would only be investigated if there were

- 1 other circumstances that caused us to look at that date.
- Q. Okay. So absent external circumstances, when you
- 3 receive and review a ballot that says May 10th, for
- 4 example, you're not conducting any investigation of whether
- 5 the voter, for example, actually signed the ballot on May
- 6 10th?
- 7 A. When Berks County receives a properly timely
- 8 presented absentee or mail-in ballot, we look to see if it
- 9 is dated and signed.
- 10 Q. Okay. But you don't conduct an investigation to
- determine if the date that's written on the ballot --
- 12 A. We simply determine is the ballot dated and is it
- 13 signed.
- 14 Q. Okay. So for all you know, if someone wrote May
- 15 10th, they could have signed the ballot on May 9th?
- 16 A. We simply determine is it dated or signed?
- 17 Q. Okay. If a voter returns a ballot that, for
- 18 example, has no birth date on it, would you exclude that
- 19 ballot on the basis of the date?
- 20 A. We simply determine is the ballot dated or
- 21 signed.
- Q. Okay. I don't believe I asked you. When Berks
- receives absentee or mail-in ballots, does it date-stamp
- 24 the outer envelope to indicate when that ballot was
- 25 received?

There are two ways that it can be determined 1 Α. relative to date. One is the outer envelope of the ballot 2 has a unique bar code unique to the election and unique to 3 Berks County. If someone uses some other or an older outer 5 envelope, it will not be accepted. That is the first test of timeliness. It only relates to that election. 6 7 When it's received in the office, whether from a drop box, from the mail, or by the voters themselves, it is 8 dated and time-stamped upon receipt. Sorry. I want to make sure I understand the 10 first part of your answer. With respect to the scanning, 11 is what you're saying the bar code that appears on the 12 return envelope is scanned upon the county's receipt of the 13 14 envelope? It is and it is unique to that specific election 15 Α. and to Berks County. 16 17 Ο. Okay. And what is scanning the envelope's bar 18 code, what does that do? If you scan that into SURE, does 19 that generate some information into the SURE system? 20 It does and it also generates information to the So when it is scanned in, it notifies the system 21 that the absentee and/or mail-in ballot has been received; 22 23 and a notification goes to the voter letting them know it 24 has been received. If it is undated, a notification goes 25 to the voter that it's been received but it is not dated or

if it's not signed that it's not signed letting them know 1 that that is the case. 2 Okay. And is one of the pieces of information 3 that appears after the envelope is scanned the date on 5 which the ballot was received? Please repeat that question. 6 Α. 7 Certainly. Yes. You said that scanning the Ο. ballot or, excuse me, scanning the return envelope, the unique bar code on the return envelope generates certain information. Is one piece of information generated by --10 It does not gener -- that is a manual process. 11 Α. So when the ballots are received in the election office, 12 the first thing that happens is they're viewed. If there's 13 14 a missing date or a missing signature, they are set aside. If everything is there, they are immediately scanned. 15 ones that are missing -- into SURE. The ones that are --16 17 and I might add when they're scanned into SURE, they look again. So that's a second look to make sure they're signed 18 19 and dated. If they are signed and dated, they go into the 20 SURE system. If for some reason, there's a third check 21 and that's precanvassing that begins on 7:00 a.m. on 22 23 Election Day. As part of the precanvassing process in Berks County, before they are opened they're determined 24 25 again is there a missing date or signature. In the rare

- 1 case that that would happen, in that case they're set aside
- and the information in the SURE system would be reversed
- 3 indicating that it lacked either a signature or a date.
- 4 Q. Understood. And I believe for the 2022 primary
- 5 election Berks had sent to the Acting Secretary a
- 6 certification of results; is that correct?
- 7 A. That is correct.
- 8 Q. Okay. And what date was that?
- 9 A. Actually I believe two dates. I'm not going to
- 10 stipulate exactly, but I believe the second date which
- included the provisionals I believe was June 8th.
- 12 Q. Okay. But that did not include any ballot for
- 13 which the voter had omitted a date on the return envelope;
- is that correct?
- 15 A. It did not.
- 16 O. Okay.
- 17 MR. BOYER: Nothing further, Your Honor.
- 18 CROSS-EXAMINATION (as on Redirect)
- 19 BY MR. BUKOWSKI:
- 20 Q. Good afternoon, Mr. Leinbach.
- 21 A. Good afternoon.
- Q. Why does Berks County and the Berks County Board
- of Elections require that absentee and mail-in ballots be
- 24 both signed and dated in order to be canvassed and counted?
- 25 A. Because we believe the statute is quite clear in

- 1 requiring that the outer envelope must be or shall be
- 2 signed and dated. And we act on the clear direction of the
- 3 statute as well as the prior direction of the Secretary of
- 4 the Commonwealth.
- 5 MR. BOYER: Objection, just to the extent as
- 6 all previous objections. This is just his opinion of the
- 7 law.
- 8 JUDGE COHN JUBELIRER: Thank you.
- 9 THE WITNESS: It's my clear reading of the
- 10 law.
- 11 BY MR. BUKOWSKI:
- 12 Q. Okay. As of Election Day for the May, 2022
- 13 primary election, what was the guidance from the Department
- of State on counting undated ballots?
- 15 A. The guidance was undated ballots should not be
- 16 counted.
- 17 Q. And is that what Berks County did when it
- 18 processed mail-in and absentee ballots for the May, 2022
- 19 primary?
- 20 A. That is correct. We did not count undated
- 21 ballots.
- Q. You had mentioned information going into the SURE
- 23 system and then notifications being sent to voters about
- 24 how their mail-in or absentee ballot was being processed.
- 25 Does a voter have an opportunity to cure a ballot if it's

- 1 missing a signature or a date?
- 2 A. A voter has the opportunity to come in to the
- 3 election department and voluntarily fill in their signature
- 4 or the date prior to the election.
- 5 Q. Do you know whether that happened in the May,
- 6 2022 primary election?
- 7 A. I cannot say with certainty.
- 8 Q. Okay. For ballots that had the date, for
- 9 example, May 10th, I don't think there's any issue that
- 10 that would look odd, a May 10th signature or a ballot dated
- 11 May 10th. But if there's a ballot that had an incorrect
- 12 date, you know, I think counsel pointed out you don't know
- 13 whether the person signed it on May 9th and dated it May
- 14 10th or vice versa. Why are those ballots -- if there's a
- belief that there's an incorrect date on the ballot, how
- does Berks County process that?
- 17 A. If there's something that would cause us to
- 18 believe there is an irregularity and it involves the date
- or involves the signature or both, we would set that aside.
- 20 And in setting it aside initially the Director of Elections
- 21 would look at it to see if she is able to make a
- determination, and if not that would come before the Board
- of Elections to adjudicate.
- Q. And in the May, 2022 primary election, were any
- absentee or mail-in ballots submitted to the Board of

- Elections of Berks County to be adjudicated where the date

 was -- where the question to be adjudicated was the
- 3 accuracy of the date?
- 4 A. I'm not aware of any.
- 5 Q. Okay. Do you feel in your role as a member of
- 6 the Berks County Board of Elections you can ignore the
- 7 language of the Election Code that states that the
- 8 declaration of a voter shall be signed and dated?
- 9 A. No. And I stated to that fact when the McCormick
- 10 and Oz campaign came before the Board of Commissioners, one
- 11 calling for us not to count undated ballots, the other
- calling for the board to count undated ballots; and I made
- 13 it very clear that I don't have the leeway or discretion to
- 14 determine what I think the law should say.
- I don't have the discretion to determine whether
- or not a date is material or immaterial. I simply am
- 17 obligated to follow the clear and plain language of the law
- 18 that says undated and/or unsigned ballots shall not be
- 19 counted.
- 20 Q. And did the McCormick campaign appeal any
- 21 determination by the Berks County Board of Elections with
- respect to handling either of the issues adjudicated by the
- 23 board?
- A. They did.
- 25 Q. What did the McCormick campaign appeal?

- 1 A. They appealed our decision to not count the
- 2 undated ballots.
- 3 Q. And was that the case that came up to the
- 4 Commonwealth Court?
- 5 A. Yes, it was.
- 6 Q. Okay. And Berks County was a party, a respondent
- 7 in that action?
- 8 A. Yes, we were.
- 9 Q. Okay. And as we've heard testimony, this Court
- issued a June 2nd, 2022 order in that case. You're
- 11 familiar with that order?
- 12 A. Yes, I am.
- 13 Q. Did Berks County comply with that order?
- 14 A. Yes, we did. I will stipulate that we asked our
- 15 counsel to clarify exactly what the order directed. It was
- 16 clear to us that this was an interim directive that
- 17 anticipated a more complete decision at a future date, and
- 18 we believed it was appropriate. We were not asked to
- 19 certify. We were simply asked to provide the numbers and
- 20 separated dated and undated ballots which we did.
- 21 Q. And so is it your understanding that the June
- 22 2nd, 2022 order from this Court in the McCormick case did
- 23 not require certification of certified returns to include
- votes from undated ballots?
- 25 A. There was no mention of certification at all.

- 1 O. Okay. You're aware that the Third Circuit Court
- of Appeals issued a decision May 20th, 2022, in the case
- 3 captioned Migliori v. Cohen?
- 4 A. I am.
- 5 Q. And are you also aware that that did not involve
- 6 an election in the May, 2022 primary?
- 7 A. Yes, that is what I understood.
- 8 Q. Okay. And after that decision was issued, did
- 9 Berks County receive further guidance from the Department
- of State regarding the processing of undated mail-in and
- 11 absentee ballots?
- 12 A. We did.
- 13 Q. Okay. And what did that guidance say?
- 14 A. There were a couple of different or possibly
- three different pieces of communication that I'm familiar
- 16 with but basically directed the county to recertify the
- totals including undated ballots.
- 18 Q. And are you referring to the communications that
- 19 were -- that Mr. Marks had testified to earlier --
- 20 A. I am.
- 21 O. -- in some e-mails? And, in fact, one of those
- e-mails that was Joint Exhibit 6 was Mr. Marks's June 17th,
- 23 2022 e-mail, and then he had also sent a June 27th, 2022
- 24 e-mail to the election officials; do you recall that?
- 25 A. Yes, I do.

- 1 Q. Do you have those over there or not?
- 2 A. I have them in front of me now.
- Q. Okay. Would you refer to the June 27th, 2022
- 4 e-mail from Mr. Marks?
- 5 A. Yes.
- 6 Q. I believe it's probably part of Joint Exhibit 10
- 7 because that's the one --
- 8 A. It was.
- 9 Q. -- where you responded?
- 10 A. Yes.
- 11 Q. So just describe again for the Court what Joint
- 12 Exhibit 10 is.
- 13 A. So Joint Exhibit 10 is directed to Dear County
- 14 Election Official. I received it along with a number of
- others, and it is clearly directed to a group of counties
- 16 who have either not yet certified vote totals from undated
- 17 ballots or have not provided the Department with
- 18 information about when we will be able to do so. It
- directs us to send those certified vote totals by a certain
- 20 date.
- 21 And at the bottom it says, as noted in my
- original e-mail, please send copies of your certifications
- and any questions or responses to all three of the
- 24 following DOS staff members, one of which is Jonathan
- 25 Marks.

- 1 Q. And did you respond to that e-mail?
- 2 A. I did respond the following day, June the 28th.
- 3 Q. And your response is what's at the top of the
- 4 first page of the exhibit marked Joint Exhibit 10; is that
- 5 right?
- 6 A. That is correct.
- 7 Q. And as we noted earlier in my examination of Mr.
- 8 Marks -- well, before we get to the last paragraph, what
- 9 did you say in your response?
- 10 A. It's rather brief. Jonathan, please help me
- 11 understand where the clear Court guidance is regarding
- 12 certification on undated ballots. I do not see it. And
- 13 then I quoted from his letter, quote, rulings in the
- 14 Commonwealth Court of Pennsylvania and the U.S. Court Of
- 15 Appeals for the Third Circuit makes it clear that we will
- 16 have to certify vote totals that include the vote totals
- from undated ballots, end quote.
- 18 I then went on to say I believe the rulings are
- 19 anything but clear at best. The issue is not settled. I
- look forward to your response.
- 21 Q. And did you receive a response to your June 28th,
- 22 2022 e-mail to Mr. Marks?
- 23 A. I received no further communication from Mr.
- 24 Marks.
- 25 Q. And was the next communication from the

Department of State the letter from Attorney Gates dated 1 June 29th, 2022, addressed to the Berks County Director of 2 Elections Services, Paige Riegner? 3 Α. That is correct. 5 Ο. And that is what is marked as Joint Exhibit 11, 6 correct? 7 That is correct. Α. After receiving the June 29th letter from Attorney Gates and your exchange with Mr. Marks, did the Berks County Board of Elections have another meeting? 10 We did on July the 1st. 11 Α. What happened at that meeting? 12 Q. Well, I did my best to get additional information 13 Α. 14 prior to any vote on this important decision. I did not receive a response from Jonathan Marks. The only response 15 was, as noted, from counsel for the Department of State. 16 17 And so at that meeting I reiterated my clear reading of the current statute that ballots, outer envelopes of the 18 19 ballots that are either undated or not signed shall not be 20 counted. And I also noted that the two decisions cited, 2.1 neither one of them dealt with certification. Both of them 22

occurred -- the one where we abided by the Commonwealth

Court, this Court, we did exactly what the Court asked us

And based on the lack of clear judicial guidance

23

24

25

to do.

- 1 and the plain language of the statute, I could not in good
- 2 conscience vote to certify undated ballots.
- I also noted that this type of issue is what is
- 4 causing a lack of trust in the system. When plain language
- 5 we're being told is no longer plain, no longer means what
- it says it means, we damage the credibility of our
- 7 elections.
- 8 Q. And when Berks County sent its certified results
- 9 to the Department of State on June 8th, 2022, do you know
- 10 whether or not the Third Circuit decision in Migliori v.
- 11 Cohen was in effect?
- 12 A. I do not know.
- 13 Q. Okay. And was June -- did the Berks County Board
- 14 of Elections view its deadline to provide certified results
- to the Acting Secretary of the Commonwealth as June 8th?
- 16 A. That is correct.
- 17 MR. BUKOWSKI: Nothing further, Your Honor.
- 18 JUDGE COHN JUBELIRER: Thank you.
- MR. KING: May it please the Court.
- 20 CROSS-EXAMINATION (as on Redirect)
- 21 BY MR. KING:
- 22 Q. Commissioner, good afternoon.
- 23 A. Good afternoon.
- 24 Q. I'm Thomas W. King, III. We've met?
- 25 A. Yes, we have.

Ο. I wanted to ask you, in Berks County according to 1 the stipulated facts, we show 507 democratic ballots and 2 138 republican ballots that were undated and not counted, 3 correct? 5 Α. Total of 645, that is correct. And are you familiar enough with the results in Q. Berks County to know down-ballot whether the state 7 committee posts in either party, republican or democrat, 8 local county committee posts, if any of those might be affected by 507 democratic ballots and 138 republicans if 10 you're ordered to recertify this election? 11 That's a fairly substantial number of undated 12 ballots, 645. Obviously it would change the results in any 13 elections where votes were cast for a particular race. 14 Based on the number of races down-ballot, committee slots 15 in particular, that were ties or extremely close, I would 16 not be surprised to understand that it would impact the 17 outcome of some of those races. 18 19 And do you know whether the Berks County 20 republican party, the Berks County democratic party, the Pennsylvania republican party, or the democratic party of 21 Pennsylvania, do you know if they've had meetings after 22 23 this primary election has taken place at which people from 24 Berks County participated because they were certified by 25 the County of Berks as having won the elections?

- 1 A. That is correct. They have.
- 2 Q. And some of those people would have attended --
- 3 for example, I'm most familiar with the republican state
- 4 committee meeting -- so that meeting of the republican
- 5 state committee, were you there at the last meeting?
- 6 A. I was.
- 7 Q. It was just a week or so ago, and so the Berks
- 8 County representatives were seated and voted at that
- 9 meeting, correct?
- 10 A. That is correct.
- 11 Q. And that's based on the county certification that
- 12 took place earlier?
- 13 A. That is correct.
- 14 Q. All right. Have you ever had to recertify an
- 15 election in Berks County?
- 16 A. I'm in my 15th year and I've never been requested
- 17 to recertify.
- 18 Q. Have you ever heard of the recertification of an
- 19 election?
- 20 A. I didn't know there was such a term. I think if
- 21 you certify an election it's certified.
- Q. Now, you're familiar at least a little bit
- 23 because you all were deeply involved in the McCormick and
- Oz election debate?
- 25 A. Yes.

Ο. And so are you aware of whether the Secretary 1 herself was, in fact, a participant in that case before 2 Judge Cohn Jubelirer? 3 Α. I can only speak to my experience, and the 5 individuals that appeared before our election board were representatives of the McCormick campaign and 6 7 representatives of the Oz campaign. I was not -- we had no one from the Secretary of the Commonwealth weigh in in our 8 hearing or in the meeting where we made subsequent 10 decisions. Now, of course, the Attorney General himself is 11 Q. on the ballot this year, correct? 12 13 Α. He is not. 14 MR. BOYER: Objection to relevance. THE WITNESS: Yes, I take it back. 15 JUDGE COHN JUBELIRER: He is. 16 17 THE WITNESS: Yes, not as the Attorney General. 18 19 JUDGE COHN JUBELIRER: Just --I'm sorry. The sitting Attorney 20 MR. KING: General is on the ballot running for Governor of 21 Pennsylvania. I just want to know whether he filed an 22 23 appeal. 24 MR. BOYER: And my objection is to

relevance, Your Honor.

25

1	JUDGE COHN JUBELIRER: He objected to
2	relevance. Do you want to respond?
3	MR. KING: Yes, Your Honor. The relevance
4	is unclean hands. The action that's been brought here is
5	in the nature of equity. With respect to the mandamus
6	action, that's an equitable action. You have to come here
7	with clean hands. And so what's happened here is that not
8	only are these appeals untimely, but the people who are
9	participating in these appeals had every right to file an
10	appeal if they wanted to. They could have filed it timely.
11	They could have filed it at all.
12	JUDGE COHN JUBELIRER: I'm sorry but as I'm
13	looking at the caption, I don't see anybody having brought
14	this action
15	MR. KING: Yes, ma'am.
16	JUDGE COHN JUBELIRER: who's running for
17	office.
18	MR. KING: No, not that's brought it but
19	JUDGE COHN JUBELIRER: Okay.
20	MR. KING: the lawyer for the party who's
21	brought it is a candidate.
22	JUDGE COHN JUBELIRER: So that's a different
23	I mean I'm not sure that that
24	MR. KING: I'll withdraw the question.
25	JUDGE COHN JUBELIRER: Yes. Thank you.
I	

- 1 MR. KING: Yes, ma'am.
- Thank you very much, Commissioner.
- THE WITNESS: Thank you.
- 4 MR. BOYER: Just a few follow-ups, Mr.
- 5 Leinbach.
- 6 THE WITNESS: Sure.
- 7 REDIRECT EXAMINATION (as on Recross)
- 8 BY MR. BOYER:
- 9 Q. I believe you said in your experience you've
- never recertified election results; is that right?
- 11 A. From my experience I have not been involved in
- 12 recertifying an election.
- 13 Q. Okay. Have you ever updated incomplete
- 14 certifications?
- 15 A. We may have. I don't recall right now.
- 16 Q. Well, what about in this election? Did you
- 17 certify certain results on July [sic] 6th to the
- 18 Department?
- 19 A. I've already testified that there were two
- 20 separate reports. The second one on June the 8th included
- 21 the provisional ballots.
- Q. Okay. So you sent one certification on July 6th,
- 23 correct?
- 24 A. Yeah. We did not recertify. We certified what
- 25 we were able and certified the provisional ballots as I

- 1 understand it on June the 8th.
- Q. Okay. So on June 8th you updated the
- 3 certification that you sent on June 6th; is that correct?
- 4 A. I don't know what it's called. I'm simply
- 5 telling you what we did. We certified everything we had on
- 6 June the 6th and certified as I understand it the
- 7 provisional ballots that were not yet completed on June the
- 8 8th.
- 9 Q. Okay. I believe you said you're obligated to
- 10 follow your interpretation of the Election Code; is that
- 11 correct?
- 12 A. I did not. I said I'm obligated to follow the
- 13 plain language of this election statute.
- 14 Q. Forgive me. Thank you for that clarification.
- 15 If a Court decides what the language of the election
- 16 statute means, would the Berks County Commissioners follow
- 17 that decision?
- 18 A. If it's a definitive decision, yes.
- MR. BOYER: Nothing further, Your Honor.
- 20 JUDGE COHN JUBELIRER: And before we finish,
- 21 I want to make sure, counsel, did you make an unclean hands
- argument in your papers? Is that before the Court? I
- don't recall seeing that.
- 24 MR. KING: I think we raised the -- I'm not
- 25 sure about that to be honest with you. I know that we

raised equitable defenses. 1 2 JUDGE COHN JUBELIRER: I know you did. wasn't sure if unclean hands was one of them. 3 MR. KING: I'm not sure either. 5 JUDGE COHN JUBELIRER: If you did and there are factual questions that would assist you obviously in a 6 7 defense that you've raised to this action, I don't want to preclude that. 8 MR. KING: I appreciate that. I don't think it's necessary at this point. 10 JUDGE COHN JUBELIRER: 11 Okay. 12 Thank you, Your Honor. MR. KING: 13 JUDGE COHN JUBELIRER: Thank you. 14 MR. BUKOWSKI: Just one last follow-up question, Commissioner Leinbach. 15 RECROSS-EXAMINATION (as on Further Redirect) 16 17 BY MR. BUKOWSKI: In response to the last question about following 18 Ο. 19 clear Court guidance, is it the -- is it your understanding that the November, 2020 Pennsylvania Supreme Court decision 20 in In Re: Canvass is clear quidance stating that undated 21 absentee and mail-in ballots should not be counted for all 22 elections after November, 2020? 23 24 It is based on my consultation with our Α. 25 solicitor, our county solicitor, our election board

1	solicitor. Yes, we believe that is clear.
2	MR. BUKOWSKI: Nothing further.
3	MR. KING: No, thank you, Your Honor.
4	MR. BOYER: Nothing further, Your Honor.
5	JUDGE COHN JUBELIRER: Okay. Thank you
6	very, very much. We appreciate your testimony and your
7	time today.
8	THE WITNESS: Thank you, Your Honor.
9	(Witness excused.)
10	JUDGE COHN JUBELIRER: Are there any further
11	witnesses? Let's see. You had a
12	MR. BOYER: Not from the Petitioners, Your
13	Honor.
14	JUDGE COHN JUBELIRER: Okay.
15	MR. BUKOWSKI: Not from Berks and Lancaster
16	Respondents, Your Honor.
17	MR. KING: Nor from Fayette, Your Honor.
18	JUDGE COHN JUBELIRER: Okay. How are we
19	with time? I mean does anybody need a break?
20	THE REPORTER: I'm good.
21	JUDGE COHN JUBELIRER: Okay.
22	MR. BOYER: I think we could take a five
23	JUDGE COHN JUBELIRER: I was going to say
24	maybe we should take a five-minute break before we begin
25	with the legal arguments. We'll proceed with Petitioners

Appendix 21

1	MR. KING: Thank you very much.
2	JUDGE COHN JUBELIRER: Okay. Thank you for
3	the clarifications. And so we'll take five minutes, I
4	think is that sufficient
5	MR. BOYER: Thank you, Your Honor.
6	JUDGE COHN JUBELIRER: in order to keep
7	everything moving?
8	MR. KING: Thank you, Your Honor.
9	MR. BUKOWSKI: Yes, Your Honor.
10	JUDGE COHN JUBELIRER: Thank you very much.
11	(A recess was taken from 2:42 p.m. to 2:50 p.m.)
12	MR. BOYER: Thank you, Your Honor. And
13	again for the record, Jacob Boyer on behalf of the
14	Department of State and the Acting Secretary.
15	The three counties in this case, Your Honor,
16	are holding up final certification of the primary election
17	because they refuse to complete their duty to certify
18	results that reflect every lawfully cast ballot. Now, the
19	counties don't meaningfully dispute that they have a duty
20	to certify results that include every lawfully cast ballot.
21	Instead they say it is they and not the Secretary that
22	decides what constitutes a lawfully cast ballot, but that
23	misses the issues in this case.
24	It's neither the Secretary nor the county
25	boards of election that ultimately decide what constitutes
1	

1	a lawfully cast ballot. It's an order of this Court. It's
2	Pennsylvania law and it's federal law. And all three of
3	those in this case, Your Honor, require that the ballots at
4	issue here be included in final certification of the 2022
5	primary election.
6	And until the counties provide the Secretary
7	with a certification that includes the ballots at issue
8	here, the Secretary cannot complete her own duty to finally
9	certify the results of the primary election.
10	Now, I'm going to begin discussing our
11	mandamus count, count one of the petition for relief on
12	which we have sought an order, a peremptory judgment; and
13	I'd like to begin that discussion with a bit of context
14	about what is and is not at issue with this count.
15	The mandamus count proceeds exclusively on
16	the basis of this Court's June 2nd order. It is not a
17	count to enforce any guidance of the Secretary. Had there
18	been complete silence between the Secretary following this
19	Court's order in McCormick and now, the mandamus count
20	would be legally indistinguishable. It is not a count to
21	enforce any guidance by the Secretary as the briefs on the
22	other side would suggest and as the questioning today would
23	suggest.
24	And as I will get to momentarily, we readily
25	acknowledge that the Court's order does not use the word

1	certification; but as I will describe, the consequence of
2	this Court's order that the counties must canvass and count
3	these ballots is that their exercise of discretion was told
4	they were informed or ordered by the Court how to
5	exercise their canvassing discretion.
6	And after that order there is no further
7	discussion to remove lawfully cast ballots from the
8	certification. The Election Code simply does not permit
9	counties that freedom.
10	Now, moving on to the Court's order from
11	June 2nd and why it counts excuse me, why it requires
12	that the counties here include the ballots at issue in this
13	certification. The Court's order was quite clear the
14	ballots and just for purposes of clarity of the record,
15	the ballots we are talking about are ballots that are
16	lacking a date on the return envelope, either an absentee
17	or a mail-in ballot, but ballots that otherwise were timely
18	received ballots that otherwise as the Court's order said
19	have no deficiencies or irregularities.
20	So we are talking exclusively about ballots
21	in which the only basis the county asserts for denying
22	their inclusion and certification is that the voter failed
23	to include a handwritten date on the ballot return
24	envelope. So I may refer to undated ballots throughout,
25	but that is the class of ballots that I'm talking about.

1	If a ballot, for example, is undated and unsigned, we're
2	not contesting that. So I do
3	JUDGE COHN JUBELIRER: Without a handwritten
4	date?
5	MR. BOYER: On the outer envelope, exactly.
6	So if there is a missing date and other errors, those
7	ballots are not at issue. We do not believe that the law
8	requires or permits those ballots to be counted. For
9	example, an envelope that lacks both a date and a
10	signature.
11	The Court's order on June 2nd was quite
12	clear that the counties here must canvass. On page 14 of
13	the Court's opinion, it was clear that by canvass it meant
14	count the ballots at issue here. And it's clear from
15	throughout the opinion the basis of that order was the
16	Court's legal conclusion that both Pennsylvania law and
17	federal law require those ballots be counted.
18	It was also clear at pages 6, 14, 18 of the
19	Court's opinion that the Court understood the request to be
20	from the petitioners there a request that the Court order
21	the counties to count these ballots, not to merely
22	segregate the ballots, not merely to identify how many
23	ballots there are, but to count the ballots and report the
24	tallies on the basis of the Court's conclusion that
25	Pennsylvania law and federal law likely require these

1	ballots to be counted.
2	Now, under the Election Code there are clear
3	consequences of a Court order that certain ballots must be
4	canvassed and must be counted.
5	JUDGE COHN JUBELIRER: And just to clarify,
6	when the context of the Court's opinion was in a request
7	for preliminary injunction and so the Court was technically
8	I mean, do you agree that the Court was technically
9	examining the likelihood of success on the merits prong of
10	the preliminary injunction test?
11	MR. BOYER: Yes. That is the standard the
12	Court was applying. The order that the Court entered which
13	is what we believe guides here was a clear order to canvass
14	on the basis of that legal analysis. That's quite
15	comprehensively described in Your Honor's opinion from June
16	2nd. And the consequences of an order to canvass and count
17	ballots under the Election Code is that those ballots must
18	also be reflected in the final certification.
19	And I will walk
20	JUDGE COHN JUBELIRER: Okay. And you're
21	going to walk me through that analysis?
22	MR. BOYER: And I'm going to walk through
23	why that is. So this is for Your Honor's reference is this
24	is pages 8 through 9 of our brief sort of walks through the
25	Election Code and makes clear that once it's determined

1	that a ballot is canvassed and counted, there is no further
2	discretion on the part of the counties, on the part of the
3	Secretary to overrule a Court's decision that ballots must
4	be canvassed.
5	So the relevant section of the Election Code
6	here, Your Honor, is 25 P.S. 3146.8 which is the section
7	that governs canvassing of both absentee and mail-in
8	ballots. Paragraph (g)(3) of that section proscribes the
9	conditions that a ballot must meet to be canvassed. One of
10	those is that the declaration is sufficient.
11	Now, the consequences of the Court's
12	reasoning in the Court's order was a determination that
13	return envelopes lacking a date are sufficient. Once that
14	determination is made and there's an order to canvass and
15	count those ballots, there is no further discretion under
16	the Election Code as to what happens under those ballots.
17	Under paragraph $(g)(4)$ of that same section
18	and I will read this directly, Your Honor, and this is
19	quoted in our brief as well.
20	Paragraph (g)(4), all absentee ballots which
21	have not been challenged under Section 1302.2 which
22	prescribes some provisions and procedures for challenging
23	ballots and all mail-in ballots which have not been
24	challenged under Section 1302(d)(a)(2) which is another
25	set of challenges that have been verified under

1	paragraph 3 paragraph 3 refers to the paragraph
2	describing the conditions for canvassing shall be
3	counted and included with the returns of the applicable
4	election district as follows. And then it goes on to
5	report that.
6	Section 3154 sort of picks up the process
7	after there is computation and canvassing, and there it
8	directs that the election districts which are actually
9	conducting the canvassing and counting under 3146.8(g) and
10	(4) are to report to the county board of commissioners the
11	results that they have canvassed and that they have
12	computed.
13	There is no discretion under 3154 that
14	authorizes the county Board of Elections to decide the
15	ballots that have already been counted and canvassed under
16	3146.8 are no longer going to be included in the
17	certification, meaning there is a process. You know, you
18	heard Mr. Marks testify about a process that begins with
19	canvassing, counting, and ultimately concludes with
20	certification.
21	Any discretion that the county boards have
22	exists at the canvassing and counting. Of course that
23	discretion is subject to the Election Code and subject to
24	orders of the Court; and in this case because there was a
25	Court order dictating how to exercise that discretion which

1	ballots must be canvassed and counted, there was no further
2	discretion under the Election Code on the back end to
3	remove ballots that this Court ordered must be counted.
4	For that reason, Your Honor, I think much of
5	the case law in the present and, in fact, all of the case
6	law in the present and I'll walk through some of the
7	statutes as well that my colleagues cite is actually
8	irrelevant. There is a case cited several times, In re:
9	McCracken, that speaks about the discretion county boards
10	have for canvassing and computing ballots.
11	We don't dispute that. The Court ordered
12	them how to exercise that discretion. There is no
13	subsequent discretion at the certification stage.
14	JUDGE COHN JUBELIRER: And so how do you
15	define certification? Is there a provision in the statute?
16	MR. BOYER: Yes. The most relevant
17	provision is 3154 paragraph F which speaks about the
18	process of what election boards are supposed to do once
19	they have received canvassed and computed results from
20	their election districts. They're to receive them. They
21	are to add them together.
22	And I can read through that paragraph if it
23	would be helpful, Your Honor, but it is 3154(f) that
24	describes that process that the county boards are to go
25	through during certification. And throughout the language

1	is directory. The ballots that have been canvassed and
2	computed shall be certified.
3	Now, there's been a couple mentions about
4	the timing of this mandamus case and what options the
5	Secretary or the Department should have availed themselves
6	of. I want to make a broader point and then a more
7	specific point about the relevant statutes.
8	The broader point is the Department is not
9	an ordinary litigant. As you heard Mr. Marks testify,
10	there are often disputes between counties and the
11	Department about various aspects of election
12	administration; and because the Department, you know, does
13	not have authority to tell the counties in the main what to
14	do, they try to resolve those disagreements.
15	And between the order in McCormick, the
16	discontinuance in McCormick, and this case, the Department
17	was in constant communication with the counties about this.
18	And throughout that communication, they were able to
19	prevail upon quite a few counties and convince quite a few
20	counties to change their view based on discussions about
21	what the law heard.
22	I think you heard Mr. Marks testify his June
23	17th e-mail went to every county. His June 27th e-mail, I
24	think he said at that point there was a handful that had
25	certified undated but most did not. By June 27th that

1	number was down to nine. By June 29th that number was down
2	to four. By July 1 that number was down to three. If the
3	expectation is that the Department is going to sue county
4	boards every time there is a disagreement, there will be a
5	flood of litigation. It is not a productive way and there
6	is no need for it, and there is nothing that requires it.
7	As to the specific statutes that the
8	counties believe required the Department to act more
9	expeditiously, not only do they misread those statutes, but
10	those statutes confirm exactly what I was just saying about
11	the lack of discretion with respect to certification.
12	So the one that they've cited most commonly
13	in their brief is 25 P.S. 3157 which provides two days for
14	an aggrieved person to challenge a decision of any county
15	board regarding the computation or canvassing of the
16	returns. It does not permit challenges to the
17	certification.
18	And the reason for that as this Court has
19	cited and I'll get to it in a minute is quite clear. All
20	discretion happens at the computation and the canvassing
21	stage. There is no expectation under the Election Code
22	that a board or that any ballot that meets the standards
23	for computation or canvassing or even more that a Court has
24	ordered must be canvassed and be counted can on the back
25	end be removed at the certification stage. There is not an

1	existing process for that because that is not how the
2	Election Code works.
3	As this Court said in In re: 2003 Election
4	for Jackson Township Supervisor, 3157 requires immediate
5	resolutions of disputes that prevent certification. 3157
6	is to have everything resolved in advance of certification.
7	It is not a process for challenging certification because
8	there is no expectation under the Election Code that
9	certification is anything other than a ministerial there
10	is no expectation that ballots that had been adjudged to be
11	eligible for computation and canvassing will be removed at
12	the certification stage.
13	And counsel for Fayette asked Mr. Marks are
14	computation, canvassing, and certification different stages
15	and they are. 3157 is clear that it applies to computation
16	and canvassing. 3157(d) separately refers to staying
17	certification pending certain challenges. There is no
18	ambiguity that when we are talking about computation and
19	canvassing, that does not include certification.
20	So the statute that they have pointed to
21	saying we should have proceeded under this, you had two
22	days, it's plainly inapplicable and it confirms our point
23	that once you have canvassed and computed certain ballots
24	there is no additional
25	JUDGE COHN JUBELIRER: So your point is that

1	3157 specifies that it's an order or decision of any county
2	board regarding the computation or canvassing of the
3	returns or recount or recanvass thereof and that there are
4	different things that canvassing and computation are not
5	certification
6	MR. BOYER: Correct.
7	JUDGE COHN JUBELIRER: because they're
8	two separate things? Okay.
9	MR. BOYER: Absolutely. And as it applies
10	to absentee and mail-in ballots, the decision as to what
11	ballots are canvassed as I mentioned earlier is controlled
12	by 3146.8 paragraph (g)(3). You count ballots that are
13	canvassed unless there is an error on the face of the
14	ballot.
15	For example, you have multiple votes or
16	something like that. Those ballots are canvassed. The
17	ballot meets the standards for canvassing, meets the
18	standards for counting. There is no dispute that ballot
19	must be reflected in the certification of election results.
20	So in addition to the reading of the
21	Election Code that I walked through between 3146.8, 3154,
22	3157 is even further evidence that there is no expectation
23	of discretion that will happen at the certification stage
24	with respect to what ballots have been canvassed and
25	counted. If they are canvassed and counted, they must be

1 certified.

I'd like to move now to our second count which is the count for declaratory and injunctive relief and walk through a bit more broadly what it is that the Election Code requires, not just this Court's June 2nd order but stepping back what it is that the Election Code requires with respect to ballots that a voter has failed to write a date on the return envelope but otherwise are timely and otherwise have no deficiencies or irregularities as Your Honor described in the June 2nd order.

Now, there's been a great deal of attention paid to Section 3146.6 which is the section that describes the process by which a voter completes an absentee. That one is specific to absentee ballots. There is a parallel section with substantively identical language for mail-in ballots, and that's the section that's been alluded to that says a voter shall date the return envelope. That section alone does not dictate whether a ballot that's missing or a return envelope that's missing a date meets the conditions for canvassing.

As I mentioned earlier, the process that describes canvassing or rather the section that describes canvassing is not 3146.6, but instead is 3146.8 and specifically paragraph (g)(3) and that section says that a declaration -- excuse me, a ballot may be canvassed if the

1	declaration's return envelope is sufficient. The word is
2	is sufficient. And to understand the consequences of these
3	two statutes, they must be read together.
4	Under the Statutory Construction Act, we are
5	directed to read statutes in conjunction under section 1
6	Pa.C.S. 1932. And I think the Supreme Court's decision in
7	the Pennsylvania Democratic Party versus Boockvar is
8	illuminative of how this interpretative methodology must
9	proceed.
10	There was a question there as to whether
11	ballots, absentee and mail-in ballots in particular, can be
12	counted if a voter has failed to use the inner secrecy
13	envelope, meaning they have omitted that and they have put
14	their ballot directly in the return envelope. There just
15	as here there is language saying a voter shall do that. A
16	ballot needs to be in the inner envelope. The inner
17	envelope shall be in the outer envelope, and that's the
18	process for a voter to return.
19	That section alone did not dictate the
20	Supreme Court's analysis of this question. Instead it read
21	that section in tandem with the canvassing section which is
22	again 3146.8 to determine what exactly the legislative
23	intent was; and there because in the canvassing section
24	there is specific language that says if when a county is
25	precanvassing and they can determine who cast a ballot,

1	that ballot needs to be invalidated.
2	So by implication the ballot is missing a
3	secrecy envelope even though there's nothing in the
4	canvassing section that says, you know, toss out ballots
5	without a secrecy envelope. The clear implication of the
6	canvassing section's direction that if you can determine
7	who cast a ballot that it needs to be voided informed the
8	Court's analysis of what's to happen with ballots lacking
9	the inner secrecy envelope.
10	So following the exact methodology that the
11	Supreme Court used in PDP v. Boockvar, and the cite there
12	for reference is 238 A.3d at 378, shall date alone does not
13	dictate the consequences. The canvassing section that
14	binds the counties and dictates their determination of
15	whether a ballot meets the standards for precanvassing says
16	the declaration must be sufficient.
17	Now, sufficient, of course, is not the same
18	as complete, is not the same as a ballot must perfectly
19	comply. What sufficient means is that the declaration must
20	be adequate for its purpose; and the statute, the Election
21	Code, is quite clear about what the purpose of the
22	declaration is.
23	In 3146.4 for absentee ballots and 3150.14
24	for mail-in ballots, the statutes identify what the purpose
25	of the declaration is; and that's for the voter to attest

1	that they are qualified to vote, that they have not already
2	voted. A signature alone is sufficient for that purpose,
3	and the Election Code itself provides that answer.
4	25 P.S. 3553 says that someone alone
5	excuse me, someone who only signs the declaration envelope
6	if it is false, that's sufficient for prosecution for any
7	consequences that may follow. It is the signature, not a
8	signature and a date that confirms the voter is everything
9	that the declaration says the voter is.
10	So when we are determining sufficiency by
11	the plain text of the Election Code, all of the answers for
12	what the purpose is and what the Election Code and what the
13	General Assembly deemed sufficient for that purpose are
14	straight in the text of the Election Code. The shall date
15	language that most of the county commissioners referred to
16	as directing their discretion here is not by itself what
17	dictates the answers.
18	You know, but even, Your Honor, if reading
19	the shall date language and the sufficiency language
20	together, if there's a conclusion that the language isn't
21	clear but instead there is some sort of ambiguity. Again,
22	following the Statutory Construction Act's directions for
23	how we approach ambiguous statutory language, we end up in
24	the exact same place.
25	For example, under 1 Pa.C.S. 1922, paragraph

1	1, the Statutory Construction Act directs we are to avoid
2	statutory interpretations that produce absurd results. As
3	you've heard from Mr. Marks, as you heard from the County
4	Commissioners from Berks, from Lancaster, across the board
5	or I'll say nearly across the board, counties do not review
6	the accuracy of the date. They do not determine if the
7	date that the voter writes is right. In fact, they don't
8	even have a method to do that.
9	If a voter writes May 10th, a county board
10	has no way of confirming that that was, in fact, the date
11	that the voter signed the ballot if the date of the
12	signature is the date that the statute otherwise
13	contemplates. It is an absurd result to think that the
14	Election Code cares deeply about the presence of a date if
15	it cares not what that date says.
16	Additionally, there are other instances if
17	we are to rely only on shall as dictating the answer here
18	of absurd results that would follow. For example, for
19	those who vote in person and this is again in our brief
20	they are directed that they shall close the door behind
21	them. If they don't, it doesn't state what the consequence
22	is.
23	But under an interpretation that shall by
24	itself dictates the answer here, if you apply that
25	throughout the Election Code, you end up in a situation

1	where voters who don't fold their ballots right, voters who
2	don't fully close the door behind them, their votes will
3	also be invalidated.
4	Additionally, if there is ambiguity here,
5	the Supreme Court has said repeatedly including in
6	Pennsylvania Democratic Party v. Boockvar and Your Honor
7	said this in the June 2nd Memorandum Opinion when there are
8	ambiguities in the Election Code, we interpret them to
9	effectuate the statute's purpose; and that means we avoid
10	disenfranchising voters for minor irregularities. And
11	there is no doubt that omitting a date where the content of
12	the date does not even matter to the counties is a minor
13	irregularity.
14	Now, you heard some examples of what
15	function the date might serve. For example, you heard,
16	well, there may be someone who died before Election Day and
17	their daughter or someone else, you know, cast a ballot in
18	their name and sent it in. In that instance no matter what
19	date is on the ballot, that vote will not count. A voter
20	who dies before Election Day cannot vote. Same with a
21	voter who moves out of state.
22	Across the board voters must meet the
23	eligibility criteria as of Election Day. So the date, you
24	know, if we're trying to figure out, well, you voted on May
25	24th May 10th and you left on May 12th, then, you know,

1	how do we reconcile all this? None of that matters. The
2	date is not in any way instructive as to whether the vote
3	that was cast should be counted.
4	And no one, whether it was in Migliori,
5	whether it was in McCormick, whether it was today, no one
6	has come up with a function for the date that is relevant
7	to whether the vote is valid; and, of course, that is
8	further confirmed by the fact that counties regularly,
9	including the Respondents here, count ballots independent
10	of the accuracy of the date. And, as Your Honor mentioned
11	or wrote in the June 2nd opinion, it's hard to find that
12	the date is anything more than a minor irregularity when
13	its accuracy is unimportant.
14	JUDGE COHN JUBELIRER: Do you have a
15	position about whether a challenge could be made to ballots
16	that, for example, include a birth date instead of a date
17	that's a possible signing date? Is that something that
18	could be challenged by a candidate or a voter?
19	MR. BOYER: I think it could be challenged.
20	I don't think that challenge would succeed. I don't think
21	the Election Code contemplates you know, it says sign
22	and date. Of course it doesn't say what date. Counties
23	treat that to mean any date. And I think even if there was
24	arguments to be made that, all right, well, it means X date
25	and so if anyone puts a different date, you know, their

1	vote doesn't meet the statutory criteria.
2	Perhaps I think it would still be the case
3	that the date doesn't matter because it is not it
4	doesn't make the declaration sufficient. The date is
5	really beside the point when we're determining the
6	sufficiency of the declaration which again is the language
7	that dictates which absentee and mail-in ballots counties
8	are to canvass.
9	Count two, Your Honor, we've not only sought
10	declaratory and injunctive relief as a matter of what the
11	Pennsylvania Election Code requires but, of course, is in
12	addition to what federal law requires.
13	I don't think I need to spend too much time
14	on this point, Your Honor, because the June 2nd opinion
15	that Your Honor wrote, everything that was written there
16	applies equally here because the definition of vote under
17	101(e) this is 52 U.S.C. 101(e) which is the federal
18	statute at issue applies to the certification process
19	given how that statute defines vote, and it specifically
20	says the protections under the relevant statute apply all
21	the way through the final certification of the election.
22	So I'll finish and I'll respond to other
23	points as needed on rebuttal, but I do want to make sort of
24	this overarching point about what this case is about.
25	JUDGE COHN JUBELIRER: And just before you

1	do that, we heard today that a recertification in some
2	counties, I think for example Berks, could end up changing
3	the results that have been certified by the counties for
4	certain positions such as state committee people or other
5	elections that didn't cover the whole county.
6	Is that a concern here that an order from
7	this Court at this time would upset that and the
8	expectations that the individuals who have been certified
9	as winners by the county would then find themselves not?
10	MR. BOYER: So I'll say I have not thought
11	about that as much. I can provide more information as the
12	Court wants, but I'll say two points that I think are
13	relevant.
14	The basis for count one, the mandamus
15	action, is because the Secretary under Section 3158 and
16	3159 must receive accurate certifications of election
17	results for the elections that she also is responsible for
18	certifying. She has no responsibility and no statutory
19	relationship to those elections. So I think there is not
20	much that she can do with respect to them.
21	Under the statute, she must receive from
22	counties certified results for the races that she also has
23	responsibility for, and she doesn't have responsibility for
24	those. And I think also generally, you know,
25	certifications, final certifications of elections are

1	generally thought to moot election [inaudible].
2	For example, the Migliori petition that's
3	been mentioned a number of times and there are arguments
4	being made that no matter whether the Third Circuit
5	decision was right or wrong and whether the Supreme Court
6	might otherwise have granted review, the candidates have
7	conceded the election result was certified. The case is
8	moot.
9	JUDGE COHN JUBELIRER: Is the case moot?
10	Has one of those candidates taken a position in Lehigh
11	County Court?
12	MR. BOYER: One of the candidates there did
13	concede the election, yes. And I am not saying the
14	Department's position right now is the case is moot.
15	JUDGE COHN JUBELIRER: Correct.
16	MR. BOYER: I'm saying there is a petition
17	from the candidate who did concede saying this petition is
18	moot.
19	JUDGE COHN JUBELIRER: I see.
20	MR. BOYER: So I'd like to conclude for now
21	with where I started which is what this case is about. As
22	I mentioned at the outset, this is not a case where the
23	Secretary believes she can order the counties to do certain
24	things. If she had that power, we would not be before Your
25	Honor asking for an order that the counties do certain

1	things.
2	The testimony that's been elicited, the
3	arguments that have been made about the primacy of the
4	counties relative to the Secretary is all beside the point.
5	The Secretary, the county, we are all subject to the
6	Election Code as finally interpreted by this Court and the
7	Supreme Court of Pennsylvania and, of course, federal law
8	ultimately as determined by the federal courts.
9	At the same time the Secretary, even if she
10	has no independent authority to receive elections and say
11	those ballots are null and void, she is not a rubber stamp.
12	When the Secretary receives certifications, whether there's
13	clerical errors where it's clear a county has excluded
14	certain ballots maybe inadvertently or inadvertently, the
15	Secretary returns to the counties and addresses that and
16	raises that point.
17	Where there is clear case law saying ballots
18	are being excluded that are lawful and, in fact, an order
19	that says the very ballots at issue here must be canvassed
20	and there is no further discretion under the Election Code,
21	the Secretary simply has not received from the counties the
22	certifications that they are required to provide to her
23	under 3154 and the following statutes and in turn she
24	cannot complete her own statutory duties to certify the
25	accurate election results.

Appendix 22

1	Unless there are further questions now, I'll
2	save the rest of my points for rebuttal.
3	JUDGE COHN JUBELIRER: Okay.
4	MR. BOYER: Thank you, Your Honor.
5	MR. BUKOWSKI: May it please the Court, Your
6	Honor. It's been my pleasure to represent the Berks County
7	Board of Elections and the Lancaster County Board of
8	Elections before Your Honor today.
9	We're here under circumstances where no
10	candidate and no voter is challenging the final certified
11	results timely submitted by the Berks County Board of
12	Elections, the Lancaster County Board of Elections, and the
13	Fayette County Board of Elections; and yet Petitioners are
14	seeking a writ of mandamus and declaratory and injunctive
15	relief from this Court to enforce what I understood until
16	today to be the Petitioners' directive based on no
17	statutory authority.
18	But now I understand that Petitioners are
19	not trying to enforce their directives to the county Boards
20	of Elections but trying to enforce this Court's June 2nd,
21	2020 [sic] order in the McCormick challenge, and I'll
22	address that as we get into the elements of Petitioners'
23	claim for emergency relief.
24	There's no dispute about the timeline, but
25	you would have thought from counsel's argument that the In

1	re: Canvass decision in November, 2020, never occurred. I
2	didn't hear him mention that one time during his argument
3	to this Court and that case at least on the issues before
4	the Court is binding on this Court and the county Boards of
5	Elections.
6	In that case there clearly was a
7	four-to-three majority of the Pennsylvania Supreme Court
8	that concluded under the plain language of the Pennsylvania
9	Election Code that undated ballots, undated absentee and
10	mail-in ballots with no other defects shall not be counted
11	in any election after November, 2020.
12	JUDGE COHN JUBELIRER: Well, would you agree
13	that it is a plurality decision?
14	MR. BUKOWSKI: Not on that issue, Your
15	Honor. There was a three it's three, three, one; and if
16	you take the three Justices and the Justice Dougherty's
17	opinion
18	JUDGE COHN JUBELIRER: Well, I understand
19	but what you're doing I mean, and my question let's take
20	it in steps.
21	MR. BUKOWSKI: Sure.
22	JUDGE COHN JUBELIRER: It is a do you
23	disagree that in the opinion announcing the judgment of the
24	Court in that case it states, we conclude the dating, the
25	declaration is a directory rather than a mandatory

1	instruction, and thus the inadvertent failure to comply
2	does not require that ballots lacking a date be excluded
3	from counting?
4	MR. BUKOWSKI: I agree that that opinion
5	announcing the judgment of the Court says that.
6	JUDGE COHN JUBELIRER: Okay.
7	MR. BUKOWSKI: And that was signed on by
8	three Justices. Justice Wecht signed on to that opinion
9	for the limited purpose of applying
10	JUDGE COHN JUBELIRER: Right.
11	MR. BUKOWSKI: it to that election.
12	JUDGE COHN JUBELIRER: But that doesn't
13	change then that it was a plurality opinion that then I
14	mean I think it at least is and I believe that there's been
15	some comments that the it's, well, a bit confusing.
16	MR. BUKOWSKI: I think it's not confusing,
17	Your Honor, if you look at if you look at Justice
18	Wecht's opinion, his opinion concurring in the result where
19	he says, I agree this election I agree but going forward
20	and I'll quote from that.
21	JUDGE COHN JUBELIRER: Yes. And I mean
22	that's fine and Justice Dougherty, I've read, of course,
23	all of their opinions. But there is also case law that
24	sort of cautions if you will against overly interpreting
25	should I say the effect of plurality opinions that they

1	to the extent that we interpret them to establish binding
2	precedent going forward. I think we have to proceed with
3	caution.
4	MR. BUKOWSKI: I don't
5	JUDGE COHN JUBELIRER: That's all I would
6	say with that, and I'm fine for you to quote the language
7	of what is not a majority opinion but what is a concurring
8	opinion.
9	MR. BUKOWSKI: And I think what I
10	understand what Your Honor is saying; and I would commend
11	Your Honor to review, although it's not binding on this
12	Court, two of Your Honor's colleagues on this Court.
13	JUDGE COHN JUBELIRER: In the Ritter?
14	MR. BUKOWSKI: In the Ritter case.
15	JUDGE COHN JUBELIRER: Right.
16	MR. BUKOWSKI: Came to the exact result I'm
17	urging you to come to today. And so I adopt wholesale
18	their analysis of In Re: Canvass and urge you to do the
19	same, and that would make three of you and who knows what
20	the rest of the Court would do. Obviously Judge Wojcik had
21	his own view on that and set it forth there.
22	But I do believe that Judge McCullough's
23	opinion in Ritter is persuasive and that this Court should
24	take a hard look at that analysis. And they concluded
25	there that there's a majority as to the narrow issue, and

1	I'm only talking the narrow issue on whether the statute
2	says whether the statute requires that an undated ballot
3	be rejected.
4	There is a sliver of light certainly on the
5	federal statute question that In Re: Canvass left open;
6	and the opinions, you know, Justice Wecht's opinion, you
7	know, mentioned it but said I'm not going to step into that
8	without the benefit of full advocacy and I think that was
9	wise. But I didn't hear really any thorough analysis or
10	argument from opposing counsel on that point.
11	But so on that narrow issue I do and
12	ironically I guess the opinion in Ritter, the unreported,
13	unpublished opinion in Ritter by Judge McCullough was
14	January of 2022. It involved the same election as Migliori
15	which was the federal court case which reached a different
16	result, and I will address briefly what's before the
17	Supreme Court now because I think the timeline is pretty
18	clear though that we established through the record today
19	and the stipulated facts.
20	You know, the guidance from the Department
21	all the way up through Election Day was don't count undated
22	ballots. You know, the timing being what it is, May 20th
23	was three days after Election Day, the Migliori Third
24	Circuit opinion comes out. That mandate never takes
25	effect. The Supreme Court stay took effect on May 31st

1	before the mandate became effective. The stay was lifted
2	June 9th.
3	Meanwhile these county Boards of Elections
4	are facing deadlines trying to timely certify the results
5	of this election which Migliori really doesn't address
6	because it's a different election, and I think the opinion
7	makes it clear that that decision applies only to that 2021
8	judicial race in Lehigh County although certainly the
9	analysis, you know, one could argue would apply.
10	JUDGE COHN JUBELIRER: How could you argue
11	that it would not apply?
12	MR. BUKOWSKI: Well, I would argue that it's
13	wrong.
14	JUDGE COHN JUBELIRER: Well, I mean but
15	that's arisen and I'm sure that, you know, that there could
16	be disagreement and I respect that with regard to the June
17	2nd order and the opinion that went with that that, you
18	know, you thought that was incorrect, too.
19	MR. BUKOWSKI: Right.
20	JUDGE COHN JUBELIRER: So there are I don't
21	think well, certainly at the time I don't want to
22	prejudge. So there's always a question as to whether a
23	judicial decision when you look back on it you might
24	whatever. But otherwise what we think of in, you know,
25	stare decisis has particularly I think if not stare decisis

1	let's say that certainty
2	MR. BUKOWSKI: Sure.
3	JUDGE COHN JUBELIRER: that opinions that
4	can be read, understood, and applied in the future so that
5	all of these hardworking people who are trying to make
6	decisions now how to apply the statutes and the law when
7	they're counting votes and so the voters know what's
8	required of them is really important.
9	And so to that end, I wonder why or if you
10	would agree that having a decision on the merits in a case
11	like this where probably with any decisions in our original
12	jurisdiction here appealed as of right to our Supreme Court
13	might provide a decision that could be then applied with
14	more certainty in these upcoming elections?
15	MR. BUKOWSKI: I was hoping you didn't ask
16	that question because thinking about coming in here today,
17	but I knew you would. And let me answer it to say
18	certainly, certainly if this Court issued a decision on the
19	merits in this case which is subject obviously to appeal as
20	of right to the Supreme Court, as the Court indicated would
21	provide some clarity and at least a means by which Boards
22	of Elections could, you know, hopefully sooner rather than
23	later get clearer guidance on all the relevant issues.
24	What my response to your question, however,
25	is, we're not here unfortunately I think probably the

1	best chance for that decision on the merits to have been
2	made was the McCormick case because it was a real challenge
3	by a real voter, a real candidate who there's no issue
4	on timeliness. All the Boards of Elections were parties.
5	The Acting Secretary was a party.
6	And I understand what happened and the
7	voluntary discontinuance, but so therefore I believe this
8	is not an actual case or controversy. It's I'll use the
9	vernacular a ginned up case or controversy, and I don't
10	mean that in a pejorative way. I'll assume good faith on
11	the part of the Acting Secretary that she's trying to, you
12	know, provide some clarity, too.
13	If I were bringing the action, I would have
14	teed it up a little differently and said maybe for
15	declaratory judgment and said, you know, 64 counties ruled
16	one way, three ruled another way. We need clarity.
17	JUDGE COHN JUBELIRER: Well, then I was
18	going to ask because there is a request for declaratory
19	relief and one of the requirements in the Election Code
20	or let me just ask how you interpret in the Section 2642,
21	Powers and Duties of County Boards, it says, you know, to
22	the end that primaries and elections may be honestly,
23	efficiently, and uniformly conducted and whether you
24	perceive there to be a concern?
25	I mean and the Secretary, of course, takes

1	the same oath or at least an oath that the county board
2	officials take to protect, obey, and defend the
3	Constitution and the laws. So as she's certifying her
4	results, she has as well a duty arguably, or we can see if
5	you disagree.
6	But anyway the concern about uniformity and
7	whether there's a concern if in three counties or five
8	counties or ten counties certain ballots are not counted
9	and in the remaining counties those ballots are counted and
10	does that create an issue either under the Election Code or
11	the Constitution?
12	MR. BUKOWSKI: I think my answer to that is
13	this Court should not take on and issue a declaratory
14	judgment. This is an advisory opinion that there's no
15	candidate challenging, there's no voter challenging.
16	JUDGE COHN JUBELIRER: Are candidates and
17	voters the only parties that can challenge?
18	MR. BUKOWSKI: I don't believe that's the
19	language in the statute says an aggrieved person. I don't
20	know whether
21	JUDGE COHN JUBELIRER: The language in which
22	statute?
23	MR. BUKOWSKI: In the statute that allows
24	for appeals from let me get it appeals from the
25	decisions of Boards of Elections. I have it here.

1	JUDGE COHN JUBELIRER: I think you're
2	looking at 3146.8 which refers to canvassing.
3	MR. BUKOWSKI: I think 3157 is what I was
4	JUDGE COHN JUBELIRER: 3157, yes, and it was
5	from decisions of the county board. But it still says
6	regarding the computation or canvassing of the returns.
7	MR. BUKOWSKI: I agree.
8	JUDGE COHN JUBELIRER: How would you read
9	that? Maybe I should ask your colleague because I think he
10	made a very clear distinction when questioning Mr. Marks
11	about the distinction between canvassing and certification.
12	MR. BUKOWSKI: I think canvassing, you know,
13	counting votes, whether or not to count votes as part of
14	the canvass is a decision. So the decision not to count
15	the undated ballots in my view is a decision by the Board
16	of Elections with respect to canvassing. That decision,
17	you know, the statute provides there's two days for any
18	aggrieved person to challenge that decision.
19	I argue that June 6, 7th, and 8th,
20	respectively, were the dates when those decisions were made
21	final when these county Boards of Elections submitted their
22	certified results to the Secretary and that, within two
23	days if somebody was going to challenge that including the
24	Secretary and I'll assume without conceding that the
25	Acting Secretary could be an aggrieved person under the

1	statute.
2	But assuming that to be true, then by June
3	10th then she would have had to have filed an action to
4	this Court because this Court's May 27th administrative
5	order said because there is a statewide recount now all
6	appeals, even though it's original jurisdiction, all
7	appeals will come to this Court.
8	I guess I alternatively argue that the
9	appropriate date would have been the date on which the July
10	1st date on which I mean you could argue serially the
11	first time Berks County said we're not going to do it, you
12	know, because it didn't need to be committed to writing or
13	the first time Lancaster or Fayette County said we're not
14	going to recertify, that would have been a decision of the
15	respective boards from which such an appeal would have been
16	required to be filed within two days.
17	And lastly I think at least as to Lancaster
18	and Berks they sent correspondence July 1st for Berks, July
19	5th each from one of the solicitor in Lancaster was July
20	5th, the first assistant deputy in Berks was July 1st. And
21	even if you extended grace to those dates I think
22	Fayette's might have been earlier but even if you said
23	okay, two days from those dates, you know, we're at July
24	11th and it's not timely.
25	So even a lot of assumptions in favor of the

1	Acting Secretary and Department make this case untimely
2	filed, but I think it also has the hallmarks of that we've
3	argued a lack of an actual case or controversy. And I'll
4	come back to the mandamus later, but because the Court is
5	focused on the declaratory judgment
6	JUDGE COHN JUBELIRER: But we can look at
7	both. I just mentioned declaratory so
8	MR. BUKOWSKI: What I'll say is that the
9	Declaratory Judgments Act precludes, you know, relief when
10	there's not an actual case or controversy. And I guess the
11	Secretary's arguing that she's aggrieved somehow; but she's
12	really not because when you look at the Code, the certified
13	results were submitted. She has no discretion.
14	If anybody doesn't have discretion at this
15	stage of the 2022 May primary it's the Acting Secretary
16	because these three boards have sent her the certified
17	results, and Mr. Marks did testify when the Secretary gets
18	certified results from the county boards she has no
19	discretion. She has the ministerial duty to certify the
20	election.
21	JUDGE COHN JUBELIRER: I think that's a
22	legal question.
23	MR. BUKOWSKI: No. And I'm not suggesting
24	that that's an admission, but that's the argument is that
25	the statute says that and provides for that. And having

1	received the certified results from these county Boards of
2	Elections, the Secretary had an option at that point,
3	certify; or if she believes what she's asserting now,
4	appeal to this Court within two days not a month and a week
5	or so after those results were received.
6	So it's not timely and it's not an actual
7	case or controversy because there's no I still think
8	there has to be a candidate or, you know, some outcome that
9	would be hanging in the balance for this.
10	JUDGE COHN JUBELIRER: Did all of the
11	counties do what Berks County did and notify the people who
12	voted by mail or absentee that their ballot was received
13	but without a signature or date so that they had an
14	opportunity to cure?
15	MR. BUKOWSKI: I believe what Commissioner
16	Leinbach was testifying to was that when
17	JUDGE COHN JUBELIRER: Oh, was it
18	MR. BUKOWSKI: It was Berks.
19	JUDGE COHN JUBELIRER: It was Berks, okay.
20	MR. BUKOWSKI: It was Berks. But when the
21	SURE system itself puts, sends the notices when those are
22	scanned in, then that will
23	JUDGE COHN JUBELIRER: So the SURE system.
24	MR. BUKOWSKI: Notifies voters as to what
25	the status it will send an e-mail if they included an

1	e-mail address.
2	JUDGE COHN JUBELIRER: Correct.
3	MR. BUKOWSKI: And then also there's a way
4	for voters to check the status of their ballot, and then
5	they can come in.
6	JUDGE COHN JUBELIRER: But that status is
7	more than just it was received?
8	MR. BUKOWSKI: Correct.
9	JUDGE COHN JUBELIRER: It will tell them if
10	it was if it did not have a date or did not have a
11	signature?
12	MR. BUKOWSKI: Yeah. The answer to your
13	question is I see Mr. King nodding no. I know it is for
14	Berks. I believe it is for Lancaster, but I don't want to
15	swear to it and those folks have left.
16	JUDGE COHN JUBELIRER: Yes. And he maybe
17	can answer later and that wasn't put on the record, but I
18	was not aware of that if it does exist.
19	MR. BUKOWSKI: And then going back to let
20	me shift because I want to come back to this Court's order
21	on June 2nd
22	JUDGE COHN JUBELIRER: Yes.
23	MR. BUKOWSKI: because I was left my
24	first thought and then my second thought was, wow, after
25	hearing the way the Secretary interpreted this Court's June

1	2nd preliminary injunction order because I will come back
2	to that.
3	But on the mandamus piece, I think, you
4	know, the canvassing and counting of ballots is clearly an
5	act of discretion and whether to count ballots or set aside
6	undated ballots also is an act of discretion. And I think
7	what their argument is, is no it's not because the Court
8	told you to do this.
9	But we cited Appeal of McCracken which is a
10	1952 Pennsylvania Supreme Court case that says canvassing
11	and computing necessarily embrace acts of discretion, and
12	then it cites the older case which we also quoted Boord v.
13	Maurer which was I think 1941 or so Pennsylvania Supreme
14	Court.
15	And based on that alone and then the
16	requirement that mandamus is improper when there's
17	discretion, that should result in the denial/dismissal of
18	count one of their petition.
19	JUDGE COHN JUBELIRER: Okay. And that's
20	based on the idea that the canvassing and counting is
21	included in the certification?
22	MR. BUKOWSKI: Correct.
23	JUDGE COHN JUBELIRER: Okay. So those are
24	different
25	MR. BUKOWSKI: Although I guess you only
I	

1	certify once you canvass and count; and so once your
2	canvassing and counting is done, then you certify. So the
3	discretionary and what they're complaining about is the
4	not counting these votes. So I know they're saying and
5	then you certified votes without counting them, but you
6	can't get around the fact that the complaint is that these
7	counties did not count undated absentee and mail-in
8	ballots.
9	JUDGE COHN JUBELIRER: Okay.
10	MR. BUKOWSKI: And their rationale for that
11	and this is where I come back to this Court's June 2nd,
12	2020 [sic] order in McCormick. First as Your Honor pointed
13	out in the colloquy with counsel that that was a
14	preliminary order, and I think it's instructive to quote
15	from parts of Your Honor's opinion in that because it sheds
16	light on what the meaning of the order itself and
17	obviously no one knows better than you do what the Court
18	meant.
19	But on page 21 of your opinion, you're
20	talking about the likelihood of success on the merits prong
21	of the requested preliminary injunction; and you concluded
22	that based on the review of the undisputed facts and the
23	parties' arguments and relevant case law, the Court
24	concludes Petitioners have established they are likely to
25	succeed on the merits.

1	And I think it's helpful to read the rest of
2	that sentence because Your Honor said, because they have,
3	quote, demonstrated that substantial legal questions must
4	be resolved to determine the rights of the party, end
5	quote; and then there's the cite to the SEIU case and then
6	going on is and their claim is, quote, more than merely
7	viable or plausible, end quote. And so that was the
8	Court's preliminary assessment of the arguments.
9	And I don't think any of the counties I
10	know Berks and Lancaster had no issue with the preliminary
11	order to say okay, let's segregate and count these and
12	submit two tallies. I don't think but I think I understood
13	what the Secretary is arguing now is by saying the magic
14	words canvass, that the Court ordered these counties to
15	certify because they were required as part of this Court's
16	order in Canvass to count.
17	And once they've counted them, the genie is
18	out of the bottle and they've got to then certify those
19	counted votes; and they have no discretion despite the fact
20	that this Court at the very end of Your Honor's opinion the
21	concluding paragraph states thus when a final decision on
22	the merits of whether the ballots that lacked a dated
23	exterior envelope must be counted or not, the Acting
24	Secretary will have the necessary reports from the county
25	boards.

1	And then Your Honor went on in the order to
2	say what it says, and it does say if they're not already do
3	so. Doing so segregate the ballots that lack a dated
4	exterior envelope, canvass those ballots. Assuming there
5	are no deficiencies or irregularities that would require
6	otherwise, report the two vote tallies to the Acting
7	Secretary, include votes with from dated and undated.
8	And based on all the other language and it's
9	going to be for Your Honor to decide, I cannot imagine that
10	that order meant what the Acting Secretary says it means
11	and then what the results from that are that this Court
12	concluded on the merits and made a final decision that
13	these undated ballots must be counted and therefore
14	included in the certified results.
15	And if that's their argument, it's up to the
16	Court to decide whether that's what this Court intended. I
17	guess I would ask on behalf of the Berks County and
18	Lancaster County if that's what this Court ordered, the
19	Court should reconsider that order or clarify that order.
20	The Court denied the request to vacate it, and I'd even
21	renew that motion to vacate the order.
22	JUDGE COHN JUBELIRER: Right.
23	MR. BUKOWSKI: As I believe, that wasn't
24	what you intended. I think clarification probably does it.
25	JUDGE COHN JUBELIRER: Well, and yes, I

1	stand by my opinion and order of course.
2	MR. BUKOWSKI: Of course. And I think
3	clarity in this case as to what that meant
4	JUDGE COHN JUBELIRER: Well, every opinion
5	and order of a Court in a sense takes on a life of its own
6	as it is interpreted and applied in the future.
7	MR. BUKOWSKI: Right.
8	JUDGE COHN JUBELIRER: And
9	MR. BUKOWSKI: And I do think it's helpful
10	that it was a preliminary order only because
11	JUDGE COHN JUBELIRER: Although it was an
12	extensive analysis of the likelihood of success on the
13	merits.
14	MR. BUKOWSKI: It was. It was. And what I
15	would say is at that point in time, again June 2nd, the
16	Court did not have the benefit of Justice Alito's
17	dissenting opinion in the
18	JUDGE COHN JUBELIRER: Although isn't his
19	dissenting opinion also qualified with the fact that it was
20	preliminary, that he was essentially relying on the request
21	for stay that had been given which expressed what
22	Pennsylvania law was at the time and he was relying on that
23	interpretation?
24	MR. BUKOWSKI: I do think what he and I
25	looked at it very closely. I read that dissenting opinion
1	

1	and compared it to the Third Circuit's opinion. It's
2	certainly I was shocked when I reread preparing for
3	today how little the Third Circuit opinion breaks down the
4	elements of the statute in question the way Justice Alito
5	did in, you know, the elements one through five. There's
6	no discussion like that at all in the Third Circuit
7	opinion.
8	And so I do think for having it a few days
9	even Justice Alito's preliminary analysis and I think he
10	left some room there, but I think he's spot on when it
11	comes to analyzing elements I think it's two and five of
12	the federal statute in describing that you can't possibly
13	that statute does not really go to the qualifications of
14	a voter to vote.
15	It is the or this statute the dating
16	requirement is the act of voting itself and doesn't affect
17	the qualifications of the voter to vote, and therefore it's
18	kind of a circular argument that the Appellant in Migliori
19	and the Third Circuit adopted. And I think the concurring
20	opinion in Migliori I think was quite candid in pointing
21	out that Ritter conceded a couple points that he didn't
22	argue that really left no room.
23	But I think the statutory analysis that
24	Justice Alito did applies here, and this Court should take
25	that into account and revisit its preliminary analysis of

1	in McCormick as it contemplates where it will come down on
2	that because I think if it does so the analysis is such
3	that it becomes clear that the federal statute does not
4	apply to abrogate the dating requirement on those absentee
5	ballots.
6	JUDGE COHN JUBELIRER: Well, I'm not sure
7	that anything required the abrogation. It's an
8	interpretation if you will of the statutory requirement and
9	whether it's, you know well, we can
10	MR. BUKOWSKI: That's right. It was a
11	suggestion that that was not material to the qualification,
12	and what Justice Alito points out and I agree and urge the
13	Court to consider and agree as well is that that dating
14	requirement doesn't go to the qualification to vote. It
15	goes to whether the vote that was cast will be counted.
16	It's not disenfranchising.
17	It's not saying the voter, you know, was not
18	qualified to vote; and, therefore, it doesn't have the
19	effect let me just say that it doesn't have the
20	effect that the Third Circuit concluded it does. And,
21	therefore, the result is that that statute should not
22	result in county Boards of Elections being required to
23	count undated ballots.
24	I guess I'll leave conclude really with
25	and obviously we've filed extensive papers, but I think I'd

1	like to conclude with what I think is the key language in
2	the In re: Canvass decision from Justice Wecht's opinion.
3	And he goes back time and time again to the Court's
4	decision in the PDP case.
5	JUDGE COHN JUBELIRER: Before you conclude
6	just one final question and that is the difference between
7	and we can call them, you know, wrongly dated ballots or I
8	hate to let's say ballots that contain handwritten dates
9	on the envelopes that are incorrect
10	MR. BUKOWSKI: Okay.
11	JUDGE COHN JUBELIRER: or wrong
12	MR. BUKOWSKI: Sure.
13	JUDGE COHN JUBELIRER: and ballots that
14	do not contain handwritten dates on them on the outside
15	envelope.
16	MR. BUKOWSKI: Understood.
17	JUDGE COHN JUBELIRER: Is that what you
18	believe the Legislature intended in the dating requirement
19	and, if so, how is that helpful?
20	For example, let's say the Lancaster County
21	case and if the person there, if the daughter had put her
22	birth date, her mother's birth date on there, that wouldn't
23	have helped; but it wouldn't have been let me just say
24	this it wouldn't have been found not to be counted,
25	right? But it would not have enabled anybody to determine

1	whether it had been cast prior to her mother's death.
2	MR. BUKOWSKI: I believe that's absolutely
3	right, and she probably would not be facing criminal
4	charges.
5	JUDGE COHN JUBELIRER: Right. So how does
6	the dating requirement assist county boards in any way if
7	it's only those people who for whatever reason, and I'm
8	guessing inadvertently, forget to put a date down? Because
9	if people go to all the effort of doing everything else
10	correctly to vote, this is inadvertent, or inadvertently
11	write their birth date on the envelope, why should one be
12	counted versus one not; is that the legislative intent?
13	MR. BUKOWSKI: Right. And that's the
14	question that keeps coming up because time and time again
15	the Courts come back to that question and say, you know, if
16	you're counting incorrect dates, why aren't you why
17	should we not just say, you know, the date requirement is
18	immaterial and count them all?
19	Two answers I guess. One, the plain
20	language of the statute says it shall be filled out,
21	signed, and dated. Maybe that's not the answer the Court
22	would like to hear, but it's clear language
23	JUDGE COHN JUBELIRER: No. That's
24	MR. BUKOWSKI: and it's mandatory
25	language. And as you did hear uniformly I think from all

the Commissioners, you know, all those ballots that are
incorrectly dated as they're processed they're subject to
challenge.
And I'm going to make a prediction here I
guess maybe that's dangerous but because the Courts
keep saying, you know, that we, that counting the undated
ballots somehow means we should count or counting the
incorrectly dated ballots means we shouldn't, you know,
enforce the date requirement that's plainly written in the
statute, I suggest that's probably the next set of cases
that candidates are going to start challenging ballots that
have incorrect dates.
And then we're going to have hearings at
county Boards of Elections on that issue because I don't
think that's what the Legislature intended, and I think
what it intended is that it would be the date that the
ballot was signed. The instructions say that. The ballot
itself says today's date trying to comply with Justice
Wecht's concern or satisfy his concern that there be clear
language so the voter knows what's required and what the
consequences of not complying are.
And I think that ballot that's Joint Exhibit
1 does that. The instructions, we stipulated the
instructions are not in dispute here, that those do that.
I'm more familiar with the Berks instructions than

1	Lancaster, but I've seen them both. They both have
2	detailed instructions that say when you're voting, it's got
3	to be signed and dated or it will not count.
4	JUDGE COHN JUBELIRER: Okay. Well, you've
5	answered my question. Thank you.
6	MR. BUKOWSKI: Yeah. Okay. And it really
7	does come down to where I was going to conclude anyway
8	because the language, this language from near the end of
9	Justice Wecht's opinion it's on page star 1088 of the
10	Westlaw version, so it seems to be the second from the last
11	paragraph in his opinion before Justice Dougherty's
12	opinion.
13	And it says, quote, I've returned throughout
14	this opinion to our decision in PDP and I do so once more.
15	I maintained in that case that the Election Code should be
16	interpreted with unstinting fidelity to its terms and that
17	election officials should disqualify ballots that do not
18	comply with unambiguous statutory requirements when
19	determining noncompliance requires no exercise of
20	subjective judgment by election officials.
21	The date requirement here presents such a
22	case, and that is really and to me that's where you can
23	that distinguishes the undated from the incorrectly
24	dated ballots because it does not require any subjective
25	judgment by an election official to conclude this ballot is

1	missing a date and as opposed to trying to interpret
2	whether the date is correct.
3	So I do believe those incorrectly dated
4	ballots are subject to challenge, and we try and twist
5	ourselves in knots to come up with hypotheticals. And
6	Justice Wecht, you know, said the open-ended inquiry into
7	instead of applying the statute as written and, you know,
8	shall in the same sentence having two meanings, one for the
9	signature and one for the date, you know, we're twisting
10	ourselves in knots trying to come up with materiality, you
11	know, immaterial, minor, you know, discrepancy and words to
12	that effect.
13	JUDGE COHN JUBELIRER: So it's your position
14	because you see it in Justice Wecht in the final sentence
15	of his last footnote says it is inconsistent with
16	protecting the right to vote to insert more impediments to
17	its exercise than considerations of fraud, election
18	security, and voter qualifications require and that in your
19	opinion, although that may be correct under the way we've
20	interpreted the Election Code, that is up to the General
21	Assembly?
22	MR. BUKOWSKI: It is and he's calling on and
23	has called for clarification, and I think that's a good
24	idea. But the way it's written right now, it's got to be
25	enforced.

1	And because again I come back to where these
2	Boards of Election were by June 8th was Migliori's not in
3	effect. They're facing a deadline to certify. This
4	Court's opinion in my view did not intend to require
5	certification of the undated ballots. It never reached a
6	final decision on the merits and maybe Your Honor would
7	have gotten there eventually but by then we would have
8	had some other arguments to make about the statutory
9	interpretation.
10	And as I said previously, that's the case
11	that really was best teed up for this Court to make a
12	nonadvisory declaratory judgment. This is not the case.
13	Even though it might provide the clarity and get the issue
14	before the Supreme Court sooner rather than later, I urge
15	the Court to exercise restraint in not taking on that job
16	in this case.
17	JUDGE COHN JUBELIRER: And so essentially
18	you would ask us to issue an order dismissing
19	MR. BUKOWSKI: Correct.
20	JUDGE COHN JUBELIRER: the action?
21	MR. BUKOWSKI: Correct.
22	JUDGE COHN JUBELIRER: Okay. Thank you very
23	much.
24	MR. BUKOWSKI: And then I guess I would also
25	clarify that in doing so I would ask that the Secretary be

ordered to, you know, certify the results of the election.
JUDGE COHN JUBELIRER: Thank you.
MR. BUKOWSKI: Thank you, Your Honor.
MR. KING: May it please the Court. I'll
try not to repeat the excellent argument that my colleague
just made. I will say that with respect to this action, we
join in the request that this action be terminated, be
dismissed.
I think it's pretty clear what this action
is, Your Honor. It's simply an attempt to ask this Court
to modify the order that you entered in McCormick. The
order in McCormick did not and certainly Your Honor could
have included an order to certify those results. Had Your
Honor ordered the certification of those results, I would
suggest respectfully that there would have been that the
appeal that was taken and later discontinued and other
appeals would have been taken and that that matter with
respect to certification would have been in front of the
Court.
I would also suggest that the Secretary has
every ability she has done it on numerous occasions as
this Court knows she has every ability to file a King's
Bench action in front of the Supreme Court to get this
issue in front of them. She could do that tomorrow if she
wanted to. And I would suggest that it's likely that there

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1	ordered to, you know, certify the results of the election.
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6	just made. I will say that with respect to this action, we
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11	to modify the order that you entered in McCormick. The
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13	have included an order to certify those results. Had Your
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17	appeals would have been taken and that that matter with
18	respect to certification would have been in front of the
19	Court.
20	I would also suggest that the Secretary has
21	every ability she has done it on numerous occasions as
22	this Court knows she has every ability to file a King's
23	Bench action in front of the Supreme Court to get this
24	issue in front of them. She could do that tomorrow if she
25	wanted to. And I would suggest that it's likely that there

1	will be somebody there soon with respect to this issue.
2	This case is not the case, respectfully,
3	that should go up because this case in particular has other
4	problems with it. It has problems with respect to the fact
5	that Your Honor entered an order that didn't say to
6	certify. And so now what we have is we have a month and a
7	half later, almost two months later we have an action here
8	that is nothing more than a thinly veiled attempt to ask
9	you to modify your order beyond the Judicial Code's
10	provisions for the modification of an order.
11	So that case was discontinued. The case was
12	no longer pending. No one came back in that case. In the
13	McCormick Oz case, no one came back in that case and said
14	to Your Honor, Your Honor, would you please modify this and
15	require the certification of these results.
16	And so when you look at, for example,
17	there's a recent case in the Pennsylvania Superior Court
18	which I understand is not binding but it's illustrative and
19	also by Judge King in that Court that talks about this
20	30-day requirement. It had to do you've probably seen
21	it. It's a recent decision. It's published. It has to do
22	with someone asking for counsel fees after the conclusion
23	of a case, and it cites correctly the 30-day requirement,
24	the 30-day provision even though counsel fees seem to be
25	whether they're directly related to the case or not.

1	And that's exactly what's happening here.
2	This is an attempt by the Secretary, and she was the named
3	Respondent in the McCormick case. It's McCormick versus
4	Chapman, and then we have all these other, you know, Boards
5	of Elections. But she had every opportunity in that case
6	to do exactly what she's trying to do here. She could have
7	asked you to modify your order. She could have said order
8	them to certify it. She could have done all those things.
9	She didn't do that.
10	And in the absence of doing it, what she's
11	doing is she's doing it here; and this isn't the place to
12	do it. And this case has the great potential to expand the
13	powers of the Secretary of the Commonwealth beyond that
14	contemplated by the Legislature or even that addressed by
15	the Courts. So in this Court we've addressed in the past,
16	in the Fulton County case we've addressed the Secretary's
17	exercising powers that are beyond those granted by the
18	Legislature; and that's exactly what this is an attempt to
19	do.
20	The Secretary's duties are and this is
21	the reason why we asked that this matter be dismissed among
22	others. The Secretary's duties are much like in my hockey
23	analogy which didn't get too far earlier, but I'll try it
24	again. She is much like in a hockey game. She is the
25	scorekeeper. She is not the referee. She is not an

aggrieved party. She is the Commonwealth.
When she comes here and I'm telling the
Court something that you know better than I. When the
Secretary comes here as the Acting Secretary, she comes as
the Commonwealth. She doesn't come as Leigh Chapman. She
comes as the Honorable Leigh Chapman, the Secretary of the
Commonwealth, which means she's invoking the Commonwealth.
She's not an aggrieved person.
There is no aggrieved person in this matter.
There is no case or controversy here. This is asking for
an advisory opinion. It's asking even worse to seek to
modify your opinion in the McCormick case which I would
suggest at this point is res judicata with respect to this
matter and certainly is the rule or law of the case, and no
one asked in that case to modify it to include
certification. It never happened.
JUDGE COHN JUBELIRER: But let me give you
just a hypothetical.
MR. KING: Yes, ma'am.
JUDGE COHN JUBELIRER: Assume that one of
the counties certified results that are not consistent with
the law for whatever reason and nobody, you know, there was
no challenge but left out a municipality. Or I mean I'm
trying to think of something where it's clear to the
Secretary and it would be clear that what they've done is

1	not consistent.
2	Is she still required by law then, she has
3	no discretion, she must certify that or would she be able
4	to in that case file a mandamus saying no, you have to
5	certify, you have to include in your totals what is
6	required under the law?
7	MR. KING: In our opinion, since you asked,
8	in our opinion, she is already certifying results which are
9	inconsistent from county to county. I spoke about the
10	Ziccarelli case. Clearly the Ziccarelli case is a
11	startling result to me that two counties can count the
12	votes differently. That's exactly what they did in
13	Ziccarelli, and we have a Senator Brewster sitting in the
14	Pennsylvania Senate right now as a result of the largesse
15	of the federal court in not invoking the Bush Gore doctrine
16	which should have applied.
17	And so I would also suggest, Your Honor,
18	since you asked me, I would also suggest that this is
19	happening as we sit here, as we stand here because what's
20	happening with respect you asked about the SURE system
21	and the signatures and the curing. That's commonly
22	referred to as curing. Somebody sends it in and it needs
23	to be fixed.
24	And so there is a great debate in this
25	Commonwealth about whether curing and the Court, the

1	Supreme Court addressed it only in passing. And so there
2	is a mention in the Boockvar case that there is no
3	provision in the Election Code for curing. There is none.
4	So in the 2020 election people were talking
5	about all sorts of curing. They were talking about they
6	might have voted for the wrong person. They wanted to come
7	in after the mail ballot came in. They want to come in and
8	get their mail ballot back and vote for the other guy. And
9	so there was that sort of curing.
10	There is also this curing which is of great
11	controversy over all these counties. Some counties allow
12	curing. Some counties don't allow curing. Some counties
13	like Montgomery put the ballots out on a card table out in
14	the hall and allow people from political parties to come in
15	and bring people in to try to cure the ballots. Some
16	people
17	JUDGE COHN JUBELIRER: They don't allow for
18	opening, but you mean allow them to come in. I mean I'm
19	asking. I wouldn't imagine they would be allowed to open
20	them; but if somebody forgets to put a date on
21	MR. KING: Yes.
22	JUDGE COHN JUBELIRER: they can come in
23	and put a date on.
24	MR. KING: That's what I
25	JUDGE COHN JUBELIRER: Is that what you're

1	talking about curing?
2	MR. KING: It is what I'm talking about
3	curing. However, there are also what also happens is
4	that people have been advised that it's okay to vote
5	provisionally after they've already voted by this mail-in
6	system. So then they vote by the mail-in system. It goes
7	into the SURE system, and somebody shows up and votes
8	provisionally afterwards. We have
9	JUDGE COHN JUBELIRER: But they have a
10	method of checking that, right? Everybody has their
11	MR. KING: Yes.
12	JUDGE COHN JUBELIRER: Right.
13	MR. KING: But
14	JUDGE COHN JUBELIRER: So and this isn't
15	really of record. You know, we're talking about evidence
16	
17	MR. KING: You asked.
18	JUDGE COHN JUBELIRER: that wasn't
19	presented. Yes. And thank you. I appreciate your answer
20	but
21	MR. KING: I was getting back to your
22	question.
23	JUDGE COHN JUBELIRER: Yes.
24	MR. KING: I was getting back to your
25	question which was, well, what would the Secretary do if

1	she saw that counties
2	JUDGE COHN JUBELIRER: Well, I was just
3	asking about limits of discretion, and you seem to be
4	arguing that there are that she has absolutely no
5	discretion.
6	MR. KING: That's what the statute says.
7	She is a member of the executive branch. She is that's
8	the executive branch's role. The Legislature set up the
9	Election Code, set up the methods. They've set up the
10	rules of who did what, and the statute I'm not going to
11	read it again but it's crystal clear. It says exactly
12	what the Secretary is to do. She is to tabulate. She is
13	to receive. She is to tabulate, and she is to announce the
14	results.
15	And here we are in Pennsylvania we're in
16	July, almost August and to the surprise of lots of people
17	out there, whoever's watching this on YouTube or elsewhere,
18	that the Governor's race isn't certified yet and the United
19	States Senate race isn't certified, Congressional races
20	aren't certified, House races aren't certified, and Senate
21	races aren't certified in these three counties. And across
22	the state the Governor's race isn't certified or the U.S.
23	Senate race.
24	So we do have she does have the and
25	this is why and I'll just go through these quickly as to
25	this is why and I'll just go through these quickly as to

1	why we say that this case is inappropriate. But she does
2	have the mandatory obligation to tally these results from
3	the counties. There's nothing that the counties have done
4	here which is incorrect or inaccurate. And I say that
5	because Your Honor's order did not say to certify.
6	And also I say this because the Migliori
7	case which was once the Ritter case and became Migliori is
8	pending on certiorari before the United States Supreme
9	Court. So if this Court were to enter an order today,
10	tomorrow, the next day, next week and all of a sudden the
11	Supreme Court of the United States grants certiorari and
12	will hear the argument of whether it's correct or not, then
13	Your Honor has read Mr. Justice Alito's opinion that he
14	says that in almost in these words that he thinks the Third
15	Circuit likely got it wrong.
16	And I agree with my colleague that when you
17	look at Justice Alito's opinion, his dissent on the grant
18	of an emergency order and we know that these emergency
19	orders are currently disfavored by the Court because they
20	
21	JUDGE COHN JUBELIRER: Well, and he also
22	said that it's based on the review that he's been able to
23	conduct in the time allowed and that he doesn't rule out
24	the possibility that further briefing and argument, you
25	know, might convince him that his current view is

1	unfounded. So it's a preliminary review
2	MR. KING: Yes.
3	JUDGE COHN JUBELIRER: without benefit of
4	argument. But then so we still do have a Third Circuit
5	opinion that is in effect.
6	MR. KING: Yes, except it's also on appeal.
7	So I would also add these things because I
8	know we've taken up a lot of your time, and we appreciate
9	it very much. I would add these. There is no emergency in
10	this matter. This is an emergency petition before you.
11	The party who comes here created the emergency by not
12	performing her duties. She didn't certify the election,
13	and she didn't perform her
14	You heard the testimony from the Deputy
15	Secretary, and he's a real gentleman. And I want to say
16	that we work with him all the time. He is just a terrific
17	person to have in government, and he's a truthful witness.
18	And he said, our duties are ministerial. That's exactly
19	what their duties are.
20	They're not supposed to and this Court
21	should not, I say respectfully, should not vest the
22	Secretary with the power to start to investigate how these
23	certifications took place because, for example I won't
24	go off on a tangent for example, with respect to this
25	thing about curing, the next Secretary of the Commonwealth

1	let's say that a republican Governor is elected this
2	fall and the next Secretary of the Commonwealth says that
3	curing's not permitted, will that Secretary of the
4	Commonwealth be in here saying to you that these counties
5	like Allegheny and Philadelphia and so forth now have to
6	recertify their results because they allowed curing?
7	And I will tell you, curing is a very real
8	issue that's likely to be before this Court and that Court
9	soon, and the Supreme Court soon. So there is no emergency
10	other than that created by the party that's here before you
11	asking to get emergency relief.
12	There is also no case or controversy. This
13	action is merely, this merely masquerades as a request for
14	an advisory opinion at best. At worst it's an attempt to
15	circumvent the system by attempting to get you, Your Honor,
16	to modify and that's the exact word to modify your
17	prior order which did not include the term certify. Had
18	Your Honor wanted to say that everybody should certify,
19	then you could have said that and I suggest you would have
20	said it if you wanted to.
21	I would also say that the Petitioners here
22	have taken opposite and contrary positions in their
23	guidance and in their briefs and pleadings. I will also
24	say that with respect to this issue of the undated ballots
25	and the wrong dated ballots, part of the problem created in

1	this Commonwealth is from the guidance issued by the
2	Secretary of the Commonwealth telling these county boards
3	that they must count the wrong dated ballots.
4	And I would suggest to you and I agree with
5	in the question that you posed to Mr. Bukowski I want to
6	join in his answer. I think it's entirely correct to
7	challenge the dates that, for example, predate the issuance
8	of the ballots. I think that's entirely correct. I think
9	that people who put dates on here that would perhaps go
10	past the eight o'clock receipt date, I think that if you
11	put dates like that that they could be challenged.
12	So I think that that guidance that was
13	issued was incorrect. And so we have the Secretary who
14	issued the incorrect guidance now suggesting that because
15	people have counted ballots with other dates on them, that
16	now we have to count them all. I just don't think that's
17	right.
18	I would also say, of course, I've said this
19	the Ritter case is still pending in the Supreme Court. The
20	Petitioners come I did say and I'm really proud to have
21	found this, Your Honor, because you asked me earlier and I
22	got a little nervous. You asked me if I raised unclean
23	hands. So I'm proud to tell you that I found it, and I did
24	raise unclean hands.
25	JUDGE COHN JUBELIRER: In the papers in the

1	emergency
2	MR. KING: In my response.
3	JUDGE COHN JUBELIRER: In your response.
4	MR. KING: Yes, Your Honor.
5	JUDGE COHN JUBELIRER: Okay.
6	MR. KING: And so what we said is the
7	Petitioners have come before this Court with unclean hands
8	and having failed to comply with statutory limitations and
9	having failed to comply with statutory obligations to
10	certify the election. We said they have unclean hands
11	because she has this affirmative duty to do this.
12	And, you know, the unfortunate part about
13	mandamus is that, as the Court well knows, you can't file a
14	counterclaim. So it's not possible to do that in a
15	mandamus case. Had it been possible, I would have filed;
16	and Mr. Bukowski pointed that out to me right away the
17	first time we spoke, you can't do that. And so I said
18	well, that's too bad. I'd like to do it. So had I been
19	able to do it, I would file a counterclaim here and say you
20	need to certify this election.
21	And as the Court understood and heard, there
22	are consequences to this. The consequences to this are
23	drastic because this case would seemingly give people the
24	opportunity to make a collateral attack on an order that's
25	already been entered and to do so in an untimely manner in

1	a different case than the case in which the order arose.
2	And so nobody did it in McCormick; and, therefore, nobody
3	appealed it in McCormick because it wasn't there.
4	The parties who were in McCormick, only some
5	of them are here today. The rest of the parties in
6	McCormick which is what they're asking you to do is
7	modify the order from that case all the rest of those
8	parties aren't here. There's a whole bunch of other county
9	boards who were parties and would be entitled to be here.
10	I would also suggest that as I said earlier
11	McCormick does not require, your opinion in McCormick does
12	not require the result that's sought here. And for all of
13	these reasons and for the reason that expanding the
14	Secretary's powers would not be something that we would
15	expect the Commonwealth Court of Pennsylvania to
16	countenance, this would expand her power to investigate as
17	opposed to perform the ministerial function of calculating
18	the tallies of the votes.
19	And it would give her the ability this
20	case for the first time I think you heard the witness say,
21	Mr. Marks, the Deputy Secretary, say he's never heard of
22	this happening before. I've never heard of it happening
23	before, but certainly the Court would have more experience
24	than we would. I've not ever heard of this happening
25	before, and I don't think it has happened before.

1	It's a ministerial function, and these
2	boards by the way on the opposite side of that coin,
3	these boards perform a quasi-judicial function. So it's
4	not the question of whether the ballot is to be counted.
5	It's whether these people make the decision of whether to
6	count it or not, right? That's the discretion that they're
7	exercising is whether to count the ballot that has the
8	signature or the date missing on it and that's a
9	discretionary and that's exactly the discretion that
10	they exercised here or all three of them wouldn't be here.
11	So when people exercise discretionary
12	functions like that, then certainly mandamus does not lie;
13	and this is clearly a case where mandamus should not lie.
14	If anything were to survive today's proceeding, the
15	declaratory judgment action at best would survive. But
16	again with respect and the mandamus action just simply
17	cannot survive. With all due respect, Judge, the mandamus
18	cannot for all the reasons we've all said, there's no way
19	in the world this is a mandamus case.
20	Secondly, there's no way in the world this
21	is a proper dec action case. It's not a proper dec action
22	case because there is no aggrieved party, and they've
23	failed to follow the requirements of the statutes. There's
24	no candidate. There is no person. There is no contest.
25	There is no election in question. This is simply an

1	advisory opinion that they seek.
2	And by the way, if they want such an
3	opinion, when you read the King's Bench rules which I
4	know Your Honor has read many times when you read the
5	King's Bench rules, you can likely take that issue up with
6	the Supreme Court and you'll likely get some decision on
7	it. And so that would be the appropriate place for them to
8	take this, not by using this vehicle.
9	There are so many you know, we filed
10	preliminary objections. I'm not going to go into all those
11	details. I think we've raised all the things I talked
12	about. We incorporated them into our response here, but
13	there are so many issues. This is not a great case to
14	ultimately decide this issue, and they have other means to
15	do it.
16	So thank you very much for your time, Your
17	Honor. Glad to answer any other questions if you have any.
18	JUDGE COHN JUBELIRER: I don't believe I
19	have any other. You've answered them all.
20	MR. KING: Thank you very much. It's my
21	honor to be here.
22	JUDGE COHN JUBELIRER: Thank you.
23	MR. BOYER: Thank you, Your Honor. I know
24	it's been a long day, so I will endeavor to keep this brief
25	and just make a few what I believe to be important points.

Appendix 24

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21	honor to be here.							
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23	MR. BOYER: Thank you, Your Honor. I know							
24	it's been a long day, so I will endeavor to keep this brief							
25	and just make a few what I believe to be important points.							

1	Number one, this is exactly the right action							
2	for these circumstances. There's no statute that							
3	contemplates what the counties are doing here which is							
4	refusing to include from their certifications lawfully cast							
5	and canvassed ballots. Under 3158 and 3159 of the Election							
6	Code by refusing to do that, they are interfering with the							
7	Secretary's statutory obligation to receive those							
8	accurately completed certifications and then perform her							
9	own certifications of those results.							
10	You heard allusions to this may not be the							
11	right time, that Mr. Marks has made clear what the							
12	Department was doing. It was communicating with the							
13	counties and was prevailing upon the counties, it was							
14	convincing the counties successfully in those back and							
15	forths; and I do not think we want the precedent to be the							
16	Department must sue a county immediately if there's a hint							
17	of disagreement.							
18	There's been a lot of talk including from us							
19	about the significance of Your Honor's decision in							
20	McCormick. I think							
21	JUDGE COHN JUBELIRER: Listen, if you could							
22	just talk a little slower and louder, that would be							
23	helpful.							
24	MR. BOYER: Forgive me. I will. I didn't							
25	want to take up any more of your time							

1	TUDOR COURT TURNS TO T
1	JUDGE COHN JUBELIRER: I know.
2	MR. BOYER: but I will slow down.
3	JUDGE COHN JUBELIRER: Thank you.
4	MR. BOYER: We have made our points on
5	McCormick clear. I'll add a few additional ones. I
6	recognize that it was a preliminary injunction, but the
7	order is the order and it says what it says.
8	And we have laid out our belief of the
9	consequences of what follows from that order and our
10	understanding of, you know, the direction to separately
11	tally ballots that excuse me, votes that separately
12	tally a count that excludes undated ballots was to preserve
13	the opportunity for a different decision and final judgment
14	on appeal. Of course that never same.
15	JUDGE COHN JUBELIRER: So what is the effect
16	of that? Did the order to separately tally the ballots the
17	way it was written you think then what happened convert to
18	a final order of certification or
19	MR. BOYER: It didn't convert to a final
20	order of certification. I think the clear consequence of
21	the Court's legal analysis and ultimately its order was
22	that these ballots at issue which are the same ballots
23	we're here talking about today were lawfully cast. That
24	order was never it wasn't vacated. It wasn't
25	contravened by a final judgment by Your Honor.

1	JUDGE COHN JUBELIRER: So if the case hadn't							
2	been dismissed and there had been further arguments and							
3	orders, in that case what would have happened to this							
4	order?							
5	MR. BOYER: I think it depends on what order							
6	Your Honor ultimately entered. If Your Honor entered an							
7	order saying much like the order granting preliminary							
8	injunction these are lawful ballots, they must be							
9	canvassed, they must be canvassed excuse me, canvassed,							
10	counted, we'd be in the exact same position.							
11	JUDGE COHN JUBELIRER: So it really in your							
12	mind the effect of the order not vacating the opinion and							
13	order is somehow influencing your argument here?							
14	MR. BOYER: I think it's one, the existence							
15	of the order; two, Your Honor's decision not to vacate it;							
16	and three, no other order whether from a final judgment							
17	from Your Honor or on appeal. There's only been one order.							
18	It's to canvass these ballots. It said separately exclude							
19	ballots in case there's a different decision. That							
20	theoretical possibility never arrived.							
21	JUDGE COHN JUBELIRER: Okay.							
22	MR. BOYER: I'd like to move quickly to In							
23	Re: Canvass and make a couple of points about that. I							
24	think Your Honor's questions got at this, but it is							
25	absolutely not precedential. I know there is one decision,							

1	an unprecedential decision from this Court in Ritter							
2	reaching a contrary conclusion; but respectfully, the case							
3	law cited there doesn't support what the Court did. In							
4	Pennsylvania we follow the Marks rule which means the							
5	narrowest rationale in support of a judgment is							
6	precedential.							
7	So no matter what the narrowest rationale							
8	is, the judgment was that the ballots be counted; and the							
9	only precedent that can follow is a rationale in support of							
10	counting those votes.							
11	JUDGE COHN JUBELIRER: When you say the							
12	narrowest and again you're speeding up							
13	MR. BOYER: I'm sorry.							
14	JUDGE COHN JUBELIRER: But the narrowest							
15	interpretation in support of the judgment in your mind,							
16	that would be the judgment of the Court which was to count							
17	the ballots?							
18	MR. BOYER: Yes. The judgment of the Court							
19	was unequivocally to count the ballots. Under the Marks							
20	principle which Pennsylvania follows and the Supreme Court							
21	said that as recently as in 2020 in a decision called							
22	Commonwealth v. Alexander, and I'm looking for the							
23	citation.							
24	JUDGE COHN JUBELIRER: That was in your							
25	brief?							
ī								

1	MR. BOYER: I don't believe it was in our
2	papers, so we weren't responding to the argument about
3	JUDGE COHN JUBELIRER: Right. I think it
4	was cited in the Ritter.
5	MR. BOYER: I think it was cited in Ritter
6	as well; but it makes clear Pennsylvania follows the rule
7	that says if there is to be precedent when there is no
8	majority opinion, it can only be a rationale that supports
9	the judgment. In Downington, another decision of this
10	Court from earlier this year, all three Judges of this
11	Court agreed that no precedent from In Re: Canvass. Your
12	Honor, of course, reached that conclusion correctly as
13	well.
14	I'd like to make a couple points about what
15	to do with Justice Wecht and why under the circumstances it
16	would be particularly appropriate notwithstanding that the
17	case law doesn't support treating it as precedential.
18	There were five days in In Re: Canvass between when the
19	Court granted emergency jurisdiction and issued its
20	decision. There was not extensive time for the Court to
21	consider the issue. There was not oral argument.
22	So under these circumstances whereby the law
23	of Pennsylvania it is dicta at most for Justice Wecht to
24	say in a future election I would do so and so, number one,
25	it's dicta; and number two, under those circumstances given

1	how expedited the review was and the narrowest briefing was							
2	mostly on the emergency petitions anyway, the arguments are							
3	not as fully developed as they are now as you acknowledge,							
4	as Your Honor acknowledged in McCormick.							
5	So, number one, under Pennsylvania precedent							
6	there's nothing there that's precedential; and number two,							
7	the circumstances are particularly compelling to sort of							
8	consider this issue freshly.							
9	I'd like to make just two final points.							
10	Number one, counsel referred to some of the inconsistencies							
11	about the Secretary's authority and the positions she has							
12	taken and made specific mention and also questioned Mr.							
13	Marks about the Ziccarelli matter but without giving any							
14	context for what the request from the plaintiffs was there.							
15	After the In Re: Canvass decision in which							
16	the Supreme Court of Pennsylvania told Allegheny County it							
17	can count undated ballots, the plaintiffs then sued the							
18	Secretary in federal court for refusing to follow the							
19	Supreme Court's order. And in that context she said she							
20	has no authority to overrule a Court to say if a Court says							
21	these ballots may be counted, I, the Secretary, have no							
22	authority to overrule a Court.							
23	And if you look at page 8 of Fayette							
24	County's Exhibit D, it's quite clear what the context of							
25	that brief is; and the same is true here. We're here							

1	because the Court's order and because case law compels the							
2	counties to include in their certifications the ballots							
3	that are at issue.							
4	Much like in Ziccarelli, we have no							
5	independent authority. We're bound by the decisions of the							
6	Court. We're bound by the Election Code; and until we							
7	receive complete certifications of all lawfully cast votes							
8	from the counties as the Courts have defined it, the							
9	Secretary cannot complete her statutory duties.							
10	JUDGE COHN JUBELIRER: And so in your mind							
11	the Secretary has the discretion to well, am I correct							
12	in understanding your argument is that when she certifies							
13	the results, she must do it in a way that follows the law,							
14	and what she's here asking is essentially in some way for							
15	the Court to determine what is the law and what is required							
16	by these counties so that the certification will be							
17	accurate and her understanding is that these three counties							
18	like the other 64 counties should count the undated							
19	ballots?							
20	MR. BOYER: Yes, but I'll add a caveat							
21	JUDGE COHN JUBELIRER: Yes, thank you. I							
22	want to make sure							
23	MR. BOYER: to clarify what the							
24	Secretary's							
25	JUDGE COHN JUBELIRER: I fully							

1	understand. It's a little
2	MR. BOYER: It is correct to say the
3	Secretary cannot certify results if she receives from the
4	counties incomplete certifications and incomplete by virtue
5	of them excluding lawfully cast ballots. She does not have
6	the independent authority to decide what constitutes a
7	lawfully cast ballot or not. That's up to the Courts. And
8	in this context the Courts have spoken as to what qualifies
9	as a lawfully cast ballot.
10	JUDGE COHN JUBELIRER: So she's here trying
11	to give effect to a Court's decision and how she
12	understands it?
13	MR. BOYER: Correct. If you imagine two
14	poles, at one a Secretary who believes she has the
15	independent authority to review and make her own judgments
16	of the law; another a Secretary that's purely a rubber
17	stamp even if there are patently mistakes in the
18	certifications whether they're clerical, whether there are
19	whole swaths of ballots. I think the Secretary's authority
20	clearly falls somewhere in between those.
21	And when there is a decision or decisions of
22	the Court that say the certifications are excluding ballots
23	that under state law, under federal law, under the
24	consequences of this Court's order must be canvassed and
25	counted, those ballots cannot be excluded from

1	certification. The Secretary is aware of those Court							
2	decisions and not							
3	JUDGE COHN JUBELIRER: And now a final							
4	question by me is, if I just assume for the sake of							
5	argument that I don't agree with your interpretation of the							
6	June 2nd order, is that the end of it or are you still							
7	relying on the Migliori case or federal law or any other							
8	opinion of the Court that would support your position?							
9	MR. BOYER: If Your Honor disagrees with our							
10	read of the June 2nd order, I believe that's it for the							
11	mandamus count but not for the declaratory and injunctive							
12	relief count. I think the arguments we have presented make							
13	it clear as to why even in the absence of that order the							
14	law does require the counties to include these							
15	certifications under the reasoning announced and							
16	articulated in the opinion from Your Honor, in the opinion							
17	from the Third Circuit.							
18	So yes, the mandamus count does depend on							
19	the consequence of the order. The declaratory and							
20	injunctive relief count does not.							
21	JUDGE COHN JUBELIRER: Okay. Thank you.							
22	MR. BOYER: I would like to make one last							
23	point about uniformity and finality. The Secretary has							
24	been pushing for uniformity and finality on this issue for							
25	quite some time now, and it's desperately needed.							
1								

1	I'll say and this is exactly the right case
2	to do it, and there is a clear case in controversy. The
3	issues are squarely presented, thoroughly briefed in
4	Pennsylvania law, and voters generally need clarity on
5	these issues; and I think we have presented reasons why
6	clarity should counsel for counting these ballots and
7	ultimately have them included in the final certifications
8	of elections.
9	Thank you, Your Honor.
10	JUDGE COHN JUBELIRER: Thank you very much.
11	As we conclude this very long day, I want to
12	thank all of you for your preparation, for your thoughtful
13	legal arguments, and a very thorough presentation of the
14	issues. Clearly you're all extremely knowledgeable; and
15	while you and the parties have different interpretations of
16	the law, you are united in appreciating the importance of
17	your common purpose to assure that ballots are accurately
18	counted and that the voters of Pennsylvania can exercise
19	their right to vote for the candidates of their choice in a
20	free and fair election.
21	I want to recognize all the county boards,
22	the county boards that were here as well as all of the
23	county boards and election workers who steadfastly and
24	tirelessly work to meet the challenge; and we heard some of
25	what is involved with that today.

Appendix 25

YOUR BALLOT WILL NOT BE COUNTED UNLESS:

- ☐ You sign and date the voter's declaration in your own handwriting
- ☐ You seal your ballot inside the [color] secrecy envelope ("Official Election Ballot") and place it in here

EXHIBIT

Joint 1 7/28/22

> Voter's declaration

election; that I have not already voted in this election; that I have not already voted in this election; and I further declare that I marked my ballot in selection and I further declare that I marked my ballot in selection and I further declare the enclosed ballot. I under the I may be a stand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand be a long only vote by provisional ballot at my polling place, unless I surrender my balloting materials, to be hereby declare that I am qualified to vote in

sign or mark here (Required) voided, to the judge of elections at my polling place

Today's Date (Required)

FOR

COUNTY

ELECTION USE

ONLY

Sign their

Completed by

Voter

Unable

hereby declare

윽

Physical Disability: Declaration Because

am unable to

of my illness or physical disability. I have made or assistance because I am my declaration for voting my ballot without unable to write by reason mark in lieu of

mark here

Today's

Witness, address (street)

Witness, address (city, zip code)

sign here

	☐ You	sign and d	ate the vot	 ter's declaratior	TED UNLESS: In in your own handwriting Crecy envelope ("Official Elec	ction Ballot") and place it	in here
Witne	Witne	Witne	Today	Voter	To be Sign Illnes I herek my dee assista of my i receive my sig	- FOR	1

Voter's declaration

I hereby declare that I am qualified to vote in this election; that I have not already voted in this election; and I further declare that I marked my ballot in selection; and I further declare that I marked my ballot in selection. I am qualified to vote the enclosed ballot. I under postand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand place after I would be a polling poll place, voided, to the judge of elections at my polling place unless I surrender my balloting materials,

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•	oter, sign or mark here
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GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES

Date: September 11, 2020

Version: 1.0

EXHIBIT

Joint 2 7/28/22

EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES

1 BACKGROUND:

The Pennsylvania Election Code describes processes that a qualified voter follows to apply for, receive, complete and timely return an absentee or mail-in ballot to their county board of election. These processes include multiple secure methods used by the voter's county board of election to verify that the qualified voter's absentee or mail-in application is complete and that the statutory requirements are satisfied. These include voter identification verification confirmed by either a valid driver's license number, the last four digits of the voter's social security number or other valid photo identification, and unique information on the application including the voter's residence and date of birth. Before sending the ballot to the applicant, the county board of elections confirms the qualifications of the applicant by verifying the proof of identification and comparing the information provided on the application with the information contained in the voter record. If the county is satisfied that the applicant is qualified, the application must be approved. This approval shall be final and binding, except that challenges may be made only on the grounds that the applicant was not a qualified voter, and those challenges must be made to the county prior to five o'clock p.m. on the Friday prior to the election.

Once the qualified voter's absentee or mail-in application is approved, the voter is mailed a ballot with instructions and two envelopes. The outer envelope includes both a unique correspondence ID barcode that links the envelope to the qualified voter's application and a pre-printed Voter's Declaration that the voter must sign representing that the voter is qualified to vote the enclosed ballot and has not already voted. This Guidance addresses the examination of the Voter's Declaration on the ballot return envelope. This Guidance assumes that the voter has satisfactorily completed the steps described above as to application for, receipt and return of an absentee or mail-in ballot.

2 RECORDING THE DATE, RETURN METHOD AND BALLOT STATUS FOR RETURNED BALLOTS:

County boards of elections should have processes in place to record the date, return method, and ballot status for all voted ballots received. County boards of elections must store and maintain returned ballots in a secure location until the ballots may be pre-canvassed or canvassed.

The county board of elections should stamp the date of receipt on the ballot-return. County boards of elections should record the receipt of absentee and mail ballots daily in the SURE system. To record a ballot as returned, the staff should scan the correspondence ID barcode on the outside of the envelope. The correspondence ID on the envelope is unique to each absentee or mail-in voter and each issuance of a ballot to a voter. Once a correspondence ID has been returned in the SURE system, it cannot be returned again. Further, if a ballot issuance record is cancelled by the county board of elections (e.g. voided to reissue a replacement ballot) in the SURE system, the correspondence ID on the cancelled ballot will become invalid. If the same barcode is subsequently scanned, the SURE system will not allow the returned ballot to be marked as being approved for counting.

The county boards of elections should record the date the ballot is received (not the date that the returned ballot is processed). In the event a county board of elections is entering the ballot on a date other than the date the ballot was received, the county personnel should ensure that the SURE record reflects the date of receipt, rather than the date of entry, since by default, SURE will automatically populate both the 'Date Received' and 'Vote Recorded' fields with the current date and time unless users manually correct the date to reflect the date received.

3 EXAMINATION OF DECLARATION ON BALLOT RETURN ENVELOPES:

The county board of elections is responsible for approving ballots to be counted during pre-canvassing.

To promote consistency across the 67 counties, the county boards of elections should follow the following steps when processing returned absentee and mail-in ballots.

After setting aside ballots of elector's who died prior to the opening of the polls, the county board of elections shall examine the Voter's Declaration on the outer envelope of each returned ballot and compare the information on the outer envelope, i.e., the voter's name and address, with the information contained in the "Registered Absentee and Mail-in Voters File, the absentee voter's list and/or the Military Veterans' and Emergency Civilians Absentee Voters File."

If the Voter's Declaration on the return envelope is blank, that ballot return envelope must be set aside and not counted. If the board determines that a ballot should not be counted, the final ballot disposition should be noted in SURE. The ballot return status (Resp Type) should be noted using the appropriate drop-down selection.

If the Voter's Declaration on the return envelope is signed and the county board is satisfied that the declaration is sufficient, the mail-in or absentee ballot should be approved for canvassing unless challenged in accordance with the Pennsylvania Election Code.

The Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections.

Version	Date	Description	Author
1.0	9.11.2020	Initial document release	

TLP: WHITE



GUIDANCE CONCERNING CIVILIAN ABSENTEE AND MAIL-IN BALLOT PROCEDURES

Date: September 28, 2020

Version: 1.0

EXHIBIT

Joint 3 7/28/22

GUIDANCE CONCERNING CIVILIAN ABSENTEE AND MAIL-IN BALLOT PROCEDURES

1 Mail-in and Civilian Absentee Balloting – General Provisions

Qualified voters may apply at any time on or before 5:00 p.m. on the Tuesday before any primary or election for a mail-in or civilian absentee ballot, and county boards of elections must begin processing applications at least fifty (50) days before the primary or election. County boards of elections may process applications earlier than fifty (50) days before the primary or election, if the county board of elections determines that it is better for its operational needs to do so.

1.1 Who May Request an Absentee or Mail-in Ballot?

All qualified voters in Pennsylvania are eligible to vote by mail-in ballot, and no excuse is required. For example, even if a voter will be present in their municipality on Election Day, but would simply prefer to vote from home, they may request a mail-in ballot.

Absentee ballots may be voted by domestic voters who will be absent from their municipality on Election Day due to work or vacation, voters who are celebrating a religious holiday, and voters such as college students who also may be away from the municipality on Election Day, if they don't choose to vote where they go to school. Absentee ballots are also for those who are unable to attend their polling place due to illness or physical disability.

A voter may only qualify for and vote one ballot.

2.2 Permanent Voter Lists

Any qualified voter can request to be placed on the permanent mail-in voter list at any time.

For the permanent annual **absentee** ballot list, only voters with a permanent illness or disability are eligible; this section does not apply to voters expecting to be absent from the municipality. Absentee voters who request to be placed on the permanent absentee list do not have to renew their physician's certification of continued disability every four (4) years or list it on each application.

If voters wish to request to become an annual permanent voter:

- For annual permanent **mail-in** list requests: these requests may be submitted when completing their online mail-in ballot request application.
- For annual permanent **absentee** list requests: this may be submitted by paper application only due to the physician's certification requirement.

Each year the county must send an application to any voter on the permanent absentee and mail-in voter lists by the first (1st) Monday in February. The yearly application, once approved, serves as a standing request for a mail-in or absentee ballot to be mailed to that voter for every election that calendar year and for any special election until the third (3rd) Monday in February the next year.

If a permanent mail-in or permanent absentee voter no longer wishes to receive a ballot for the upcoming election or wishes to cancel her permanent status, the voter can submit a cancellation form to the county board of elections. The cancellation form can be found at VotesPA.com.

2 Requesting an Absentee or Mail-in Ballot

There are three (3) ways by which voters can apply for mail-in or absentee ballots:

- 1. By Mail
- 2. In Person
- 3. Online

2.1 MAIL REQUESTS

A voter may submit a paper application via mail to the county board of elections for absentee and mailin ballot applications.

2.2 In-person (Over the Counter) Requests

Act 77 of 2019 allows voters to request and cast an absentee or mail-in ballot over the counter in advance of Election Day. After ballots are finalized by a county, voters may apply at a County Election Office (CEO) during established business hours to receive and cast a mail-in or absentee ballot in person while the voter is in the office.

Once the voter is determined to be qualified and the application for an absentee or mail-in ballot is approved, the county board of elections **must promptly present** the voter with the voter's mail-in or absentee ballot. Under Section 1305 of the Election Code, 25 P.S. § 3146.5, a county board of elections may not deny the eligible voter's request to have the ballot presented to the voter while the voter is at the office unless there is a bona fide objection to the absentee or mail-in ballot application. Voters still need to provide proof of identification (as defined in the Election Code) to be verified by county boards of elections to vote an absentee or mail-in ballot. Proof of identification for civilian absentee and mail-in voting include a valid driver's license number, the last four digits of the voter's social security number or other valid photo identification.

Voters who receive a mail-in or absentee ballot in person must be provided an opportunity to privately and secretly mark their ballot. **Note:** The marking of the ballot in secret does not have to take place in the election offices. It can be provided in a nearby location.

2.2.1 Satellite County Election Offices

County election boards may provide for mail-in and absentee application processing and balloting at more than one location within county borders.

Counties may establish additional business hours for CEOs; hours do not have to be limited to weekdays or to typical business hours. Counties are encouraged to offer business hours outside of these time frames, including weeknights or weekend hours to enable maximum flexibility and convenience for voters.

When a county decides to provide additional mail-in and absentee balloting by establishing additional CEOs, the county must account for all of the following:

- Each CEO must be staffed by appointed elections personnel in municipal or county-owned or leased locations selected by the county board of elections for processing applications and in-person voting of both mail-in and absentee ballots.
- Each CEO must have a secure county network connection that is capable of connecting to the Statewide Uniform Registry of Electors (SURE), and staff trained and approved to access SURE. NOTE: The Department will work with counties to establish secure connections; the county network extension must be approved by the Department.
- Each CEO must either have copies of all ballot styles available to be voted in the county, or an on-demand ballot printer capable of printing all ballot styles available to be voted in the county.
- Each CEO must have a secure ballot collection receptacle to store voted mail-in or absentee ballots submitted at the location. County boards of election are required to keep voted ballots in a sealed or locked container until the time of pre-canvassing.
- Please see the Department of State's August 19, 2020 Absentee and Mail-In Ballot Return Guidance for more information and guidance on choosing a location for a CEO.

2.3 ONLINE REQUESTS

A voter may submit either an absentee or mail-in ballot request online via the Department's online portal at PA Voter Services.

Online applications must be processed according to the same statutory requirements as an application submitted by-mail or in person, including the proof of identification requirements defined in the Election Code.

3 Delivery of Mail-in and Absentee Balloting Materials

Counties must begin delivering mail-in or absentee ballots as soon they are certified and available. Counties may await the outcome of pending litigation that affects the contents of the ballots, but in any event the county must begin delivering mail-in or absentee ballots no later than the 2nd Tuesday prior to Election Day.

Once the counties begin delivering their ballots, as additional applications are received and approved, the county must deliver or mail ballots to such additional voters within forty-eight (48) hours of receipt of approved applications.

3.1 BALLOTING MATERIALS

The absentee and mail-in balloting materials must include the following:

- 1. The voter's proper ballot style based on the voter's registration address.
- 2. A white, inner (or "secrecy") envelope that indicates official ballot.

3. A pre-addressed outer ballot-return envelope that contains a declaration which the voter must sign and date.

The ballot must be returned within the inner envelope, which must be placed in the pre-addressed outer envelope.

With regard to the inner envelope:

- The Pennsylvania Supreme Court held on September 17, 2020, that any ballot that is not returned in the official ballot envelope (secrecy envelope) must be set aside and declared void. These ballots have been referred to as "naked ballots." In accordance with that ruling, all ballots that are not returned within the inner envelope must be set aside and may not be counted. Counties are strongly encouraged to include an instructional insert which describes how the voter should mark and return their ballot and to clearly warn that ballots must be returned in the secrecy envelopes or they will not be counted. The Department encourages county boards of election to publicize the requirement that ballots must be returned within the inner envelope, including on the county's website, in their offices, at ballot collection sites, and in other locations that may assist and educate voters.
- If any voted ballot's inner (or "secrecy") envelope contains any text, mark, or symbol which reveals the identity of the voter, the voter's political affiliation (party), or the voter's candidate preference, the envelopes and the ballots inside them must be set aside, declared void and may not be counted.

With regard to the outer ballot-return envelope:

- 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.
- A ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted. Ballot-return envelopes must be opened in such a manner as not to destroy the declarations executed thereon.
- All ballot-return envelopes containing executed declarations must be retained for a period of two years in accordance with the Election Code.

3.2 BALLOT DESIGN REQUIREMENTS

Act 12 of 2020 changed the law with respect to the surrender process for voters who request mail-in or absentee ballots.

Pursuant to Act 12 of 2020, a warning notice is required to be listed on both the absentee and mail-in ballots, which states:

WARNING: If you receive an absentee or mail-in ballot and return your voted ballot by the deadline, you may not vote at your polling place on election day. If you are unable to return your voted absentee or mail-in ballot by the deadline, you may only vote a provisional ballot at your polling place on election day, unless you surrender your absentee or mail-in ballot and envelope to the judge of elections to be voided to vote by regular ballot.

4.1 VOTER MUST RETURN OWN BALLOT

A voter must return his or her own completed absentee or mail-in ballot by 8:00 pm on Election Day to the county board of elections or other county-designated drop-off location. Third-person delivery of absentee or mail-in ballots is not permitted, and any ballots delivered by someone other than the voter are required to be set aside. The only exceptions are voters with a disability who have designated in writing an agent to deliver their ballot for them. Agency forms may be found at VotesPA.com. Emergency absentee ballots also may be delivered by a designated agent.

4.2 COLLECTION OF MAIL-IN AND ABSENTEE BALLOTS

In addition to the main CEO and satellite CEOs, counties may provide for other secure ballot collection locations that the county deems appropriate to accommodate in-person return of voted mail-in and absentee ballots. Please refer to the Department's August 19, 2020 Absentee and Mail-In Ballot Return Guidance for more information and guidance regarding ballot collection locations and procedures.

County boards of election are required to keep absentee and mail-in ballots in a sealed or locked container(s) until the time of pre-canvassing.

4.3 Surrender Process for Voters Who Request Mail-In or Absentee Ballots

Once a voter requests a civilian absentee or mail-in ballot, they should vote and return that mail-in or absentee ballot by mail, or deliver it in person to a county elections office (CEO) or other designated drop-off location prior to 8:00 P.M. on Election Day.

However, if a voter has not voted their mail-in or absentee ballot, they may take it to their polling place on election day to surrender it. (NOTE: This is a different procedure than was in place for the June 2020 primary. Act 12 of 2020 changed the procedures for voters who request mail-in or absentee ballots, but later appear at their polling place. These changes take effect for the first time in the November 2020 General Election.)

Specifically, a voter who requests a mail-in or absentee ballot and who is not shown on the district register as having voted the ballot may vote at their polling place on Election Day if (1) the voter surrenders the original mail-in or absentee ballot and its outer envelope to the judge of elections to be spoiled, and (2) the voter signs a statement subject to the penalties under 18 Pa. C.S. § 4904 in substantially the following form:

I hereby declare that I am a qualified registered elector who has obtained an absentee ballot or mail-in ballot. I further declare that I have not cast my absentee ballot or mail-in ballot, and that instead I remitted my absentee ballot or mail-in ballot and the envelope containing the declaration of the elector to the judge of elections at my polling place to be spoiled and therefore request that my absentee ballot or mail-in ballot be voided.

If the voter turns in (surrenders) his or her ballot and outer envelope and signs the statement, the voter is permitted to vote by regular ballot at the polling place.

If a voter whose record in the district poll book indicates that the voter requested a mail-in or absentee ballot but the voter does not surrender their ballot and declaration envelope and sign the required statement, the voter should be provided a provisional ballot. Even if the voter asserts that they did not cast a mail-in or absentee ballot and is eligible to vote, the voter should only be provided a provisional ballot.

5 ABSENTEE AND MAIL-IN VOTING PROCESSES FOR COUNTY ELECTION OFFICIALS

5.1 POLL BOOK PROCESSES

The poll books will be divided into two sections.

The main section will include a) voters who have not requested a mail-in or absentee ballot for this election and b) voters who requested an absentee or mail-in ballot but who did not return their ballot by the date the pollbooks were printed. There will be a special watermark in the poll book indicating that voters who did not return their ballot by the date the pollbooks were printed must either surrender their ballot as described in Section 4.3 above or vote provisionally if they appear at the polling place on Election Day.

The secondary section of the pollbook will contain a list of voters who have both requested and returned their ballot (cast their vote) by the time the poll book was printed.

Voters who requested but have not returned their absentee or mail-in ballot may vote in person at their polling place on election day ONLY if they surrender their ballot and the declaration envelope that accompanies it, as described in Section 4.3 above. The poll worker shall take the surrendered ballot and declaration envelope and mark them as "VOID." There is a location in the poll book where the poll worker must indicate that the items were surrendered. The voided ballot and declaration envelope, and the signed surrender declaration should be placed in a secure envelope or container and returned to the county election office with other polling place materials at the end of the voting day. The surrendered ballot materials must be preserved.

As noted above, the poll book record for voters whose cast absentee or mail-in ballot has already been received will indicate that the voter's ballot was cast and they are not eligible to vote at the polling place. This will aid poll workers when checking in voters to easily determine that these voters are not eligible to vote on the voting equipment but may vote provisionally if the voter believes they are eligible to vote.

The watermarks in the poll books as listed above also apply to voters with a permanent flag on their voter record. In either case, the poll worker will be able to determine the appropriate course of action when reviewing the poll book on election day.

5.2 Pre-Canvassing and Canvassing Absentee and Mail-in Ballots

The Act 12 of 2020 amendments provide for a pre-canvass period beginning on the morning of Election Day to canvass all ballots received prior to the pre-canvass meeting. The amendments further provide for a canvass meeting beginning no earlier than the close of polls to canvass all ballots not included in the pre-canvass meeting.

Pre-canvass Meeting

- The **pre-canvass** may begin no earlier than 7:00 AM on Election Day. County boards of election must provide notification of the time and location of a pre-canvass meeting at least 48 hours prior to the meeting by posting notice on its website.
- The county board of elections must provide a list of the names of the voters whose absentee or mail-in ballots are to be pre-canvassed.
- One authorized representative for each candidate and one authorized representative for each
 political party must be permitted to remain in the room where the pre-canvass meeting occurs.
- Persons observing, attending or participating in the pre-canvass meeting MAY NOT disclose the result of any portion of the pre-canvass prior to the close of polls on Election Day.
- The Department strongly urges all counties to begin pre-canvassing at the earliest time allowed to ensure that results can be tabulated promptly.

Canvass Meeting

- The canvass of mail-in and absentee ballots may begin no earlier than the close of polls and no
 later than the 3rd day following the election. County boards of election must provide
 notification of the time and location of the canvass meeting at least 48 hours prior to the
 meeting by posting notice on its website.
- The county board of elections must provide a list of the names of the voters whose absentee or mail-in ballots are to be canvassed.
- The canvass process must continue through the 8th day following the election to include valid military and overseas ballots received by 5:00 PM on the 7th day following the election.
- One authorized representative for each candidate and one authorized representative for each political party must be permitted to remain in the room where the canvass meeting occurs.
- The Department strongly urges all counties to begin canvassing at the earliest time allowed to ensure that results can be tabulated and reported promptly.

Pre-canvass and Canvass Procedures

At the pre-canvass or canvass, as the case may be, the county board of elections should:

- Segregate the unopened ballots of voters whose applications were challenged by the challenge deadline (5:00 PM on the Friday before the election).
 - These ballots must be placed in a secure, sealed container until the board of elections holds a formal hearing on the challenged ballots.
 - Ballot applications can only be challenged on the basis that the applicant is not qualified to vote.
- Set aside the ballot of any voter who was deceased before election day.

- Set aside any ballots without a filled out, dated and signed declaration envelope.
- Set aside any ballots without the secrecy envelope and any ballots in a secrecy envelope that include text, mark, or symbol which reveals the identity of the voter, the voter's political affiliation (party), or the voter's candidate preference.

The Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis.

No challenges may be made to mail-in or absentee ballot applications after 5:00 pm on the Friday before the election.

No challenges may be made to mail-in and absentee ballots at any time based on signature analysis.

NOTE: For more information about the examination of return envelopes, please refer to the Department's September 11, 2020 *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes*.

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Version History:

Version	Date	Description
1.0	9.28.2020	Initial document
		release

Voting by mail-in or absentee ballot is safe, secure, and easy.

How to return your mai...



EXHIBIT

Joint 4 7/28/22

In Pennsylvania, you have two options for mail ballots.

- Mail-in ballot Any qualified voter may apply for a mail-in ballot. You may simply request this ballot without a reason.
- Absentee ballot If you plan to be out of the municipality on election day or if you have a disability or illness that prevents you from going to your polling place on election day, you can request this ballot type, which still requires you to list a reason for your ballot. In order to request either ballot type, you must be registered to vote.

Check Your Registration Status

(https://www.pavoterservice s.pa.gov/Pages/voterregistrati onstatus.aspx)

to review your registration information.

Quick links

Deadlines for the November 8 Election

 November 1, 2022 at 5 p.m. - APPLICATIONS for a mail-in or absentee ballot must be received by your

(https://www.votespa.com/Resources/Pages/Contact-Your-Electicon board on-Officials.aspx)

 November 8, 2022 at 8 p.m. – VOTED BALLOTS must be RECEIVED by your county election office - postmarks are not enough.

<u>emergency</u>

Missed the deadline? If you have an (such as an unexpected illness or disability or last-minute absence from your municipality) you may still be able to get a ballot after the deadline. Find information about how to emergency absentee ballot get an .

How do I request a mail-in or absentee ballot?

Any registered voter

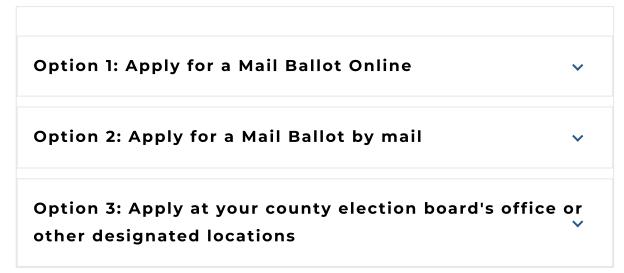
 $(https://www.pavoterservices.pa.gov/OnlineAbsenteeApplication \begin{picture}(c) \hline may request a mail-in ballot \end{picture} n/\#/OnlineAbsenteeBegin)$

Absentee ballots can be requested

(https://www.pavoterservices.pa.gov/OnlineAbsenteeApplication/#/OnlineAbsenteeBegin)

by voters with disabilities or an illness that prevents them from going to their polling place on election day, or those who will be absent from their municipality on Election Day. **Request forms must be received by your county election board by 5 pm on November 1, 2022**.

Expand All



What's the annual mail-in ballot request?

You now have the option to request to be added to the annual mail-in ballot request list where **you'll** receive an application to renew your mail-in ballot request each year. Once your request is approved, you will automatically receive ballots for the remainder of the year, and you **do not** need to submit an application for each election.

Learn more about the

annual mail-in ballot request

(https://www.vote.pa.gov/Voting-in-PA/Page s/Annual-Mail-in-Voter-List.aspx)

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Third Party Ballot Delivery for Mail Voting

If you have a disability that prevents you from applying in person for your mail ballot or delivering your mail ballot, you may designate an agent to deliver your ballot materials for you. You must

designate the agent in writing using this form

(/Resources/Documents/Authorize-Designated-Agent-for-Mail-in-or-Absentee-Ballot.pdf)

or a form provided by your county.

Accessible Remote Ballot Marking Solution for Mail Voting

The Department of State is committed to increasing accessibility for voters with disabilities. Pennsylvania voters with disabilities now have the opportunity to mark their absentee or mail-in ballot electronically.

Learn more about the accessible remote ballot marking solution

(/Voting-in-PA/Pages/Accessible-Remote-Ballot-Marking-Solution-for-Mail-Voting.aspx)

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How do I vote and return my mail-in or absentee ballot?

Below are general steps on how to vote, prepare, and return your mail ballot. Be sure to follow the instructions included with your ballot. Contact your county election office if you have any questions.

Under Pennsylvania law, voters must return their own ballots. The only exceptions to this are for voters with a disability who have designated someone in writing to deliver their ballot.

Step 1:

Read the instructions carefully and mark your ballot. Be sure to complete the front and back of each page.

Step 2:

Seal your ballot in the inner secrecy envelope that indicates "official election ballot." Do not make any marks on the inner secrecy envelope.

Your ballot must be enclosed and sealed in the inner secrecy envelope that indicates "official election ballot" or it will not be counted.

Step 3:

Seal the inner secrecy envelope in the preaddressed outer return envelope. Complete, 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.

Step 4:

Return your voted ballot to the county election board. Absentee and Mail-in Ballots must be received by 8 pm on election day at your county election board. To ensure your ballot is received by the deadline, return the ballot as soon as possible.

1. You can mail your ballot.

- Using the return envelope supplied with your ballot, make sure you use the proper postage (if needed) and that it arrives to your county election board by 8 pm on election day. Postmarks do not count. If your ballot is not received by the county election board by 8 pm on election day, it will not be counted
- 2. **You can hand-deliver your ballot** before 8 pm on election day to your:

county election office

(/Resources/Pages/Contact-Your-Election-Of

ficials.aspx)

or

other officially designated site

- (/Voting-in-PA/Pages/Return-Ballot.aspx)
- Some counties are providing

(/Voting-in-PA/Pages/Return-Ball

drop-boxes ot.aspx)

for mail

ballots.

Where do I return my ballot?

Voters may return their voted mail-in or absentee ballot to their county election board of election office during that office's business hours, or another officially designated location. **Ballots must be received by your county election board before 8 pm on Election Day.**

Voting early in-person by mail-in or absentee ballot

If you are a registered Pennsylvania voter, you can use the early in-person voting option.

As soon as ballots are ready, you can request, receive, vote and cast your mail-in or absentee ballot all in one visit to your

(/Resources/Pages/Contact-Your-Election-Officials.as

county election board px)

or

other officially designated site

(/Voting-in-PA/Pages/Return-Ballot.aspx)

With this option, there is no need for mail at all, and you can cast your vote at your convenience. Learn more about

voting early in-person by mail-in or absentee ballot

(https://www.vote.pa.gov/Voting-in-PA/Pages/Early-Voting.aspx)

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Identification for Mail Voting

In order to apply for an absentee or mail-in ballot, you must supply proof of identification.

Uniformed and overseas citizens

(https://www.vote.pa.gov/Voting-in-PA/Pages/Military-and-Overs eas-Voters.aspx)

and voters who qualify under the

Voting Accessibility for the Elderly and Handicapped ACT

(https://www.vote.pa.gov/Your-Rights/Pages/Voting-Rights-and-the-law.aspx)

do not need to show ID. All other voters must use one of the following options.

Option 1

Include one of these ID numbers on your absentee or mail-in ballot form:

- Current and valid Pennsylvania driver's license
- PennDOT photo ID card

Option 2

If you don't have one of the documents listed under option 1, you can include the last 4 digits of your Social Security number on your absentee or mail-in ballot form.

Option 3

If you don't have one of the documents listed under option 1 or a Social Security number, you can provide a photocopy of one of the following IDs with your absentee or mail-in ballot application. The photocopy must show name, a photo, and an expiration date that is current.

- U.S. Passport
- U.S. Military ID (active duty and retired military ID may designate an expiration date that is indefinite). Military dependents' ID must contain a current expiration date.
- Employee photo identification issued by Federal, Pennsylvania, Pennsylvania county, or Pennsylvania municipal government.
- Photo identification issued by an accredited Pennsylvania public or private institution of higher learning.
- Photo identification issued by a Pennsylvania care facility, including longterm care facilities, assisted living residences and personal care homes.

Frequently Asked Questions

What if I requested a mail-in or absentee ballot but I didn't receive a

ballot, lost my ballot, or changed my mind and want to vote in-person?

- If you already submitted a mail-in or absentee ballot, you cannot vote at your polling place on Election Day.
- If you did not return your mail-in or absentee ballot and you want to vote in person, you have two options:
 - 1. Bring your ballot and the pre-addressed outer return envelope to your polling place to be voided. After you surrender your ballot and envelope and sign a declaration, you can then vote a regular ballot.
 - 2. If you don't surrender your ballot and return envelope, you can only vote by provisional ballot at your polling place. Your county election board will then verify that you did not vote by mail before counting your provisional ballot.

How do I know if my ballot was accepted and counted?

Under current Pennsylvania law, your mail-in ballot can't be opened until Election Day. Therefore, if there's a problem with your mail-in ballot, you won't have the opportunity to correct it before the election. Still, as long as you followed all the instructions and mailed your completed, signed, dated, and sealed in the inner secrecy envelope, ballot by Election Day, you don't have to worry.

Why are there two envelopes with my mail-in ballot?

The smaller secrecy envelope is intended to protect the anonymity of your vote. After you fill out your ballot, you must place it in the secrecy envelope and seal it.

Do not make any marks on this envelope. If you fail to place and seal your ballot in this envelope or if you make marks on this envelope, your ballot will not be counted.

The second, larger envelope is the mailing and declaration envelope. You must use it, even if you are dropping your ballot off at a drop box. Place your secrecy envelope (with your ballot inside) into the mailing and declaration envelope. You must seal it and sign and date the declaration before you can return your ballot.

Both of these envelopes must be used in order for your vote to count.

What if I miss the application deadline? Last Minute Emergencies

In emergency situations (such as an unexpected illness, disability or last-minute absence from your municipality), you can

<u>request an Emergency Absentee Ballot</u>

(https://www.vote.pa.gov/Resources/Documents/PADOS_EmergencyAbsenteeBallotApplication_English.pdf)

after 5 pm on the Tuesday before the election.

The deadline to submit your Emergency Absentee Ballot Application to the County Election Board is 8 pm on Election Day.

Emergency Application for Absentee Ballot (PDF)

(https://www.vote.pa.gov/Resources/Documents/PADOS_Emerg

encyAbsenteeBallotApplication_English.pdf)

<u>Authorized Representative for Emergency Absentee Ballot Form</u>

(https://www.vote.pa.gov/Resources/Documents/PADOS_Author

izeRepresentativeforEmergencyAbsenteeBallot.pdf)

Do not miss voting deadlines!

Sign up to receive emails about mail ballot deadlines, voting processes, new voting system, and more sent directly to your inbox.



GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES

Date: May 24, 2022

Version: 2.0

EXHIBIT

Joint 5 7/28/22

Appendix p.0451

J. Ex. 5

May 24, 2022

Background

On May 19, 2022, the U.S. Court of Appeals for the Third Circuit issued a judgment and order in *Migliori, et al. v. Lehigh County Board of Elections, et al.*, No. 22-1499. Citing the "materiality" provision of the federal Civil Rights Act of 1964 (52 U.S.C. § 10101(a)(2)(B)), the Court of Appeals held that undated ballots cast in Lehigh County in the November 2021 election must be counted. It held that there is no basis to refuse to count the undated ballots because "inasmuch as there is no dispute that ballots that have the wrong date were counted in the [Lehigh] election, the dating provisions contained in the [Pennsylvania Election Code] are immaterial." Subsequent to that judgment, on May 19, the Department of State (Department) asked counties to segregate undated or incorrectly dated ballot return envelopes in anticipation of further guidance from the department.

Though the *Migliori* judgment was issued in the context of the November 2021 election in Lehigh County, it has been the Department's position that ballots that appear to have "incorrect" dates must be counted. Now, in light of the conclusion of the Third Circuit in *Migliori* it is the Department's position that ballots with an undated return envelope must also be counted for the May 17, 2022, Primary. However, out of an abundance of caution the Department advises, that those ballots should be segregated and remain segregated from all other voted ballots during the process of canvassing and tabulation. In other words, those ballots with undated ballot return envelopes or with incorrectly dated ballot return envelopes that have been set aside, should continue to be maintained, preserved, and appropriately logged pending litigation, which we anticipate will be undertaken on an expedited basis. A determination on whether the segregated tabulations will be used in certifying elections has not yet been made, given the ongoing litigation.

Counties should further segregate the ballots in question into two categories:

- 1. Undated.
- 2. Dated with an "incorrect" date.

Like the pre-canvass and canvass of absentee and mail-in ballots last week, the canvass of the undated ballot return envelopes and any incorrectly dated ballot return envelopes that were set aside must be conducted in an open meeting:

- One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the ballots are canvassed.
- No challenges by authorized representatives or any third party are permitted during canvass of the mail-in and absentee ballots.
- To facilitate transparency and ensure that all validly cast ballots are counted, it is critically
 important that county boards maintain accurate records of the disposition of ballots received
 during this period as directed below.

Canvass Procedures

The guidance concerning mail-in and absentee ballots previously provided by the Department on September 28, 2020, continues to apply unless otherwise specified herein.

The county board of elections shall canvass segregated absentee and mail-in ballots that were previously set aside due to being undated or incorrectly dated.

The canvass meeting shall continue until all segregated absentee and mail-in ballots have been canvassed.

The county board of elections shall examine the voter declaration on each envelope to ensure that it is signed and verify that the voter's name appears on the approved list of mail-in and absentee voters.

Please keep in mind that the county board of elections should continue to set aside and not open or count any of the following:

- Ballots cast by any voter who died prior to the opening of the polls on May 17, 2022.
- Ballots that were received after 8:00 p.m. on May 17, 2022.
- Ballots with a missing signature on the Declaration Envelope.
- Ballots that lack the inner secrecy envelope.
- Ballots where the inner secrecy envelope contains any text, mark, or symbol which reveals the identity of the voter or the voter's candidate preference.

Additionally, the county board of elections should not open or count any ballots pending ID verification as follows:

• If proof of identification for an absentee or mail-in voter was not received or could not be verified, the ballot should not be counted unless the elector provided proof of identification, that can be verified by the county board, by the sixth calendar day following the Primary or on or before Monday, May 23rd.

Other than ballots falling into one of the categories set forth above, mail-in and civilian absentee ballots that comply with the Election Code and the Department's prior guidance shall be canvassed as follows:

- Ballots on which the Declaration Envelopes are signed are valid and must be counted.
- Ballots that are signed and either undated or incorrectly dated are valid and must be counted.
- County boards of elections must maintain separate counts for undated and incorrectly dated ballots.

From: Marks, Jonathan < imarks@pa.gov>
Sent: Friday, June 17, 2022 11:46 AM
To: Marks, Jonathan < imarks@pa.gov>

Subject: RE: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Good morning again everyone.

I apologize for the oversight. I forgot to copy summary of events into my earlier email. Please see the summary below.

SUMMARY

EXHIBITJoint 6 7/28/22 end ix p.0454

J. Ex. 6

- 5/20/2022 U.S. Court of Appeals for the 3rd Circuit issues judgment in Migliori acknowledging that the handwritten dates on absentee and mail-in ballots are immaterial. Later that same day, the department instructed counties to segregate undated/wrongly dated ballots and secure them until we could provide further guidance.
- 5/23/2022 Dave McCormick for U.S. Senate files suit in Commonwealth Court seeking, among other things, an injunction that would require counties to count undated ballots.
- 5/24/2022 DOS sends guidance to counties on the segregation, canvassing and tabulation of undated and wrongly dated ballots asking counties to canvass and tabulate those ballots separately from all other ballots.
- 5/24/2022 DOS sends a supplemental statewide reporting form on which counties can report undated ballot vote totals for statewide offices
- 5/26/2022 Secretary of the Commonwealth issues order for the automatic statewide recount of the U.S. Senate contest in the Republican Primary.
- 5/31/2022 Justice Alito issues an administrative stay of the 3rd Circuit's judgment in Migliori.
- 6/2/2022 The Commonwealth Court of Pennsylvania issues an opinion and order in the McCormick matter directing counties to canvass and tabulate undated/wrongly dated ballots and to report two separate vote totals (vote totals with undated ballots and vote totals without undated ballots).
- 6/3/2022 To ensure counties comply with the Commonwealth Court's 6/2 order, DOS sends updated guidance instructing counties to canvass, tabulate and report vote totals from undated ballots and to keep those ballots and vote totals segregated from all other ballots.
- 6/9/2022 The U.S. Supreme Court denies the application for stay in the Migliori case and vacates Justice Alito's administrative stay.

Kind Regards,

Jonathan Marks Deputy Secretary for Elections & Commissions Pennsylvania Department of State 401 North Office Building Harrisburg, PA 17120

Email: jmarks@pa.gov / Phone: (717) 783-2035

From: Marks, Jonathan

Sent: Friday, June 17, 2022 9:08 AM **To:** Marks, Jonathan <<u>imarks@pa.gov</u>>

Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

Dear County Election Official,

This email is provided for clarification on which vote totals are to be submitted to the Department of State (DOS) for the May 17th Primary election and the due date for those submissions.

As you are aware, over the last several weeks federal and state courts have determined that a missing handwritten date on the declaration envelope is immaterial in determining whether the

ballot is *valid and timely returned*. (Please see below a summary of events since our last update on May 20th on the litigation.) As a result of that litigation, counties have been instructed that it will be necessary to certify vote totals that include the votes from undated/wrongly dated ballots. **Those certified vote totals for the May 17 Primary are due to DOS no later than Thursday**, **June 23rd**.

Attached is a certification page that you can use to certify your county's tabulation of the May 17th results.

If you have not already canvassed, tabulated, **and certified** the votes from undated/wrongly dated ballots in an open meeting during the official canvass, it is strongly recommending that you schedule such a meeting and provide at least 48 hours' notice as you would for the Board's regular canvassing meetings. It is also recommended that you share this email with your solicitors.

Given the unprecedented nature of these events, it is expected that there will be questions. Please direct any follow up questions to Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov). In other words, please direct your questions to all three of us.

Thank you as always for your patience and continued hard work, particularly in these unprecedented times.

Kind Regards,

Jonathan Marks Deputy Secretary for Elections & Commissions Pennsylvania Department of State 401 North Office Building Harrisburg, PA 17120

Email: <u>imarks@pa.gov</u> / Phone: (717) 783-2035

Click <u>here</u> to report this email as spam.

From: Riegner, Paige <PRiegner@countyofberks.com>

Sent: Thursday, June 23, 2022 12:43 PM

To: Marks, Jonathan

Cc: Mathis, Jessica; Dauberman, Elissa

Subject: RE: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Hello,

Please see this article: Berks will cover mail ballots postage, add ballot drop box (pottsmerc.com)

Specifically, the section about the undated ballots.

Per the Commissioners, Berks County will not be submitting an additional certification at this time.

Thank you, Paige

Paige Riegner, MPA

Director of Election Services | County of Berks 633 Court Street, 1st Floor Reading, PA 19601 P: 610-478-6490 X5577 PRiegner@countyofberks.com

From: Marks, Jonathan <<u>imarks@pa.gov</u>> Sent: Friday, June 17, 2022 9:08 AM To: Marks, Jonathan <<u>imarks@pa.gov</u>>

Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

County of Berks Warning: This is an external email. Please exercise caution.

Dear County Election Official,

This email is provided for clarification on which vote totals are to be submitted to the Department of State (DOS) for the May 17th Primary election and the due date for those submissions.

As you are aware, over the last several weeks federal and state courts have determined that a missing handwritten date on the declaration envelope is immaterial in determining whether the ballot is *valid and timely returned*. (Please see below a summary of events since our last update on May 20th on the litigation.) As a result of that litigation, counties have been instructed that it will be necessary to certify vote totals that include the votes from undated/wrongly dated ballots. Those certified vote totals for the May 17 Primary are due to DOS no later than Thursday, June 23rd.

EXHIBIT

Joint 7 7/28/2020 end ix p. 045%

J. Ex.

Attached is a certification page that you can use to certify your county's tabulation of the May 17th results.

If you have not already canvassed, tabulated, **and certified** the votes from undated/wrongly dated ballots in an open meeting during the official canvass, it is strongly recommending that you schedule such a meeting and provide at least 48 hours' notice as you would for the Board's regular canvassing meetings. It is also recommended that you share this email with your solicitors.

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Thank you as always for your patience and continued hard work, particularly in these unprecedented times.

Kind Regards,

Jonathan Marks
Deputy Secretary for Elections & Commissions
Pennsylvania Department of State
401 North Office Building
Harrisburg, PA 17120
Email: jmarks@pa.gov / Phone: (717) 783-2035

FOR INFORMATION RE: COVID-19 AND WHAT YOU CAN DO... CLICK www.DoYourPartBerks.com

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Thank you.

From: Marybeth Kuznik <mbkuznik@fayettepa.org>

Sent: Monday, June 27, 2022 12:58 PM

To: Marks, Jonathan; Mathis, Jessica; House, Kori

Cc: 'Jack Purcell'; sherylheidlaw@gmail.com; Dave Lohr; Scott Dunn; mark@zeblaw.com

Subject: [External] RE: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the <u>Report Phishing button in Outlook.</u>

Dear Deputy Secretary Marks,

The Board of Elections of Fayette County has voted not to open or count the undated ballots from the May 17, 2022, General Primary. For this reason, I am unable to provide the information you request in your email below.

Dated ballots with the "wrong" date were counted and were already included in Fayette's original certification of the Primary and subsequent Recount.

Sincerely,

Marybeth Kuznik

Marybeth Kuznik

Director
Fayette County Election Bureau
2 West Main Street, Suite 111
Uniontown, PA 15401
724-430-1289, ext. 101, phone
724-430-4948, fax



EXHIBIT

Joint 8 7/28/22

From: Marks, Jonathan <jmarks@pa.gov> Sent: Monday, June 27, 2022 12:17 PM To: Marks, Jonathan <jmarks@pa.gov>

Subject: FW: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

CAUTION

This message originated from an external source. Verify the legitimacy before clicking links or opening attachments.

Dear County Election Official,

If you are receiving this email, you are among the group of counties who have either not yet certified vote totals from undated ballots or have not provided the Department with information about when you will be able to do so. I understand that this recent Primary has been unusual due to post-election litigation, but the recent rulings in the Commonwealth Court of Pennsylvania and the U.S. Court of Appeals for the 3rd Circuit makes it clear that we will have to certify vote totals that include the vote totals from undated ballots.

As a result, the Department needs you to send certified vote totals that include the votes from undated/wrongly dated ballots as soon as possible. If for some reason you are not able to do so by Wednesday, June 29, then please respond indicating the date on which you plan to do so.

In order to avoid any additional delays in finalizing our certification of the results of the General Primary, the Department may have no choice but to take action to compel certain counties to certify vote totals with undated/wrongly dated ballots in the event we do not receive those certifications before the end of this week.

As noted in my original email, please send copies of your certifications and any questions or responses to all three of the following DOS staff members: Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov).

Thank you for your urgent attention to this matter.

Kind Regards,

Jonathan Marks
Deputy Secretary for Elections & Commissions
Pennsylvania Department of State
401 North Office Building
Harrisburg, PA 17120

Email: <u>imarks@pa.gov</u> / Phone: (717) 783-2035

From: Marks, Jonathan

Sent: Friday, June 17, 2022 9:08 AM
To: Marks, Jonathan < imarks@pa.gov>

Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

Dear County Election Official,

This email is provided for clarification on which vote totals are to be submitted to the Department of State (DOS) for the May 17th Primary election and the due date for those submissions.

As you are aware, over the last several weeks federal and state courts have determined that a missing handwritten date on the declaration envelope is immaterial in determining whether the ballot is valid and timely returned. (Please see below a summary of events since our last update on May 20th on the litigation.) As a result of that litigation, counties have been instructed that it will be necessary to certify vote totals that include the votes from undated/wrongly dated

ballots. Those certified vote totals for the May 17 Primary are due to DOS no later than Thursday, June 23rd.

Attached is a certification page that you can use to certify your county's tabulation of the May 17th results.

If you have not already canvassed, tabulated, **and certified** the votes from undated/wrongly dated ballots in an open meeting during the official canvass, it is strongly recommending that you schedule such a meeting and provide at least 48 hours' notice as you would for the Board's regular canvassing meetings. It is also recommended that you share this email with your solicitors.

Given the unprecedented nature of these events, it is expected that there will be questions. Please direct any follow up questions to Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov). In other words, please direct your questions to all three of us.

Thank you as always for your patience and continued hard work, particularly in these unprecedented times.

SUMMARY

- 5/20/2022 U.S. Court of Appeals for the 3rd Circuit issues judgment in Migliori acknowledging that the handwritten dates on absentee and mail-in ballots are immaterial. Later that same day, the department instructed counties to segregate undated/wrongly dated ballots and secure them until we could provide further quidance.
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Kind Regards,

Jonathan Marks
Deputy Secretary for Elections & Commissions
Pennsylvania Department of State
401 North Office Building
Harrisburg, PA 17120

Harrisburg, PA 17120 Email: jmarks@pa.gov / Phone: (717) 783-2035 From: Pfursich, Jacquelyn E < JEPfursich@co.lancaster.pa.us>

Sent: Monday, June 27, 2022 2:08 PM **To:** Marks, Jonathan < imarks@pa.gov>

Cc: Miller, Christa < MChrista@co.lancaster.pa.us >

Subject: [External] FW: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the <u>Report Phishing button in Outlook.</u>

Mr. Marks,

Your email dated June 27, 2022 was forwarded to me from the Lancaster County Board of Elections and Registration Commission Chief Clerk for response. On June 6, 2022 the Lancaster County Board of Elections submitted its certified vote tallies for the 2022 Primary Election. At the same time, Lancaster County also provided to the Department of State a second set of vote tallies that included 82 undated mail in ballots per the Commonwealth Court Order in the McCormick case, Docket No. 286 M.D. 2022. The Commonwealth Court Order specifically indicates that the County provide the vote tallies to the Department of State in that manner so that when a "final decision on the merits of whether the ballots that lack a dated exterior envelop must be counted or not" the Department of State will have the necessary reports. To date, there is no such decision on the merits of this question that would apply to Lancaster County or the 2022 Primary Election. Therefore, the Lancaster County Board of Elections has complied with the Pennsylvania Elections Code as well as the Commonwealth Court Order.

Please continue to use the certified vote tallies previously provided by the Lancaster County Board of Elections and reference the second set of vote tallies as needed.



Regards

Jacquelyn E. Pfursich Lancaster County Solicitor 150 N. Queen Street Suite #714 Lancaster, PA 17603 717-209-3208 Fax 717-293-7208 jepfursich@co.lancaster.pa.us



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From: Marks, Jonathan < imarks@pa.gov > Sent: Monday, June 27, 2022 12:17 PM
To: Marks, Jonathan < imarks@pa.gov >

Subject: [EXTERNAL] FW: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

Dear County Election Official,

If you are receiving this email, you are among the group of counties who have either not yet certified vote totals from undated ballots or have not provided the Department with information about when you will be able to do so. I understand that this recent Primary has been unusual due to post-election litigation, but the recent rulings in the Commonwealth Court of Pennsylvania and the U.S. Court of Appeals for the 3rd Circuit makes it clear that we will have to certify vote totals that include the vote totals from undated ballots.

As a result, the Department needs you to send certified vote totals that include the votes from undated/wrongly dated ballots as soon as possible. If for some reason you are not able to do so by Wednesday, June 29, then please respond indicating the date on which you plan to do so.

In order to avoid any additional delays in finalizing our certification of the results of the General Primary, the Department may have no choice but to take action to compel certain counties to certify vote totals with undated/wrongly dated ballots in the event we do not receive those certifications before the end of this week.

As noted in my original email, please send copies of your certifications and any questions or responses to all three of the following DOS staff members: Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov).

Thank you for your urgent attention to this matter.

Kind Regards,

Jonathan Marks Deputy Secretary for Elections & Commissions Pennsylvania Department of State 401 North Office Building Harrisburg, PA 17120

Email: <u>imarks@pa.gov</u> / Phone: (717) 783-2035

From: Marks, Jonathan

Sent: Friday, June 17, 2022 9:08 AM
To: Marks, Jonathan < imarks@pa.gov>

Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

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Thank you as always for your patience and continued hard work, particularly in these unprecedented times.

SUMMARY

• 5/20/2022 – U.S. Court of Appeals for the 3rd Circuit issues judgment in Migliori acknowledging that the handwritten dates on absentee and mail-in ballots are immaterial. Later that same day, the department instructed counties to segregate undated/wrongly dated ballots and secure them until we could provide further guidance.

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- 6/9/2022 The U.S. Supreme Court denies the application for stay in the Migliori case and vacates Justice Alito's administrative stay.

Kind Regards,

Jonathan Marks Deputy Secretary for Elections & Commissions Pennsylvania Department of State 401 North Office Building Harrisburg, PA 17120

Email: jmarks@pa.gov / Phone: (717) 783-2035

Click here to report this email as spam.

From: Leinbach, Christian Y < CLeinbach@countyofberks.com>

Sent: Tuesday, June 28, 2022 12:32 PM **To:** Marks, Jonathan <jmarks@pa.gov>

Cc: Riegner, Paige <PRiegner@countyofberks.com>; Kauffman, Cody <CKauffman@countyofberks.com>; Yocom-Grill, Anne-Marie <AGrill@countyofberks.com>; Ischaefer <Ischaefer@pacounties.org>; awhite <awhite@pacounties.org>;

Daryl Miller (millerd@mail.bradfordco.org) <millerd@mail.bradfordco.org>

Subject: Certification of undated ballots

Importance: High

Jonathan

Please help me understand where the clear court guidance is regarding certification on undated ballots. I do not see it. "rulings in the Commonwealth Court of Pennsylvania and the U.S. Court of Appeals for the 3rd Circuit makes it clear that we will have to certify vote totals that include the vote totals from undated ballots." I believe the rulings are anything but clear. At best the issue is not settled.

I look forward to your response.

Sincerely,

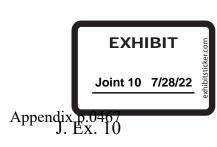
Christian Y. Leinbach
Chairman - Berks County Commissioners

633 Court Street Reading, PA 19601-4310

Phone: 610-478-6136 Ext. 3 / Ext. 6127

Fax: 610-478-6139

Email: <u>CLeinbach@CountyofBerks.com</u>
Website: www.CountyofBerks.com





Get Outlook for iOS

From: Marks, Jonathan < <u>imarks@pa.gov</u>>
Sent: Monday, June 27, 2022 12:17 PM
To: Marks, Jonathan < <u>imarks@pa.gov</u>>

Subject: FW: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

County of Berks Warning: This is an external email. Please exercise caution.

Dear County Election Official,

If you are receiving this email, you are among the group of counties who have either not yet certified vote totals from undated ballots or have not provided the Department with information about when you will be able to do so. I understand that this recent Primary has been unusual due to post-election litigation, but the recent rulings in the Commonwealth Court of Pennsylvania and the U.S. Court of Appeals for the 3rd Circuit makes it clear that we will have to certify vote totals that include the vote totals from undated ballots.

As a result, the Department needs you to send certified vote totals that include the votes from undated/wrongly dated ballots as soon as possible. If for some reason you are not able to do so by Wednesday, June 29, then please respond indicating the date on which you plan to do so.

In order to avoid any additional delays in finalizing our certification of the results of the General Primary, the Department may have no choice but to take action to compel certain counties to certify vote totals with undated/wrongly dated ballots in the event we do not receive those certifications before the end of this week.

As noted in my original email, please send copies of your certifications and any questions or responses to all three of the following DOS staff members: Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov).

Thank you for your urgent attention to this matter.

Kind Regards,

Jonathan Marks Deputy Secretary for Elections & Commissions Pennsylvania Department of State 401 North Office Building Harrisburg, PA 17120

Email: <u>imarks@pa.gov</u> / Phone: (717) 783-2035

FOR INFORMATION RE: COVID-19 AND WHAT YOU CAN DO... CLICK www.DoYourPartBerks.com

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Thank you.



COUNTY OF BERKS, PENNSYLVANIA

Office of the Solicitor

Services Center, 13th Floor 633 Court Street Reading, PA 19601

Christine M. Sadler - Solicitor

Christian Y. Leinbach, Chair Kevin S. Barnhardt, Vice Chair Michael S. Rivera, Commissioner Cody L. Kauffman, Esquire Direct Dial 610.478.6105, Ext. 6111 Email: ckauffman@countyofberks.com

Via Electronic Mail Only

Mr. Timothy E. Gates Chief Counsel, Pennsylvania Department of State 306 North Office Building Harrisburg, PA 17120 tgates@pa.gov

July 1, 2022

Dear Mr. Gates,

Thank you for your June 29th, 2022, correspondence sent to Ms. Paige Riegner, Director of the Berks County Office of Election Services. Pursuant to a majority vote of the Berks County Board of Elections, the County of Berks will not be recertifying the results of the May 17th, 2022, Primary Election as requested in your correspondence.

Sincerely,

Cody L. Kauffman, Esq.

First Assistant County Solicitor

For The Berks County Board of Elections

EXHIBIT

Joint 12 7/28/22

From: Gates, Timothy <tgates@pa.gov>
Sent: Tuesday, July 5, 2022 4:30 PM

To: Pfursich, Jacquelyn E

Subject: RE: [External] RE: Certification of Undated Ballots

Good afternoon Jacquelyn -

We believe that the county can certify the election results for the undated ballots separately without having to decertify the results that have already been certified. That being said, I appreciate your response explaining that Lancaster County's position has not changed.

Many thanks,

--Tim

Timothy E. Gates | Chief Counsel Office of Chief Counsel | Department of State 306 North Office Building | Harrisburg, PA 17120 Phone: 717.783.0736 | Fax: 717.214.9899 tgates@pa.gov | www.dos.state.pa.us

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From: Pfursich, Jacquelyn E < JEPfursich@co.lancaster.pa.us>

Sent: Tuesday, July 5, 2022 4:17 PM **To:** Gates, Timothy <tgates@pa.gov>

Subject: [External] RE: Certification of Undated Ballots

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Good afternoon Tim,

The Lancaster County Board of Elections is in receipt of your letter dated June 29, 2022 as well as your email dated July 5, 2022. On June 27, 2022, I provided to Mr. Marks the County's position regarding the unsigned mail in-ballots and the status of the litigation regarding this issue. The County's position has not changed. Furthermore, the County believes that certifying an election twice without decertifying the first certification is not consistent with the Pennsylvania Election Code.

Joint 13 7/28/22 Appendix p.047

The County has provided you the vote tallies in accordance with the Commonwealth Court Order and hopes that you reconsider your position regarding litigating this matter.

Regards,

Jacquelyn E. Pfursich Lancaster County Solicitor 150 N. Queen Street Suite #714 Lancaster, PA 17603 717-209-3208 Fax 717-293-7208 jepfursich@co.lancaster.pa.us



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From: Gates, Timothy < tgates@pa.gov > Sent: Tuesday, July 5, 2022 2:25 PM

To: Pfursich, Jacquelyn E < <u>JEPfursich@co.lancaster.pa.us</u>> **Subject:** [EXTERNAL] RE: Certification of Undated Ballots

Jaquelyn -

Following up on my email/letter from last week.

If you do not provide the requested information by 5pm today the Acting Secretary intends to pursue all necessary and appropriate legal action.

--Tim

From: Gates, Timothy

Sent: Wednesday, June 29, 2022 12:56 PM

To: jepfursich@co.lancaster.pa.us

Subject: Certification of Undated Ballots

Importance: High

Dear Jacquelyn Pfursich -

Please see the attached letter regarding certification of undated ballots by your county board of elections.

Note that I have requested a response from you by this Friday, July 1, 2022.

--Tim

Timothy E. Gates | Chief Counsel Office of Chief Counsel | Department of State 306 North Office Building | Harrisburg, PA 17120 Phone: 717.783.0736 | Fax: 717.214.9899 tgates@pa.gov | www.dos.state.pa.us

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From: Gates, Timothy <tgates@pa.gov>
Sent: Friday, July 8, 2022 6:31 PM

To: 'Marybeth Kuznik'; jackpurcell146@gmail.com **Subject:** Re: [External] RE: Certification of Undated Ballots

Following up again. Please advise on your response as requested. Fayette County is the ONLY county that I have not yet heard from.

Many thanks,

—Tim

From: Gates, Timothy <tgates@pa.gov> Sent: Tuesday, July 5, 2022 2:32 PM

To: 'Marybeth Kuznik' <mbkuznik@fayettepa.org>; jackpurcell146@gmail.com <jackpurcell146@gmail.com>

Subject: RE: [External] RE: Certification of Undated Ballots

Jack -

Following up on my email/letter from last week.

If you do not provide the requested information by 5pm today the Acting Secretary intends to pursue all necessary and appropriate legal action.

--Tim

Timothy E. Gates | Chief Counsel Office of Chief Counsel | Department of State 306 North Office Building | Harrisburg, PA 17120 Phone: 717.783.0736 | Fax: 717.214.9899 tgates@pa.gov | www.dos.state.pa.us

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From: Gates, Timothy

Sent: Wednesday, June 29, 2022 1:56 PM **To:** Marybeth Kuznik <mbkuznik@fayettepa.org>

Subject: RE: [External] RE: Certification of Undated Ballots

EXHIBIT

Joint 14 7/28/24 prendix p.0474

J. Ex. 14

Many thanks.

--Tim

From: Marybeth Kuznik < mbkuznik@fayettepa.org>

Sent: Wednesday, June 29, 2022 1:53 PM **To:** Gates, Timothy <tgates@pa.gov>

Subject: [External] RE: Certification of Undated Ballots

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Dear Tim --

A few moments ago I forwarded your message and letter to the Fayette County Board of Elections and to the county solicitors.

Marybeth

Marybeth Kuznik Director Fayette County Election Bureau 2 West Main Street, Suite 111 Uniontown, PA 15401 724-430-1289, ext. 101, phone 724-430-4948, fax



From: Gates, Timothy < tgates@pa.gov>
Sent: Wednesday, June 29, 2022 12:56 PM
To: Marybeth Kuznik < mbkuznik@fayettepa.org>

Subject: Certification of Undated Ballots

Importance: High

CAUTION

This message originated from an external source. Verify the legitimacy before clicking links or opening attachments.

Dear Marybeth Kuznik -

Please see the attached letter regarding certification of undated ballots by your county board of elections.

Note that I have requested a response from you by this Friday, July 1, 2022.

--Tim

Timothy E. Gates | Chief Counsel Office of Chief Counsel | Department of State 306 North Office Building | Harrisburg, PA 17120 Phone: 717.783.0736 | Fax: 717.214.9899 tgates@pa.gov | www.dos.state.pa.us

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dave McCormick for U.S. Senate, and David H. McCormick.

Petitioners

v. : No. 286 M.D. 2022 : Heard: May 31, 2022

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 Board 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 Board 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

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge

FILED: June 2, 2022

OPINION NOT REPORTED

MEMORANDUM OPINION BY PRESIDENT JUDGE COHN JUBELIRER

On May 23, 2022, Dave McCormick for U.S. Senate and David H. McCormick (together, Petitioners) filed a Petition for Review in the Nature of a Complaint in Equity (Petition) in this Court's original jurisdiction against named Respondents Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth (Acting Secretary), and 60 county boards of elections¹ (County Boards). In their Petition, Petitioners allege that the above-listed County Boards refuse to count absentee and mail-in ballots for the Republican Nomination for the Office of United States Senator in the May 17, 2022 General Primary Election,² where the voters failed to handwrite a date on the exterior mailing envelope but the ballots were otherwise timely received based upon the date stamped by the County Boards upon receipt and complied with all applicable requirements. On May 24, 2022, Petitioners filed a Motion for Immediate Special Injunction and Supporting Memorandum of Law, which this Court treats as a motion for a preliminary

¹ Petitioners did not name the remaining seven county boards of elections based on their belief that those boards are already providing the relief sought by Petitioners in this matter. To the extent that it is asserted that these seven counties are indispensable parties and that their absence precludes this Court from acting, the Court is unconvinced at this time that the failure to name parties who are not engaging in the alleged unlawful behavior is a barrier to the Court considering this action.

² Because the unofficial returns submitted to the Department of State by the 67 county boards of elections pursuant to Section 1404(f) of the Pennsylvania Election Code (Election Code), Act of June 3, 1937, P.L. 1333, as amended, 25 P.S. § 3154(f), for the May 17, 2022 General Primary Election indicated that a candidate in the Republican Primary for the Office of United States Senator was defeated by one-half of a percent or less of the votes cast for that office, and the defeated candidate did not request in writing that a recount not be made under Section 1404(h) of the Election Code, 25 P.S. § 3154(h), on May 26, 2022, the Acting Secretary ordered a statewide recount of the entire vote cast in the Republican Primary for the Office of United States Senator pursuant to Section 1404(g)(1) of the Election Code, 25 P.S. § 3154(g)(1). See Order of Recount for the Republican Primary for United States Senator, dated May 26, 2022. The recount was ordered to be completed by the county boards no later than noon on Tuesday, June 7, 2022, and the results of the recount submitted no later than noon on Wednesday, June 8, 2022. *Id.*

injunction (Motion for Special Injunction). For the following reasons, the Court grants the Motion for Special Injunction.

Background & Procedural History

Sections 1306(a) and 1306-D(a) of the Pennsylvania Election Code³ provide, respectively, that, after an elector marks their ballot and secures it in the secrecy envelope, the elector is to place that envelope into a second envelope (outer or exterior envelope) on which, among other things, is printed a "declaration of the elector" which "[t]he elector shall then fill out, date and sign" (dating provisions). 25 P.S. §§ 3146.6(a) (absentee), 3150.16(a) (mail-in). Whether ballots can be counted that do not contain a handwritten date on the outer envelope as described in these sections is the issue. In Count I of the Petition, Petitioners allege that the County Boards' refusal to count timely received ballots lacking a handwritten date on the exterior envelope violates Section 10101(a)(2)(B) of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B),⁴ (commonly referred to as the "materiality provision"),

. . .

³ See Section 1306(a) of the Election Code, added by the Act of March 6, 1951, P.L. 3, 25 P.S. § 3146.6(a) (relating to voting by absentee electors); see also Section 1306-D(a) of the Election Code, added by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77), 25 P.S. § 3150.16(a) (relating to voting by mail-in electors). To complete an absentee or mail-in ballot, an elector is required to "fill out, date and sign the declaration printed on [the second, outer] envelope" and either send the envelope by mail, postage prepaid, or deliver it in person to the elector's respective county board of elections no later than 8:00 p.m. on the day of the primary election. Sections 1306(a), (c), and 1306-D(a), (c) of the Election Code, 25 P.S. §§ 3146.6(a), (c), 3150.16(a), (c).

⁴ Section 10101(a)(2)(B) of the Voting Rights Act provides, as follows:

⁽a) Race, color, or previous condition not to affect right to vote; uniform standards for voting qualifications; errors or omissions from papers; literacy tests; agreements between Attorney General and State or local authorities; definitions

because the dating provisions under the Election Code are immaterial to whether a voter is qualified to vote under state law. (Petition for Review (Pet. for Rev.) ¶¶ 18-20.) In Count II, Petitioners further allege that the County Boards' refusal to count ballots lacking a handwritten date on the exterior envelope, which is a mere technical requirement, disenfranchises both absentee and mail-in voters and thus violates the Free and Equal Elections Clause under article I, section 5 of the Pennsylvania Constitution, PA. Const. art. I, § 5.5 (Pet. for Rev. ¶¶ 21-23.)

As relief, Petitioners seek a judicial declaration that "timely returned absentee and mail-in ballots may not be rejected due solely to the lack of a date in the declaration on the exterior envelope"; and an order directing the County Boards "to canvass any timely returned absentee or mail-in ballot that lacks a date on its exterior envelope and no other deficiencies or irregularities[,]" "to report to the [] Department of State [(Department)] the unofficial results of the canvass . . . of any timely returned absentee or mail-in ballot that lacks a date on its exterior envelope absent any other irregularities"; and an order enjoining County Boards "to take all other steps necessary to effectuate this Court's declaration[.]" (Pet. for Rev., Prayer for Relief ¶¶ 1-4.)

(2) No person acting under color of law shall--

. .

(B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election[.]

52 U.S.C. § 10101(a)(2)(B).

⁵ The Free and Equal Elections Clause provides: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." PA. CONST. art. I, § 5.

On May 24, 2022,6 immediately prior to the deadline by which the unofficial returns were due to be submitted to the Acting Secretary, Petitioners filed the Motion for Special Injunction seeking an order from this Court directing the County Boards to count the ballots in question. In so requesting, Petitioners assert that Pennsylvania's dating provisions for absentee and mail-in ballots are unenforceable under both state and federal law. Petitioners rely on our Supreme Court's plurality decision in In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, 241 A.3d 1058 (Pa. 2020) (In re 2020 Canvass), and the United States Court of Appeals for the Third Circuit's (Third Circuit) recent decision in Migliori v. Lehigh County Board of Elections (3d Cir., No. 22-1499, filed May 20, 2022; Amended Judgment May 23, 2022) (opinion issued May 27, 2022).8 In Migliori, the Third Circuit held that "inasmuch as there is no dispute that ballots that have the wrong date [on the exterior envelopes] were counted in the" November 2021 General Election for the Office of Judge of the Court of Common Pleas of Lehigh County, the dating provisions under Sections 1306(a) and 1306-D(a) of the Election Code are immaterial under Section 10101(a)(2)(B) of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B). See Migliori v. Lehigh County Board of Elections, No.

⁶ Also on May 24, 2022, Petitioners filed an Application for the Supreme Court to Exercise Jurisdiction Pursuant to its King's Bench Powers and/or Powers to Grant Extraordinary Relief. By per curiam order dated May 31, 2022, the Supreme Court, *inter alia*, denied the Application and declined to exercise its King's Bench powers and/or extraordinary jurisdiction over this matter. *See Dave McCormick for U.S. Senate v. Chapman* (Pa., No. 46 MM 2022, filed May 31, 2022).

⁷ Under Section 1404(f) of the Election Code, 25 P.S. § 3154(f), county boards were required to submit the unofficial returns to the Acting Secretary by 5:00 p.m. on the Tuesday following the election, i.e., May 24, 2022.

⁸ An emergency application for a stay of the Third Circuit's *Migliori*'s mandate, which was to go into effect on June 3, 2022, pending certiorari was granted on May 31, 2022, by the United States Supreme Court, through Associate Justice Samuel Alito. *Ritter v. Migliori* (U.S., No. 21A772, filed May 31, 2022). ("[T]he mandate of the . . . Third Circuit, case No. 22-1499, is hereby stayed pending further order of the undersigned or of the Court.").

22-1499 (3d Cir. Amended Judgment May 23, 2022). Moreover, the Third Circuit held that, because it was undisputed that all of the ballots that had been set aside due to the lack of a date on the exterior envelope in the November 2021 election for the Office of Judge of the Court of Common Pleas of Lehigh County were received by the deadline, there was no basis on the record to refuse to count those ballots. *Id*.

In response to the Third Circuit's judgment in *Migliori*, the Department issued Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes (Guidance) on May 24, 2022,⁹ advising the County Boards to count ballots cast with undated exterior envelopes in the May 17, 2022 General Primary Election and segregate them from all other voted ballots pending ongoing litigation of the issue. The Guidance advised the same with respect to ballots containing incorrect dates.

Two applications to intervene were filed in this matter by: (1) Doctor Oz for Senate & Dr. Mehmet Oz (Oz Intervenors); and (2) the Republican National Committee and Republican Party of Pennsylvania (Republican Intervenors) (together, Intervenors). As no objections to these applications were made, the applications to intervene were granted at the hearing and confirmed by subsequent order.

By order dated May 25, 2022, this Court scheduled a hearing on the Motion for Special Injunction and directed the parties to file, *inter alia*, responses in opposition to the Motion for Special Injunction, if any, and a joint stipulation of facts indicating which County Boards are not following the Department's Guidance.

⁹ See https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-05-24-Guidance-Segregated-Undated-Ballots.pdf (last visited June 2, 2022).

Petitioners have also filed on May 26, 2022, an Amended Application for Voluntary Discontinuance¹⁰ seeking to dismiss 12 County Boards from this action - Adams, Bedford, Cameron, Clinton, Crawford, Elk, Potter, Sullivan, Union, Warren, Washington, and Wyoming -- on the basis that they either (1) did not receive any non-overseas/non-military absentee or mail-in ballots without a voter-supplied date on the exterior envelope; (2) already counted those ballots; or (3) are complying with the Department's Guidance to County Boards directing them to count, but segregate, the challenged ballots.¹¹

Pursuant to the Court's May 25, 2022 directive, responses in opposition to the Motion for Special Injunction were received from the following County Boards: Blair County; Westmoreland County; and Berks County. The general tenor of the first two responses is that this litigation is premature and should be resolved after *Migliori* is final and/or it is determined that *Migliori* applies to this election, and the last response contends that it is unclear that *Migliori* changed the status of Pennsylvania law. In addition, Blair County indicates that it is "act[ing] appropriately" by segregating its 17 ballots that lack a date on the exterior envelope and not including them in its unofficial totals, (Blair Cnty. Response at 3), and Berks County indicates that it is following the Department's Guidance. The Union County Board seeks to be removed as a respondent in this matter because the outcome of these proceedings will not implicate its official or unofficial results for the May 17,

¹⁰ Initially, Petitioners filed an Application for Voluntary Nonsuit, seeking to have five County Boards (Cameron, Clinton, Potter, Sullivan, and Wyoming) dismissed from this action on the basis that Petitioners' requested relief is not applicable to those County Boards, as they either did not receive any non-overseas/non-military absentee or mail-in ballots without a voter-supplied date on the exterior envelope or already counted those ballots.

¹¹ At this time and given that County Boards are alleged to be handling the ballots that lack a date on the exterior envelope differently, the Amended Application for Voluntary Discontinuance is denied without prejudice to reassert.

2022 Primary Election. Finally, the following County Boards filed responses indicating they take no position on the Motion for Special Injunction: Butler County; Chester County; Clearfield County; Franklin County; Lehigh County; Luzerne County; McKean County; and Northampton County. Clearfield and Luzerne County also indicated in their responses that they were following the Guidance.

Also in accordance with the Court's May 25, 2022 directive, the parties have filed a Joint Stipulation of Facts (filed on May 27, 2022 (Jt. Stip.)), and two Supplemental Joint Stipulations of Facts (filed on May 27, 2022 (First Suppl. Jt. Stip.), and May 31, 2022 (Second Suppl. Jt. Stip.), respectively), which are signed by some, but not all, of the parties regarding the status of the count. In the Joint Stipulation and as supplemented by the Second Supplemental Joint Stipulation, the parties stipulated that a number of county boards of elections:

- (1) were not named because they have already counted the absentee/mail-in ballots lacking dates on their exterior envelopes (Armstrong, Erie, Greene, Philadelphia, Schuylkill, Sullivan, Susquehanna, York (Jt. Stip. ¶¶ 12-13));
- (2) should be dismissed from the litigation, as they either did not receive any ballots lacking dates on the exterior envelopes or are doing as Petitioners ask (Adams, Bedford, Cameron, Clinton, Crawford, Elk, Potter, Union, Warren, Washington, Wyoming (Jt. Stip. ¶ 14));
- (3) should be dismissed from the litigation, as they did not receive any Republican absentee/mail-in ballots lacking dates on their exterior envelopes (Clarion, Columbia, Jefferson, Lackawanna, Perry, Venango, Juniata, Northumberland (Jt. Stip. ¶¶ 15; Second Suppl. Jt. Stip. ¶ 3));
- (4) should be dismissed from the litigation because they are complying with the Guidance by segregating and providing separate vote tallies to the Department (Buck, Centre, Chester, Delaware, Franklin, Indiana,

Luzerne, Montgomery, Tioga, Northampton (Jt. Stip. ¶¶ 17-18; Second Suppl. Jt. Stip. ¶ 4));

- (5) it is not clear whether the board is complying with the Guidance (Somerset (Jt. Stip. ¶ 19));
- (6) are complying with the Guidance but not reporting the results to the Department (Allegheny, Cambria, McKean (Jt. Stip. ¶ 20; Second Suppl. Jt. Stip. ¶ 5));
- (7) should be removed because the board has already counted absentee/mail-in ballots lacking dates on their exterior envelopes in a single count with the rest of absentee/mail-in ballots that lack any other deficiency (Lehigh (Jt. Stip. ¶¶ 21-22));
- (8) should be removed as parties because they have complied with the Guidance (Huntingdon, Mifflin (Jt. Stip. ¶¶ 23-24));
- (9) are not following the Guidance (Bradford, Blair, Butler, Dauphin, Fayette, Lancaster, Lycoming, Westmoreland (Jt. Stip. ¶ 25));
- (10) are following the Guidance but do not intend to count the absentee/mail-in ballots lacking dates on their exterior envelopes absent further clarity or finality from the Courts (Berks (Jt. Stip. ¶ 26));
- (11) did not receive any absentee/mail-in ballots without dates on their exterior envelopes (Columbia, Union (Jt. Stip. ¶ 27)); or
- (12) did not respond to Petitioners' questionnaire (Beaver, Carbon, Clearfield, Cumberland, Forest, Fulton, Lawrence, Lebanon, Mercer, Monroe, Montour, Pike, Snyder, Wayne (Jt. Stip. ¶ 28; Second Suppl. Jt. Stip. ¶ 6)).

The first Supplemental Joint Stipulation, filed on May 27, 2022, by Oz Intervenors and signed by several county boards of elections, purports to set forth then-current counts of the numbers of undated absentee/mail-in ballots lacking dates on the exterior envelopes timely received by various counties (Adams, Allegheny, Bucks, Cameron, Chester, Clinton, Crawford, Delaware, Franklin, Perry, Somerset, Union, Venango) for the Republican Primary Election for United States Senator,

totaling 143 absentee/mail-in ballots (38 for Oz and 52 for McCormick). (See generally First Suppl. Jt. Stip.)

The Acting Secretary filed an Answer to the Motion for Special Injunction, asserting that Petitioners are likely to succeed on the merits of their case based on *Migliori*, and, alternatively, under Pennsylvania law, which "does not allow rejecting timely received absentee or mail-in ballots just because the voter did not date the return envelope." (*See* Secretary's Answer to the Motion for Special Injunction at 10.)

Republican Intervenors filed an Answer and New Matter to the Motion for Special Injunction and a Motion to Strike the Joint Stipulation, asserting that it opposes the Motion for Special Injunction, does not agree to the Joint Stipulation, and further does not agree that **any** County Boards should be dismissed from this action. Republican Intervenors also claim that the seven county boards not named as Respondents in the Motion for Special Injunction should be joined, as all county boards are indispensable parties to this action. Oz Intervenors filed a Brief in Opposition to Petitioners' Motion for Special injunction, which Republican Intervenors adopt.¹²

Hearing and Arguments

This Court held a hearing on the Motion for Special Injunction on May 31, 2022. At the start of the hearing, Petitioners; the Acting Secretary; various County Boards including Montgomery, Bucks, Franklin, Luzerne, Berks, Delaware, Westmoreland, and Chester; and Intervenors indicated they would not be presenting any witnesses or other evidence, and further agreed that the issue in this case is

 $^{^{12}}$ Oz Intervenors also filed Preliminary Objections to the Petition, which Republican Intervenors also adopt.

purely a legal one that may be resolved on the stipulated facts submitted by the parties. While some of the County Boards stated their position with respect to the Motion for Special Injunction, only Luzerne County subsequently offered argument in which it requested that the Court provide clear direction and guidance as to what to do with these ballots. The parties also agreed that it is undisputed that all absentee and mail-in ballots that lack dates on the exterior envelopes at issue in this case were timely received and contained no other irregularities as to the qualifications of the voters. Further, the parties generally acknowledged that County Boards were, in fact, counting ballots with incorrect dates on the exterior envelopes, such as a birth date.

Petitioners argue in support of the Motion for Special Injunction, ¹³ relying first on the Third Circuit's decision in *Migliori* and Section 10101(a)(2)(B) of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), and, second, that the dating provisions under Sections 1306(a) and 1306-D(a) of the Election Code do not advance a "weighty interest" under state law given these facts, and violates the Free and Equal Elections Clause of the Pennsylvania Constitution, PA. CONST. art. I, § 5. Petitioners stress that the timeliness of receipt of the ballots in question that lack handwritten dates on the exterior envelopes is established both by "receipt stamps" placed on them by the County Boards , and separately through the unique barcode on the return envelope associated with the voter and the specific ballot, which allows for ballots to be tracked through the Statewide Uniform Registry of Electors (SURE) System.

Petitioners further argue that currently the County Boards are taking different positions with some counting the ballots that lack a date on the exterior envelopes,

¹³ Given the exigency of this matter and the fact that an automatic recount is currently ongoing, the Court dispenses with a lengthy summary of the parties' arguments contained in their filings and focus on the main points of their positions as argued at the hearing.

and others not counting them; thus, the Election Code's dating provisions, which are ambiguous and should be read liberally so as to avoid the unreasonable result of disenfranchising voters, are not being uniformly applied to all Pennsylvania voters raising a question of whether the Pennsylvania Constitution is being violated. Petitioners further contend that the date that matters for eligibility purposes is Election Day. Because these ballots were all timely received by 8:00 p.m. on Primary Election Day, and could not have been cast prior to the ballot having been received by them, there is no question that the ballots have been timely completed regardless of whether there is a date on the exterior envelope. That there are no "weighty interests" which the dates on these exterior envelopes address is evident, according to Petitioners, because ballots on which their exterior envelopes contain obviously incorrect dates, such as birth dates or past or future years, are accepted and counted. Petitioners question how it would be possible to know whether a date was written on an exterior envelope contemporaneously with signing the envelope. Thus, Petitioners argue, under the facts of this case, there is no compelling reason to disenfranchise eligible voters because they inadvertently did not handwrite a date on the exterior envelope.

With regard to Section 10101(a)(2)(B) of the Civil Rights Act, Petitioners contend that this Court should find the Third Circuit's interpretation of federal law persuasive authority and that its holding in *Migliori* is "clearly correct." Petitioners note that at least four Pennsylvania Supreme Court justices recognized the potential violation of the materiality provision by the dating provisions in *In re 2020 Canvass*, a decision that did not resolve the question presently before the Court. Regarding Section 10101(a)(2)(B) of the Civil Rights Act, Petitioners contend that there are two questions before the Court: (1) whether the exterior mailing envelope is a record

or paper requisite to voting; and (2) whether voters' omission of a handwritten date on that envelope is material in determining whether voters are qualified to vote in this election. Petitioners assert that the exterior envelope is in fact a record or paper requisite to voting, under the definitions of "vote" and "voting" in Section 10101(e) of the Civil Rights Act, and that a voter's omission of a handwritten date is not material to determining anything about the qualifications to vote under Pennsylvania law. This is particularly true, Petitioners argue, where, as is undisputed here, ballots that had exterior envelopes with patently wrong dates were counted.

Petitioners request that the Court rule in their favor and grant their requested relief because they have a likelihood of success on the merits and meet the other requirements for obtaining a preliminary injunction. Petitioners clarify that the relief they seek is an order directing the County Boards to (1) segregate and count the absentee and mail-in ballots that lacked a date on the exterior envelope and include those ballots in the County Boards' final tally submitted to the Department; or, alternatively, (2) segregate, count and separately report the votes cast by the absentee and mail-in ballots that lacked a date on the exterior envelope.

The Acting Secretary agrees with Petitioners' position that ballots without a handwritten date on the outer envelope received by 8:00 p.m. on Election Day with no other irregularities should be counted in accordance with both federal and state law on the subject. The Acting Secretary notes that incorrect dates, including birth dates and those dates using the wrong year, have been counted. The Acting Secretary explains that counties are directed to track when an absentee or mail-in ballot is received by stamping its return envelope with the "received" date, in addition to scanning the unique barcode on the return envelope, which is associated with both the voter and the specific ballot allowing the ballot to be tracked through

the SURE system. The Acting Secretary further points out that no good reasons were provided to the Third Circuit as to why the dating provisions are important and submits that the date on the outer envelope does not prevent fraud, the backdating of votes, or determining voter eligibility. The Acting Secretary also states that it is fair to read the Election Code's dating provisions as a suggestion to voters, which some do not follow. The Acting Secretary distinguishes our Supreme Court's decision in In re 2020 Canvass from this case, noting that the Supreme Court did not consider the issue under federal law, as there was no thorough advocacy of the issue in that case, and did not have the benefit of *Migliori*. Additionally, according to the Acting Secretary, federal and state law on this issue may be harmonized because the Election Code does not expressly impose a consequence when there is no date on the exterior envelope. The statutory ambiguity should be resolved to avoid conflicting with both federal and state law. The Acting Secretary admits that, should an envelope not be signed, the ballot would not be counted despite that there is also no consequence provided for omission of a signature in the Election Code because a signature goes to establishing the identity of the voter.

Oz Intervenors assert that the record is insufficient to show that Petitioners have met the requirements for preliminary injunctive relief. Specifically, Oz Intervenors note that there is no irreparable harm here, as no one knows how many ballots that lack a date on the envelopes there actually are and, further, there are discrepancies with the number of those ballots that have been reported to the Department and the current vote margin. Oz Intervenors state they had no objection to the segregation of ballots, as they believe all counties are currently complying with the Guidance to segregate. With these ballots already being segregated, Oz Intervenors assert that if, after the automatic recount, the number of ballots with an

undated exterior envelope is not sufficient to change the outcome of the race, then those ballots should not be counted, and the Court would not need to address the issue. Oz Intervenors also argue that this Court's unreported decision in Ritter v. Lehigh County Board of Elections (Pa. Cmwlth., No. 1322 C.D. 2021, filed January 3, 2022), appeal denied, (Pa., No. 9 MAL 2022, January 27, 2022), remains good law despite the Third Circuit's decision in *Migliori*, which involved the same election and candidates. Oz Intervenors point out that Migliori is not final and contradicts *Ritter*. Further, Oz Intervenors assert that, under *Ritter*, the Civil Rights Act's materiality provision does not apply here because it has nothing to do with a voter's qualifications. Oz Intervenors clarify that the consequence for not including a date on the exterior envelope would be the ballot not being counted, as opposed to, for example, removing a voter from the voter rolls. According to Oz Intervenors, merely invalidating a ballot under the Election Code for failure to include a date on the exterior envelope does not result in the voter being denied the right to vote under federal law. Oz Intervenors further contend that the materiality provision was originally enacted under the Fifteenth Amendment to the United States Constitution¹⁴ to prohibit race discrimination with respect to qualifications to vote. As there is no evidence of discrimination here and no indication that the dating provisions relate to the registration or qualifications to vote, but rather are state law provisions regarding the manner of voting, Oz Intervenors argue that the materiality provision does not apply. Finally, Oz Intervenors observe that the question of whether to count ballots with undated exterior envelopes may not even need to be

¹⁴ The Fifteenth Amendment provides, in relevant part, that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV.

decided here because there may be insufficient ballots that lack a dated exterior envelope to make a difference.

Republican Intervenors contend that Pennsylvania law is clear that ballots that lack a dated exterior envelope should not be counted. They claim that this is merely an attempt by Petitioners to change the rules after the game. Further, according to Republican Intervenors, this is a policy issue decided by the Legislature, which stated that the exterior envelopes in which the absentee and mail-in ballots are submitted shall be dated. Republican Intervenors point to Justice Dougherty's concurring and dissenting opinion in *In re 2020 Canvass* and argue that the date on the exterior envelope provides proof of both when the voter cast his or her ballot and whether the voter completed the ballot within the proper timeframe. Including a date also prevents fraudulent backdating. Republican Intervenors also point to Justice Donohue's statements in *In re 2020 Canvass* about barcodes on ballots to reflect that there is nothing factually different in this case because even in 2020 county boards were scanning the ballots when received. Republican Intervenors consistently take the position that any ballots that lack a date on the exterior envelope, regardless of party, should not be counted, and further, that the Department's Guidance is not binding on either the county boards or this Court. Republican Intervenors additionally assert that all 67 county boards of elections should have been named as Respondents in this action, as they are all indispensable parties and cannot be bound unless named. Further, Republican Intervenors argue that *Migliori* is clearly wrong, as the Pennsylvania Legislature has decided this policy issue and has the power to ensure integrity in elections. Republican Intervenors assert that the Court should not intervene so close to the election under Purcell v. Gonzalez, 549 U.S. 1 (2006), as it erodes the public's confidence in the election process.

Discussion

The Court now addresses Petitioners' Motion for Special Injunction, in which they seek an order from this Court directing the County Boards, to the extent that they are not doing so, to segregate the ballots that lack a dated exterior envelope, canvass (count) those ballots, and include those votes in the County Boards' vote totals reported to the Acting Secretary. In summary, the Acting Secretary, and some of the County Board Respondents, do not object to this relief and ask the Court to provide clarity to an issue that is being resolved differently in different counties. Intervenors, and some other of the County Board Respondents, object to the counting of the ballots that lack a dated exterior envelope and reporting of those totals to the Secretary. No one objects to the ballots that lack a dated exterior envelope being identified and segregated. As to counting the ballots that lack a dated exterior envelope, Oz Intervenors object to counting the ballots at this time, asserting that the Court should wait to see if doing so could change the outcome of the primary Republican Intervenors object to these ballots ever being counted, election. reasoning that they are invalid due to their being in violation of the Election Code based on the lack of a dated exterior envelope.

As the parties argue, the Motion for Special Injunction essentially seeks a preliminary injunction. "A preliminary injunction is an extraordinary remedy[.]" *Hart v. O'Malley*, 676 A.2d 222, 223 n.1 (Pa. 1996). There are six "essential prerequisites" that a party seeking a preliminary injunction must establish for a court to issue the injunction. *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003) (internal quotation marks omitted). As described by the Supreme Court, the party seeking the preliminary injunction bears a heavy burden of proof and is required to show that: (1) "an injunction is necessary

to prevent immediate and irreparable harm that cannot be adequately compensated by damages"; (2) "greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings"; (3) "a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct"; (4) "the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, [the petitioner] must show that it is likely to prevail on the merits"; (5) "the injunction it seeks is reasonably suited to abate the offending activity"; and (6) "a preliminary injunction will not adversely affect the public interest." *Id.* "Because the grant of a preliminary injunction is a harsh and extraordinary remedy, it is to be granted only when and if **each** [factor] has been fully and completely established." *Pa. AFL-CIO by George v. Commonwealth*, 683 A.2d 691, 694 (Pa. Cmwlth. 1996) (emphasis in original).

If the preliminary injunction is a mandatory one, meaning it directs "the performance of some positive act to preserve the status quo," rather than a prohibitory one, which seeks to "enjoin the doing of an action that will change the status quo[,]" the plaintiff must establish "a clear right to relief[.]" *Mazzie v. Commonwealth*, 432 A.2d 985, 988 (Pa. 1981). This is because mandatory preliminary injunctions are more extraordinary and should be granted more sparingly than prohibitory preliminary injunctions. *Id.* "To establish a clear right to relief, the party seeking an injunction need not prove the merits of the underlying claim, but need only demonstrate that substantial legal questions must be resolved to determine the rights of the parties." *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 506 (Pa. 2014). "For a right to be clear, it must be more than merely

viable or plausible" *Wolk v. Sch. Dist. of Lower Merion*, 228 A.3d 595, 611 (Pa. Cmwlth. 2020) (internal quotation marks and citation omitted). "If the party has met the other requirements for a preliminary injunction and the underlying cause of action raises important legal questions, the right to relief is clear." *Lieberman Org. v. Philadelphia*, 595 A.2d 638, 640 (Pa. Cmwlth. 1990).

Notably, "[a] preliminary injunction [does not] serve as a judgment on the merits since by definition it is a **temporary remedy** granted until that time when the party's dispute can be completely resolved." *Appeal of Little Britain Township from Decision of Zoning Hearing Bd.*, 651 A.2d 606, 611 (Pa. Cmwlth. 1994) (emphasis added). Thus, this "proceeding is distinct from the final hearing on the merits." *Lindeman v. Borough of Meyersdale*, 131 A.3d 145, 151 (Pa. Cmwlth. 2015).

With the above principles in mind, the Court turns to the Motion before it and the parties' arguments beginning with the fourth prong of the *Summit Towne Centre* standard on which the parties focused their arguments -- whether Petitioners have shown that they are likely to prevail on the merits of their Petition, i.e., that their right to relief is clear.

Petitioners contend that they have established that they are likely to succeed on the merits in this matter such that they have a clear right to relief because, under Pennsylvania law, the Election Code is to be liberally construed so as not to deprive voters of their right to elect a candidate of their choice. They further argue that the dating provisions set forth in Sections 1306(a) and 1306-D(a) of the Election Code are not material to determining the qualifications of that voter under federal and Pennsylvania law and, therefore, an omission of the date may not be used to deny that voter the right to vote in this election.

Upon this Court's review of the undisputed facts presented in this case, the parties' arguments, and the relevant case law, the Court concludes that Petitioners have established that they are likely to succeed on the merits because they have "demonstrate[d] that substantial legal questions must be resolved to determine the rights of the parties," *SEIU Healthcare Pa.*, 104 A.3d at 506, and their claim is "more than merely viable or plausible." *Wolk*, 228 A.3d at 611. This conclusion weighs heavily in favor of issuing the requested injunctive relief.

The Court notes that no party has asserted, or even hinted, that the issue before the Court involves allegations of fraud. The parties have agreed that this election was free and fair. Nor is it disputed that the ballots in question were timely received, were cast by qualified Pennsylvania voters, and that ballots which had exterior envelopes that contained inaccurate dates, such as birth dates or dates that were clearly erroneous, were nonetheless opened, counted, and their votes included in the vote count. Finally, it is not disputed that County Boards throughout the Commonwealth are not uniform in how they are treating ballots that lack a date on the exterior envelope – some will not consider them at all, some are segregating them but not counting them, some are segregating and counting them but not reporting the vote in their totals, and some are segregating them, counting them, and including the recorded votes in their totals. Thus, without Court action, there exists the very real possibility that voters within this Commonwealth will not be treated equally depending on the county in which they vote.

The Court begins with the overarching principle that the Election Code should be liberally construed so as not to deprive electors of their right to elect a candidate of their choice. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020). For almost 70 years, the Pennsylvania Supreme Court has recognized that

[t]he power to throw out a ballot for minor irregularities, like the power to throw out the entire poll of an election district for irregularities, must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election **except for compelling reasons**. . . . The purpose in holding elections is to register **the actual expression of the electorate's will** and that computing judges should endeavor to see **what was the true result**. There should be the same reluctance to throw out a single ballot as there is to throw out an entire district poll, for sometimes an election hinges on one vote.

Appeal of James, 105 A.3d 64, 67 (Pa. 1954) (emphasis added). These principles are reflected in Section 10101(a)(2)(B) of the Civil Rights Act, which is the basis of Petitioners' first claim for relief.

Federal Civil Rights Act

Section 10101(a)(2)(B) of the Civil Rights Act states:

No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is **not material in determining whether such individual is qualified under State law to vote** in such election.

52 U.S.C. § 10101(a)(2)(B) (emphasis added). The requirement that an error or omission must be "material in determining whether such individual is qualified under State law to vote," *id.*, is consistent with the state law requirement that only compelling reasons justify the disenfranchisement of a qualified voter, *Appeal of James*, 105 A.3d at 67. Under Section 10101(e) of the Civil Rights Act, "the word 'vote' includes **all action necessary to make a vote <u>effective</u>**, including, but not limited to, registration or other action required by State law prerequisite to voting, **casting a ballot**, and **having such ballot counted and included in the appropriate**

totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election." 52 U.S.C. § 10101(e) (emphasis added). Section 10101(e) further provides that the words "qualified under State law" means "qualified according to the laws, customs, or usages of the State." *Id*.

The law and customs of Pennsylvania provide that individuals are qualified to vote in Pennsylvania if they are 18 years old as of the election, a United States citizen for at least 1 month, a resident of the Commonwealth for at least 30 days, a resident of the relevant election district for at least 30 days immediately preceding the election, and are not an incarcerated felon. PA. CONST. art. VII, § 1; Section 701 of the Election Code, 25 P.S. § 2811; Section 1301(a) of the Voter Registration Act, 25 Pa.C.S. § 1301(a); *Mixon v. Commonwealth*, 759 A.2d 442, 451 (Pa. Cmwlth. 2000) (persons with felony convictions, but not currently incarcerated, may register to vote); 1972 Op. Att'y Gen. No. 121¹⁵ (concluding a durational requirement of longer than 30 days is unenforceable).

Petitioners contend that not counting timely received ballots due to the omission of the date on the exterior envelope is a denial of the right to vote in violation of Section 10101(a)(2)(B) of the Civil Rights Act because the dating provisions are not material to the four voters' qualification requirements under state law. They argue that the dating provisions do not speak to or add any insight into a voter's age, citizenship, residency, or incarceration status, and, therefore, cannot be used as a reason not to count an otherwise validly cast ballot. Petitioners cite the Third Circuit's opinion in *Migliori*, which found the dating provisions are immaterial to a voter's qualifications and eligibility under Section 10101(a)(2)(B), and ordered that such ballots were to be counted. Petitioners argue that *Migliori* answered the

¹⁵ See https://www.duq.edu/assets/Documents/law/pa-constitution/_pdf/attorney-general/1972-121.pdf (last visited June 2, 2022).

question directly posed here on almost the same factual predicate and, therefore, the Court should find the Third Circuit's reasoning persuasive and supportive of their likelihood of success on the merits.

Intervenors argue that Petitioners have not established a likelihood of success on their federal claim because Section 10101(a)(2)(B) only applies to determinations that affect a voter's actual qualification, and not to the signature requirement on an envelope in which the ballot is returned. They assert the Fifteenth Amendment to the United States Constitution, the authority under which the materiality provision was enacted, relates to racial discrimination in laws associated with the registration and qualification of voters and the materiality provision must be read in that context. As there is no allegation that the dating requirement constitutes discriminatory action in the registration or qualification of voters in Pennsylvania, this provision does not apply here. Thus, Intervenors contend, Petitioners do not have a clear right to relief as they are unlikely to be successful on the merits of the Petition. Intervenors further argue that there is no private right of action under Section 10101(a)(2)(B) that would allow Petitioners to bring this action, as the United States Attorney General has the right to enforce this provision.

Additionally, Intervenors argue that Petitioners cannot establish a likelihood of success on the merits of the federal claim based on *In re 2020 Canvass* and their belief that the majority of the Supreme Court justices determined that the dating provisions are justified by "weighty interests" precludes a finding that the dating provisions are not "material" under Section 10101(a)(2)(B). They further argue that this Court, in *Ritter*, applied those "weighty interests" in determining that Section 10101(a)(2)(B) was inapplicable in that case.

Upon our review of Section 10101(a)(2)(B), the facts here, and the Third Circuit's analysis in *Migliori*, the Court finds the analysis in *Migliori* persuasive in determining whether Petitioners have a likelihood of success on the question of federal law asserted. In doing so, the Court notes that neither the Pennsylvania Supreme Court in *In re 2020 Canvass* nor the Court in *Ritter* had the benefit of the thorough advocacy that has been presented to this Court in the case at bar, and to the Third Circuit in *Migliori*. They further did not have the benefit of the Third Circuit's interpretation of Section 10101(a)(2)(B) as it relates to the Election Code's dating provisions. While this Court is not bound by the decisions of the federal district and intermediate appellate courts on issues of federal law, "it is appropriate for a Pennsylvania appellate court to follow the Third Circuit's ruling on federal questions to which the U[nited] S[tates] Supreme Court has not yet provided a definitive answer." **In the Circuit of the

Migliori involved very similar factual circumstances as those alleged here – the refusal to count ballots of qualified Pennsylvania voters that were timely received but did not have a dated exterior envelope, notwithstanding that ballots with exterior envelopes that had incorrect or inaccurate dates were counted. In finding that Section 10101(a)(2)(B) was violated under those circumstances, the Third Circuit reasoned:

¹⁶ The Court recognizes that the United States Supreme Court, through Justice Alito, has issued a stay of the Third Circuit's mandate in *Migliori* requiring the counting and reporting of those ballots. Justice Alito's order did not include any discussion of the merits of the Third Circuit's decision. Issuance of the stay will maintain the status quo in which the office of Judge of the Court of Common Pleas is not yet filled by a candidate until there is a final determination as to who won the election. The issuance of the stay does not at this time affect the persuasive value of the *Migliori* Court's reasoning and analysis.

Th[is] requirement[, dating the exterior envelope,] is material if it goes to determining age, citizenship, residency, or current imprisonment for a felony.

Appellees cannot offer a persuasive reason for how this requirement helped determine any of these qualifications. And we can think of none. Appellees try to make several reaching arguments. None of which we find persuasive. For example, Appellees argue that the date confirms a person is qualified to vote from their residence since a person may only vote in an election district s/he has resided in for at least thirty days before the election and one's residency could change in a matter of days. It is unclear how this date would help . . . but even supposing it could, this argument assumes the date on the envelope is correct. . . .

Intervenor-Appellee Ritter also claims that the date requirement "serves a significant fraud-deterrent function" and "prevents the tabulation of potentially fraudulent back-dated votes." Even if this were true, [Section 10101(a)(2)(B)] is clear that an "error or omission is not material" unless it serves to "determin[e] whether such individual is qualified under State law to vote in such election." Fraud deterrence and prevention are at best tangentially related to determining whether someone is qualified to vote. But whatever sort of fraud deterrence or prevention this requirement may serve, it in no way helps the Commonwealth determine whether a voter's age, residence, citizenship, or felony status qualifies them to vote. It must be remembered that all agree that the disputed ballots were received before [the] 8:00 p.m. deadline on Election Day. It must also be remembered that ballots that were received with an erroneous date were counted. We are at a loss to understand how the date on the outside envelope could be material when incorrect dates – including future dates – are allowable but envelopes where the voter simply did not fill in a date are not. Surely, the right to vote is "made of sterner stuff" than that.

.... The nail in the coffin, as mentioned above, is that ballots were only to be set aside if the date was **missing** – not incorrect. If the substance of the string of numbers does not matter, then it is hard to understand how one could claim that this requirement has any use in determining a voter's qualifications.

[The date written on the exterior envelope] was not entered as the official date received in the SURE system, nor used for any other purpose. Appellees have offered no compelling reasons for how these

dates – even if correct, which we know they did not need to be – help determine one's age, citizenship, residence, or felony status. And we can think of none. Thus, we find the dating provisions under 25 [P.S.] § 3146.6(a) and 3150.16(a) are immaterial under [Section 10101(a)(2)(B)].

Migliori, slip op. at 14-16 (footnotes omitted) (emphasis in original). At this stage of these proceedings, and in the absence of a definitive answer on this question by either the Pennsylvania Supreme Court or the United States Supreme Court, the Court finds *Migliori*'s analysis on this federal question sufficiently persuasive to conclude that Petitioners have established a likelihood of success on the merits on the Petition.

As to the argument that Petitioners cannot establish a likelihood of success on the merits because Section 10101(a)(2)(B) does not authorize a private cause of action, this Court is persuaded by the Third Circuit's thorough and well-reasoned analysis of this issue in *Migliori*. Therein, the Third Circuit rejected this argument, finding that the standard set forth in *Gonzaga University v. Doe*, 536 U.S. 273, 384 (2002), was satisfied and that a private cause of action could be filed to enforce Section 10101(a)(2)(B)'s provisions. *Migliori*, slip op. at 9-13. Accordingly, this is not a basis to find that Petitioners will be unlikely to succeed on the merits of their claims.

The Court is also not persuaded that *In re 2020 Canvass* requires a different result. It is apparent from the opinions in that matter that the federal materiality question was not resolved in that case. The Opinion Announcing the Judgment of the Court (OAJC) found "persuasive" an argument that not counting ballots that lacked a dated exterior envelope could lead to a violation of Section 10101(a)(2)(B), 241 A.3d at 1074 n.5, but did not otherwise address the argument. Justice Wecht offered his own insight into that question, stating

The OAJC does not pursue this argument, except to acknowledge a handful of cases that might be read to suggest that the name and address, and perhaps even the dat[ing provisions] could qualify as "not material in determining whether such individual is qualified under State law to vote." Given the complexity of the question, I would not reach it without benefit of thorough advocacy. But I certainly would expect the General Assembly to bear that binding provision in mind when it reviews our Election Code. It is inconsistent with protecting the right to vote to insert more impediments to its exercise than considerations of fraud, election security, and voter qualifications require.

Id. at 1080 n.54 (Wecht, J., concurring) (emphasis added). Finally, although Justice Dougherty's concurring and dissenting opinion did discuss the "weighty interests" behind the dating provisions, there was no explicit or implicit reference to Section 10101(a)(2)(B). Thus, a careful reading of *In re 2020 Canvass* reflects that at least four justices of the Supreme Court recognized that the materiality provision of Section 10101(a)(2)(B) might be applicable, although not resolving the issue "without the benefit of thorough advocacy." 241 A.3d at 1080 n.54 (Wecht, J., concurring). Because in this case, the Court has the "benefit of thorough advocacy," *id.*, not present in *In re 2020 Canvass*, *In re 2020 Canvass* is not, on its face, incompatible with Petitioners' likelihood of success on the merits of their Section 10101(a)(2)(B) claim.

Further, the specific material facts described in this case were not described by the Supreme Court in *In re 2020 Canvass*, particularly the fact that ballots with exterior envelopes that contained incorrect dates are counted and included in the election totals and that some counties are also including the ballots that lack the date on the exterior envelope in their election totals. Examining the "weighty interests" identified in Justice Dougherty's concurring and dissenting opinion, and cited in Justice Wecht's concurring opinion, as supporting their respective positions that the

legislative intent in using the word "shall" in relation to the dating provisions was that they be mandatory, not directory provisions, reveals that those interests identified were, at least implicitly, based on the belief that the date written on the exterior envelope was the actual date the ballot was completed.

For example, Justice Dougherty opined that "the date on the ballot envelope provides proof of when the elector actually executed the ballot in full," "[t]he presence of the date establishes a point in time against which to measure the elector's eligibility to cast the ballot," or that the date could be used to "ensure[] the elector completed the ballot within the proper time frame." Id. at 1090-91 (Dougherty, J., concurring and dissenting) (emphasis added) (internal quotation marks omitted). Each of these interests presume that the voter wrote the date on which the voter completed the ballot, and not their birthday or some date other than the day they executed the exterior envelope. However, it is not disputed in this matter that exterior envelopes that **clearly** used dates other than the day of execution have not been invalidated. And it would be difficult to determine whether the date accurately reflects the day the ballot was signed. Moreover, here there is no dispute that all of the ballots were received by 8:00 p.m. on Primary Election Day, which was not necessarily true in *In re 2020 Canvass*, which involved a unique situation where absentee and mail-in ballots were to be counted, by order of the Supreme Court, if they arrived within three days of Election Day, making it more relevant to know when, theoretically, a voter filled out, dated, and signed the exterior envelope. These "weighty interests," and the interpretation of the legislative intent behind the use of "shall" in those provisions, are thus undermined by the facts in this case because a ballot with an exterior envelope containing an incorrect date, which can be counted, does not ensure or establish anything in relation to fraud prevention,

electoral security, ballot confidentiality, or voter eligibility. When there is no factual basis for concluding that the dating provisions serve to address the "weighty interests," interpreting the word "shall" as mandatory, upon pain of disenfranchising qualified voters whose ballots were timely received, raises questions as to whether that interpretation fulfills the legislative intent behind those provisions. Moreover, the date that matters for eligibility purposes is the date of Election Day, which is the day of "the election." See PA. CONST. art. VII, § 1 (speaking of voter eligibility in terms of being qualified as of "the election"); 25 Pa.C.S. § 1301 (speaking of voter eligibility in terms of "the day of the election" or "the election"). Thus, if the voter died, moved or otherwise became ineligible to vote prior to Election Day, even if the voter was eligible when signing and dating the exterior envelope, that ballot would not count, no matter what date was on the outer envelope. Because these ballots were all timely received by 8:00 p.m. on Primary Election Day, and could not have been cast prior to the ballot having been received, there is no question that the ballots have been timely completed whether or not there is a date on the outer envelope. Thus, the "weighty interests" identified in *In re 2020 Canvass* are not as heavy when viewed through the lens of the facts in this case, and particularly when weighed against disenfranchising a qualified voter. Accordingly, this part of *In re 2020* Canvass is not, on its face, incompatible with Petitioners' likelihood of success on the merits of their Section 10101(a)(2)(B).

As to *Ritter*, the Court notes that, as an unreported opinion, *Ritter* is not binding authority under Pennsylvania Rule of Appellate Procedure 126(b), Pa.R.A.P. 126(b), and Section 414(a) of this Court's Internal Operating Procedures, 210 Pa. Code § 69.414(a). More importantly, there are several distinguishing factors between *Ritter* and this case. First, there is no mention in the *Ritter* opinion of the

material facts that are presently before the Court in this case, on which this Court relies, such as the fact that ballots that had exterior envelopes with incorrect or inaccurate dates on them are counted. This is important because *Ritter* relied on the "weighty interests" as described in Justice Dougherty's concurring and dissenting opinion in In re 2020 Canvass and, as discussed, the material facts in this case do not support such a finding. Second, unlike here, Ritter involved a challenge to the actions of a single county board of elections, not a challenge to boards of election throughout the Commonwealth in a statewide election. This is important because Ritter did not have to consider the fact that different counties were treating the ballots without a dated exterior envelope differently, leading to a question of unequal treatment of Pennsylvania voters casting ballots for the same candidates for the same office. Finally, it is unclear that *Ritter* had the benefit of the level of advocacy on the Section 10101(a)(2)(B) issue that was presented in this matter. In this regard, Ritter noted that the trial court had raised Section 10101(a)(2)(B) sua sponte, and that it was addressing this issue "[t]o the extent the parties refer[red]" to Section 10101(a)(2)(B) in their presentations. *Ritter*, slip op. at 18. Thus, it is not clear that Ritter fully addressed the arguments that are now raised to the Court and under the same factual predicate. Accordingly, the Court declines to find that *Ritter* precludes Petitioners from establishing that they will be successful on the merits of their Petition.

State Law

In addition to the above federal law claim, Petitioners also assert a state law claim as a basis for relief. The Pennsylvania Constitution declares that "[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." PA. CONST. art. I, § 5. For over

100 years the Pennsylvania Supreme Court has held that elections are "free and equal" when "the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial." *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). Moreover, efforts must be made to avoid disenfranchisement even when it happens "by inadvertence." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 812 (Pa. 2018) (citing *In re New Britain Borough Sch. Dist.*, 145 A. 597, 599 (Pa. 1929)).

To summarize, 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. The purpose in holding an election is to register the actual expression of the electorate's will and to see the true result.

Intervenors argue that this Court should conclude that Petitioners cannot establish a likelihood of success on the merits based on *In re 2020 Canvass* in which, they argue, a majority of the Supreme Court justices determined that the dating provisions are justified by "weighty interests." These interests as expressed in *In re 2020 Canvass*, are the date on the exterior envelope "provides proof of when the elector actually executed the ballot in full," "[t]he presence of the date establishes a point in time against which to measure the elector's eligibility to cast the ballot," or the date could be used to "ensure[] the elector completed the ballot within the proper time frame." 241 A.3d at 1090-91 (Dougherty, J., concurring and dissenting) (internal quotations omitted).

As discussed in the Court's consideration of Petitioners' federal law claim, the material facts set forth in this case were **not** set forth in *In re 2020 Canvass*,

particularly the fact that ballots that had exterior envelopes with incorrect dates were counted and included in the election totals and that some counties did count and include those ballots in the election totals. The "weighty interests" identified in that case as supporting a mandatory reading of the term "shall" in the dating provisions, and relied upon by Intervenors, reveal that those interests, at least implicitly, are based on the belief that the date written on the exterior envelope was an accurate date. However, because it is not disputed in this matter that exterior envelopes that clearly used dates other than the day of execution have not been invalidated. Moreover, because there is no dispute that all of the ballots were received by 8:00 **p.m. on Election Day,** which was not necessarily true in *In re 2020 Canvass*, these "weighty interests," and the associated interpretation of the dating provisions as mandatory, are thus undermined by the facts in this case. Under the facts in this case, as thoroughly described earlier in this opinion, 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. Accordingly, these statements in *In re* 2020 Canvass are not, on their face, inconsistent with Petitioners' likelihood of success on the merits under their state law claim. Further, as Ritter lacked the same factual predicate as the matter currently before the Court and relied upon the "weighty interests" analysis in *In re 2020 Canvass* to support its decision, it too is not inconsistent with Petitioners' likelihood of success on the merits.

For these reasons, the Court concludes that Petitioners have established that they are likely to prevail on the merits of their Petition and have a clear right to relief. There is no question that Petitioners have raised substantial legal questions that must be resolved and that their right to this relief is "more than merely viable or plausible."

Wolk, 228 A.3d at 611 (Pa. Cmwlth. 2020). Therefore, this prong weighs heavily in favor of granting the preliminary injunction.

The Remaining Prongs

The Court now considers the remaining prongs of the Summit Towne Centre standard. In examining prongs 1, 2 and 6, which relate to the equities of granting relief as opposed to denying the relief, the Court agrees that Petitioners have met their burden of proving their entitlement to relief. Respectively, those prongs require Petitioners to show that "an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages"; "greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings"; and "a preliminary injunction will not adversely affect the public interest." Summit Towne Centre, Inc., 828 A.2d at 1001. Here, numerous qualified Pennsylvania voters whose timely filed ballots are being rejected and not counted on a basis that appears to be inconsistent with state law and that the Third Circuit has held violates the Civil Rights Act, effectively disenfranchising them and depriving Petitioners of votes that were cast for Mr. McCormick, is irreparable harm that cannot be compensated by damages, is a great injury, and, in this Court's view, contrary to the public's interest. While Oz Intervenors argue that there will be no irreparable harm unless and until it is determined that counting the ballots that lack a dated exterior envelope will make a difference in the outcome of the primary election and both Intervenors argue that the public's interest in ensuring the confidence in the election process will be harmed, the Court is not persuaded. Granting temporary relief that precludes the potential disenfranchisement of qualified Pennsylvania voters who timely cast ballots while a determination is made as to whether that alleged disenfranchisement violates state or federal law is not inconsistent with the public's interest in ensuring confidence that the election process will count votes cast by qualified voters absent compelling circumstances, which may not be present here. As this primary election moves through the recount stage, the ability to determine which votes will make a difference is an ever-changing number and the Court concludes that to wait and direct relief, beyond segregation, will only delay the election process further. In addition, to the extent Intervenors rely on *Purcell*, the Court is unconvinced, at this stage of the proceeding, that a prohibition against federal courts weighing in on state election rules and laws on the eve of an election, precludes an after-the-fact state court challenge to the actual implementation of those state laws. Accordingly, these prongs weigh in favor of granting the requested injunctive relief.

As to prongs 3 and 5, which respectively require Petitioners to establish that "a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct"; and "the injunction it seeks is reasonably suited to abate the offending activity," the Court concludes Petitioners have done so. Because the offending activity is the alleged violation of state law and the Civil Rights Act by not counting timely received ballots of qualified Pennsylvania voters due to an omission of a date on the exterior envelope that may not involve a "weighty interest" under state law under these facts and that is immaterial under Section 10101(a)(2)(B), directing that those ballots be counted is reasonably suited to abate that activity. However, cognizant that this is only a preliminary determination and a full decision on the merits of this issue is yet to be made, the Court agrees that segregating those ballots, such that the number of ballots lacking an undated envelope being counted is readily discernable in the event a

different conclusion is reached upon a merits-based review, is likewise suitable. As to the status quo, this case presents an interesting situation where the status quo is that every County Board is making its own determination on what to do with these ballots. This raises the specter of the unequal treatment of qualified voters in Pennsylvania in that some qualified voters who happened to not date their exterior envelopes are having their vote counted and others are not. Under these circumstances, and, given the undeniable importance of the right of citizens to engage in the elective process and have their votes counted in the absence of "compelling reasons" to disenfranchise them, *Appeal of James*, 105 A.3d at 67, the Court concludes that providing clarity and guidance, so that voters' ballots are treated the same, satisfies this requirement. Thus, these prongs support granting Petitioners requested injunctive relief.

Conclusion

The right to vote in a free and fair election is essential in a representative democracy. The Court recognizes the tireless and dedicated efforts of the County Boards in the critical work of counting valid ballots. The Court also commends the candidates for their dedication and efforts to ensure that the election process is undertaken in a manner consistent with state and federal law. Under the facts in this case, and where there has been no answer to how requiring a handwritten date on the outside envelope supports a weighty interest when ballots with incorrect dates on their exterior envelopes are counted, a substantial question is raised as to whether voters are being disenfranchised based on a requirement that is immaterial to a voter's qualification in violation of Section 10101(a)(2)(B) of the Civil Rights Act and/or without a compelling reason in violation of state law.

Having concluded that Petitioners have met the six essential prerequisites for obtaining a preliminary injunction, the Court will grant the Motion for Special Injunction as follows: the County Boards are directed, if they are not already doing so, to segregate the ballots that lack a dated exterior envelope, to canvass those ballots assuming there are no other deficiencies or irregularities that would require otherwise, and to provide two vote tallies to the Acting Secretary, one that includes the votes from those ballots without a dated exterior envelope and one that does not. Thus, 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.

RENÉE COHN JUBELIRER, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David H. McCormick,

Petitioners

v. : No. 286 M.D. 2022

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 Board 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 Board 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

ORDER

NOW, June 2, 2022, Petitioners' Motion for Immediate Special Injunction is **GRANTED**, and the County Boards are directed, if they are not already doing so, to segregate the ballots that lack a dated exterior envelope, to canvass those ballots assuming there are no other deficiencies or irregularities that would require

otherwise, report two vote tallies to Leigh M. Chapman, Acting Secretary of the Commonwealth (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. Additionally, the Amended Application for Voluntary Discontinuance filed by Dave McCormick for U.S. Senate, and David H. McCormick is **DENIED** without prejudice.

RENÉE COHN JUBELIRER, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David H. McCormick,

Petitioners

v. : No. 286 M.D. 2022

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 Board 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 Board 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

ORDER

NOW, June 10, 2022, upon consideration of the Application for Relief in the Nature of a Voluntary Discontinuance or, Alternatively, a Dismissal for Mootness (Application for Discontinuance), filed by Dave McCormick for U.S. Senate and David H. McCormick, and the answers thereto filed by the Leigh M. Chapman, as Acting Secretary of the Commonwealth (Secretary), and Intervenors Doctor Oz for



Senate and Dr. Mehmet Oz (Oz Intervenors), and Republican National Committee and Republican Party of Pennsylvania (Republican Intervenors), the Application for Discontinuance is **GRANTED**. The Prothonotary shall mark this matter closed. In addition, upon consideration of the Application to Vacate Memorandum Opinion and Order of June 2, 2022, (Application to Vacate) filed by Oz Intervenors, in which Republican Intervenors join, and the answer filed by the Secretary, the Application to Vacate is **DENIED**.

RENÉE COHN JUBELIRER, President Judge

EXHIBIT

Berks-Lancaster 1 7/28/22

Docketed: 03/18/2022

Termed: 05/27/2022

General Docket Third Circuit Court of Appeals

Court of Appeals Docket #: 22-1499 Nature of Suit: 3441 Civil Rights Voting

Linda Migliori, et al v. Lehigh County Board of Elections

Appeal From: United States District Court for the Eastern District of Pennsylvania

Fee Status: Paid

Case Type Information:

1) civil

private
 civil rights

Originating Court Information:

District: 0313-2 : 5-22-cv-00397

Court Reporter: Mike Finney, Court Reporter Supervisor Trial Judge: Joseph F. Leeson, Junior, U.S. District Judge

Date Filed: 01/31/2022

Date Order/Judgment:

Date Order/Judgment EOD:

03/16/2022

Date NOA Filed:

03/18/2022

Prior Cases:

None

Current Cases:

03/16/2022

None

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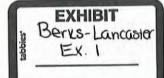
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MAJORITY LEADER OF THE HOUSE OF REPRESENTATIVES

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(see above)

MAJORITY LEADER OF THE PENNYLVANIA SENATE

Amicus Appellee

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(see above)

MS. LINDA MIGLIORI; FRANCIS J. FOX; RICHARD E. RICHARDS; KENNETH RINGER; SERGIO RIVAS, Appellants V. ZACHARY COHEN, Intervenor - Plaintiff V. LEHIGH COUNTY BOARD OF ELECTIONS V. DAVID RITTER, Intervenor - Defendant

03/18/2022	1 37 pg, 2.5 MB	CIVIL CASE DOCKETED. Notice filed by Appellants Ms. Linda Miglori, Richard R. Richards and Sergio Rivas in District Court No. 5-22-cv-00397. (JK) [Entered: 03/18/2022 11:42 AM]
03/18/2022	□ 2	RECORD available on District Court CM/ECF. (JK) [Entered: 03/18/2022 11:43 AM]
03/18/2022	3 1 pg, 241.22 KB	ECF FILER: ENTRY OF APPEARANCE from Lucas J Repka on behalf of Appellee(s) Lehigh County Board of Elections. [22-1499] (LJR) [Entered: 03/18/2022 02:16 PM]
03/18/2022	4 2 pg, 80.57 KB	ECF FILER: DISCLOSURE STATEMENT on behalf of Appellee Lehigh County Board of Elections. [22-1499] (LJR) [Entered: 03/18/2022 02:29 PM]
03/19/2022	5 2 pg, 986 KB	ECF FILER: DISCLOSURE STATEMENT on behalf of Appellees Francis J. Fox, Kenneth Ringer and Appellants Ms. Linda Miglori, Richard E. Richards and Sergio Rivas. [22-1499] (SAL) [Entered: 03/19/2022 10:32 AM]
03/19/2022	6 318 pg, 9.36 MB	ECF FILER: Motion filed by Appellees Francis J. Fox, Kenneth Ringer and Appellants Ms. Linda Miglori, Richard E. Richards and Sergio Rivas for injunction. Certificate of Service dated 03/19/2022. Service made by ECF, Email. [22-1499] (SAL) [Entered: 03/19/2022 10:51 AM]
03/19/2022	□ 7	TEXT ONLY ORDER (Clerk) Appellee's response in opposition to the motion for injunction pending appeal must be filed by 11:00 a.m. on Sunday, March 20, 2022. (KAG) [Entered: 03/19/2022 11:39 AM]
03/19/2022	8 1 pg, 197.65 KB	ECF FILER: ENTRY OF APPEARANCE from Adriel I. Cepeda Derieux on behalf of Appellant(s) Linda Migliori, Richard E. Richards, Sergio Rivas. [22-1499] (AIC) [Entered: 03/19/2022 03:47 PM]
03/19/2022	9 28 pg, 357.67 KB	ECF FILER: RESPONSE in opposition filed by Appellee Lehigh County Board of Elections to Motion for Injunction. Certificate of Service dated 03/19/2022 by ECF. [22-1499][Edited 03/21/2022 by LML] (LJR) [Entered: 03/19/2022 04:29 PM]
03/19/2022	10 1 pg, 311.2 KB	ECF FILER: ENTRY OF APPEARANCE from Joshua J. Voss on behalf of Appellee(s) David Ritter. [22-1499] (JJV) [Entered: 03/19/2022 04:58 PM]
03/19/2022	177 pg, 4.08 MB	ECF FILER: Response filed by Appellee David Ritter to motion for Injunction. Certificate of Service dated 03/19/2022. [22-1499] (JJV) [Entered: 03/19/2022 11:04 PM]
03/20/2022	12 2 pg, 131.95 KB	ORDER (CHAGARES, Circuit Judges) Appellants' motion for injunctive relief is hereby granted on a temporary basis in order to allow time for a full panel of this Court to consider the motion and responses in opposition. Appellee shall not certify the election results (scheduled to occur on March 21, 2022) pending further order of this Court. The Clerk will refer the matter to a three judge panel on an expedited basis. Panel No.: ECO-035-E. CHAGARES, Authoring Judge. (KAG) [Entered: 03/20/2022 05:27 PM]
03/21/2022	1 pg, 184.57 KB	ECF FILER: ENTRY OF APPEARANCE from Ari Savitzky on behalf of Appellant(s) Linda Migliori, Richard E. Richards, Sergio Rivas. [22-1499] (AJS) [Entered: 03/21/2022 10:50 AM]
03/21/2022	14 1 pg, 82.97 KB	ECF FILER: ENTRY OF APPEARANCE from Sophia Lin Lakin on behalf of Appellant(s) Linda Migliori, Richard E. Richards, Sergio Rivas. [22-1499] (SLL) [Entered: 03/21/2022 11:49 AM]
03/21/2022	15 1 pg, 197.27 KB	ECF FILER: ENTRY OF APPEARANCE from Jacob B. Boyer on behalf of Amicus Curiae Commonwealth of Pennsylvania. [22-1499] (JBB) [Entered: 03/21/2022 04:27 PM]
03/21/2022	16 10 pg, 48.96 KB	ECF FILER: AMICUS BRIEF on the merits on behalf of Commonwealth of Pennsylvania in support of Appellant/Petitioner's Emergency Motion for Injunction Pending Appeal. Certificate of Service dated 03/21/2022 by ECF. [22-1499][Edited 03/21/2022 by JK] (JBB) [Entered: 03/21/2022 04:33 PM]
03/21/2022	1 pg, 244.71 KB	ECF FILER: ENTRY OF APPEARANCE from Michael J. Fischer on behalf of Amicus Curiae Commonwealth of Pennsylvania. [22-1499] (MJF) [Entered: 03/21/2022 04:39 PM]
03/22/2022	18 1 pg, 106.37 KB	ORDER (Clerk) At the direction of the Court, the parties shall file their briefs as follows: Appellants' brief, Intervenor Cohen's brief (should he elect to participate), and the joint appendix must be filed on or before March 29, 2022, Appellee's and Intervenor Ritter's briefs must be filed on or before April 5, 2022 and Appellants' and Intervenor Cohen's reply briefs, if any, must be filed on or before April 8, 2022. The appeal will be calendared at the convenience of the Court. (JK) [Entered: 03/22/2022 12:21 PM]
03/22/2022	19 1 pg, 297.15 KB	ECF FILER: ENTRY OF APPEARANCE from Stephen A. Loney, Jr. on behalf of Appellant(s) Linda Migliori, Richard E. Richards, Sergio Rivas, Francis J. Fox, Kenneth Ringer. [22-1499] (SAL) [Entered: 03/22/2022 01:43 PM]
03/22/2022	20 3 pg, 111.27 KB	ECF FILER: CIVIL INFORMATION STATEMENT on behalf of Appellees Francis J. Fox, Kenneth Ringer and Appellants Ms. Linda Migliori, Richard E. Richards and Sergio Rivas. [22-1499] (SAL) [Entered: 03/22/2022 01:46 PM]
03/22/2022	21 32 pg, 1.13 MB	ECF FILER: Concise Summary of the Case filed by Appellees Francis J. Fox, Kenneth Ringer and Appellants Ms. Linda Migliori, Richard E. Richards and Sergio Rivas. [22-1499] (SAL) [Entered: 03/22/2022 01:48 PM]
03/22/2022	□ 22	ECF FILER: Transcript Purchase Order Form (Part 1) filed by Appellees Francis J. Fox, Kenneth Ringer

	1 pg, 60.41 KB	and Appellants Ms. Linda Migliori, Richard E. Richards and Sergio Rivas advising this court that no transcripts are available. [22-1499] (SAL) [Entered: 03/22/2022 01:49 PM]	
03/22/2022	23 1 pg, 154.02 KB	ECF FILER: ENTRY OF APPEARANCE from Richard T. Ting on behalf of Appellant(s) Linda Migliori, Francis J. Fox, Richard E. Richards, Kenneth Ringer, Sergio Rivas. [22-1499] (RTT) [Entered: 03/22/2022 02:51 PM]	
03/22/2022	24 1 pg, 89.5 KB	ECF FILER: ENTRY OF APPEARANCE from Connor P. Hayes on behalf of Appellant(s) Linda Migliori, Francis J. Fox, Richard E. Richards, Kenneth Ringer, Sergio Rivas. [22-1499] (CPH) [Entered: 03/22/2022 02:59 PM]	
03/22/2022	25 1 pg, 128.85 KB	ECF FILER: ENTRY OF APPEARANCE from Marian K. Schneider on behalf of Appellant(s) Linda Migliori, Francis J. Fox, Richard E. Richards, Kenneth Ringer, Sergio Rivas. [22-1499] (MKS) [Entered: 03/22/2022 03:38 PM]	
03/22/2022	26 1 pg, 89.08 KB	ECF FILER: ENTRY OF APPEARANCE from Witold J. Walczak on behalf of Appellant(s) Linda Migliori, Francis J. Fox, Richard E. Richards, Kenneth Ringer, Sergio Rivas. [22-1499] (WJW) [Entered: 03/22/2022 04:15 PM]	
03/22/2022	27 33 pg, 2.32 MB	Copy of Amended Notice of Appeal filed 03/22/2022 received from Clerk of District Court,[Edited 03/22/2022 by JK] (JK) [Entered: 03/22/2022 05:19 PM]	
03/22/2022	28 1 pg, 42.35 KB	AMENDED CASE CAPTION SENT (JK) [Entered: 03/22/2022 05:24 PM]	
03/23/2022	□ 29	TEXT ONLY ORDER (Clerk) The Clerk's Office has been notified that parties are considering filing amicus briefs in support of Appellants. At the direction of the Court, any party wishing to proceed as amicus on behalf of Appellants must file the brief and motion (if necessary) on or before April 1, 2022. (KAG) [Entered: 03/23/2022 11:06 AM]	
03/24/2022	30 1 pg, 25.98 KB	ECF FILER: ENTRY OF APPEARANCE from Adam Bonin on behalf of Intervenor(s) Zac Cohen. [22-1499] (ACB) [Entered: 03/24/2022 11:02 AM]	
03/28/2022	31 1 pg, 190.3 KB	ECF FILER: ENTRY OF APPEARANCE from Zachary Michael Wallen on behalf of Amicus Curiae Spea of the Pa. House of Representatives, Bryan Cutler; Majority Leader of the Pa. House of Representatives Kerry Benninghoff; President Pro Tempore of the Pa. Senate, Jake Corman; and Majority Leader of the Senate, Kim Ward. [22-1499] (ZMW) [Entered: 03/28/2022 04:16 PM]	
03/29/2022	32 67 pg, 498,54 KB	ECF FILER: ELECTRONIC BRIEF on behalf of Appellants Francis J. Fox, Ms. Linda Migliori, Richard E. Richards, Kenneth Ringer and Sergio Rivas. Certificate of Service dated 03/29/2022 by ECF. [22-1499] (WJW) [Entered: 03/29/2022 11:45 PM]	
03/29/2022	33 849 pg, 96 MB	ECF FILER: ELECTRONIC JOINT APPENDIX on behalf of Appellants Francis J. Fox, Ms. Linda Migliori, Richard E. Richards, Kenneth Ringer and Sergio Rivas. Certificate of service dated 03/29/2022 by ECF. [22-1499] (WJW) [Entered: 03/29/2022 11:52 PM]	
03/29/2022	1 pg, 26.01 KB	ECF FILER: ELECTRONIC INTERVENOR JOINDER BRIEF on behalf of Appellee Zachary Cohen. Certificate of Service dated 03/29/2022 by ECF. [22-1499][Changed event and edited docket text][SEND TO MERITS PANEL]-[Edited 04/14/2022 by MCW] (ACB) [Entered: 03/29/2022 11:54 PM]	
03/30/2022	□ 35	TEXT ONLY ORDER (Clerk) directing Witold J. Walczak, Esq.,counsel for Appellants, to file an Addendum to Brief containing the Certification of Virus Scan and Certification of Service in electronic format only. Due on or before 04/04/2022. (MCW) [Entered: 03/30/2022 11:11 AM]	
03/31/2022	□ 36	HARD COPY RECEIVED from Appellants Francis J. Fox, Ms. Linda Migliori, Richard E. Richards, Kenneth Ringer and Sergio Rivas - Brief with Volume 1 of Joint Appendix attached. Copies: 7. (KEL) [Entered: 03/31/2022 09:56 AM]	
03/31/2022	□ 37	HARD COPY RECEIVED from Appellants Francis J. Fox, Ms. Linda Migliori, Richard E. Richards, Kenneth Ringer and Sergio Rivas - Joint Appendix. Copies: 4. Volumes: 3 (Volume I attached to Brief). (EMA) [Entered: 03/31/2022 12:16 PM]	
03/31/2022	38 2 pg, 13.61 KB	ECF FILER: ELECTRONIC ADDENDUM to BRIEF on behalf of Appellants Francis J. Fox, Ms. Linda Migliori, Richard E. Richards, Kenneth Ringer and Sergio Rivas containing Certification of Service and Virus Scan as directed by text order (Docket No. 35). Certificate of Service dated 03/31/2022 by ECF. [22-1499][Edited docket text][Edited 04/01/2022 by MCW] (WJW) [Entered: 03/31/2022 07:47 PM]	
03/31/2022	□ 39	COMPLIANCE RECEIVED. Electronic Addendum to Brief received from Appellants Francis J. Fox, Ms. Linda Migliori, Richard E. Richards, Kenneth Ringer and Sergio Rivas. (MCW) [Entered: 04/01/2022 12:29 PM]	
04/01/2022	40 4 pg, 231.49 KB	ECF FILER: Motion filed by Appellee David Ritter for Extension of Time to file Appellees' Brief and Appellants' Reply Brief until/for 4/8/2022 and 4/15/2022. Certificate of Service dated 04/01/2022. Service made by ECF. [22-1499] (JJV) [Entered: 04/01/2022 12:53 PM]	
04/01/2022	□ 41	ECF FILER: ENTRY OF APPEARANCE from Samantha G. Zimmer on behalf of Appellee(s) David Ritter.	

23/22, 0.13 FW		EL 1100 EVANOT
	1 pg, 10.16 KB	[22-1499] (SGZ) [Entered: 04/01/2022 02:29 PM]
04/01/2022	42 33 pg, 119.14 KB	ECF FILER: ELECTRONIC AMICUS BRIEF on the merits on behalf of Amicus-Appellant Commonwealth of Pennsylvania in support of Appellant/Petitioner. Certificate of Service dated 04/01/2022 by ECF. F.R.A.P. 29(a) Permission: YES. [22-1499][Edited docket text][Edited 04/04/2022 by MCW] (JBB) [Entered: 04/01/2022 03:54 PM]
04/01/2022	1 pg, 147.02 KB	ECF FILER: ENTRY OF APPEARANCE from Tovah R. Calderon on behalf of Amicus Curiae United States. [22-1499] (TRC) [Entered: 04/01/2022 04:12 PM]
04/01/2022	1 pg, 147.18 KB	ECF FILER: ENTRY OF APPEARANCE from Noah B. Bokat-Lindell on behalf of Amicus Curiae United States. [22-1499] (NB) [Entered: 04/01/2022 04:15 PM]
04/01/2022	45 40 pg, 322.28 KB	ECF FILER: ELECTRONIC AMICUS BRIEF on the merits on behalf of United States. Certificate of Service dated 04/01/2022 by ECF. F.R.A.P. 29(a) Permission: YES. [22-1499] (NB) [Entered: 04/01/2022 04:20 PM]
04/04/2022	□ 46	HARD COPY RECEIVED from Amicus Appellant Commonwealth of Pennsylvania - Amicus Brief. Copies: 7. (SJB) [Entered: 04/04/2022 03:59 PM]
04/05/2022	☐ 47	TEXT ONLY ORDER (Clerk) granting the motion for extension of time at the direction of the Court. Appellees' briefs must be filed on or before April 8, 2022. Appellants' and Intervenor's reply briefs must be filed on or before April 15, 2022. (KAG) [Entered: 04/05/2022 11:18 AM]
04/05/2022	□ 48	HARD COPY RECEIVED from Amicus Appellant USA - Amicus Brief. Copies: 7. (KEL) [Entered: 04/05/2022 01:18 PM]
04/08/2022	49 76 pg, 686.73 KB	ECF FILER: ELECTRONIC BRIEF on behalf of Appellee David Ritter. Certificate of Service dated 04/08/2022 by ECF. [22-1499] (JJV) [Entered: 04/08/2022 12:07 PM]
04/08/2022	50 39 pg, 389.41 KB	ECF FILER: ELECTRONIC BRIEF on behalf of Appellee Lehigh County Board of Elections, Certificate of Service dated 04/08/2022 by ECF. [22-1499] (LJR) [Entered: 04/08/2022 12:23 PM]
04/08/2022	<u>51</u> 24 pg, 298.48 KB	ECF FILER: ELECTRONIC AMICUS BRIEF on the merits on behalf of The Honest Elections Project in support of Appellee/Respondent. Certificate of Service dated 04/08/2022 by ECF. F.R.A.P, 29(a) Permission: YES. [22-1499] (EMW) [Entered: 04/08/2022 08:35 PM]
04/08/2022	52 8 pg, 101.18 KB	ECF FILER: Motion filed by The Honest Elections Project to proceed as amicus on the merits in support of Appellee/Respondent. Certificate of Service dated 04/08/2022. [22-1499] (EMW) [Entered: 04/08/2022 08:37 PM]
04/11/2022	□ 53	HARD COPY RECEIVED from Appellee David Ritter - Brief. Copies: 7. (SJB) [Entered: 04/11/2022 10:32 AM]
04/11/2022	54 8 pg, 225.4 KB	ECF FILER: Motion filed by Proposed Amici Speaker Pennsylvania House of Representatives, Majority Leader of the House of Representatives, President Pro Tempore Pennsylvania Senate and Majority Leader of the Pennylvania Senate to proceed as amicus on the merits in support of Appellee/Respondent. Certificate of Service dated 04/11/2022. [22-1499] (ZMW) [Entered: 04/11/2022 01:03 PM]
04/11/2022	<u>55</u> 19 pg, 261.19 KB	ECF FILER: ELECTRONIC AMICUS BRIEF on the merits on behalf of Proposed Amici Speaker Pennsylvania House of Representatives, Majority Leader of the House of Representatives, President Pro Tempore Pennsylvania Senate and Majority Leader of the Pennylvania Senate in support of Appellee/Respondent. Certificate of Service dated 04/11/2022 by ECF. F.R.A.P. 29(a) Permission: NO. [22-1499] (ZMW) [Entered: 04/11/2022 01:19 PM]
04/13/2022	<u>56</u> 1 pg, 27.19 KB	TEXT ONLY ORDER (Clerk) directing Attorney Lucas J. Repka, Esq. for Appellee Lehigh County Board of Elections to submit 7 hard copies in red covers for the Appellee's Brief filed on 4/8/22. Due on or before 04/18/2022. (EAF) [Entered: 04/13/2022 11:23 AM]
04/13/2022	□ 57	HARD COPY RECEIVED from Proposed Amicus-Appellee The Honest Elections Project - Amicus Brief. Copies: 7. (LM) [Entered: 04/13/2022 12:16 PM]
04/13/2022	□ 58	HARD COPY RECEIVED from Proposed Amici Majority Leader of the House of Representatives, Majority Leader of the Pennylvania Senate, President Pro Tempore Pennsylvania Senate and Speaker Pennsylvania House of Representatives - Amicus Brief, Copies: 7. (LM) [Entered: 04/13/2022 12:18 PM]
04/15/2022	59 38 pg, 206.96 KB	ECF FILER: ELECTRONIC REPLY BRIEF on behalf of Appellants Francis J. Fox, Ms. Linda Migliori, Richard E. Richards, Kenneth Ringer and Sergio Rivas. Certificate of Service dated 04/15/2022 by ECF. [22-1499] (WJW) [Entered: 04/15/2022 06:24 PM]
04/18/2022	□ 60	HARD COPY RECEIVED from Appellee Lehigh County Board of Elections - Brief. Copies: 7. (LM) [Entered: 04/18/2022 02:31 PM]
04/20/2022	61 2 pg, 91.86 KB	Oral Argument Notification for 05/18/2022. Setting & Time: Maris Courtroom/11:00am. Location: Philadelphia, PA. (CMH) [Entered: 04/20/2022 09:30 AM]
04/20/2022	62 1 pg. 10.14 KB	ECF FILER: ENTRY OF APPEARANCE from Shohin H. Vance on behalf of Appellee(s) David Ritter. [22-1499] (SHV) [Entered: 04/20/2022 10:23 AM]

22-1499 Docket 7/23/22, 6:13 PM ECF FILER: SUMMARY OF ORAL ARGUMENT submitted by Attorney Joshua J. Voss, Esq. for Appellee 04/21/2022 63 David Ritter. Case Summary: Appellants lack standing to pursue an action under the Materiality Provision of the Civil Rights Act. Regardless, relief is foreclosed by several dispositive issues, including laches, lack of Art. III standing, waiver & a general failure to state a claim.. Post Video: YES. [22-1499] (JJV) [Entered: 04/21/2022 09:08 AM] ECF FILER: ARGUMENT ACKNOWLEDGMENT filed by Attorney Joshua J. Voss, Esq. for Appellee David 04/21/2022 64 Ritter. Certificate of Service dated 04/21/2022. Service made by ECF. [22-1499] (JJV) [Entered: 04/21/2022 1 pg, 158.16 KB 09:10 AM1 HARD COPY RECEIVED from Appellants Francis J. Fox, Ms. Linda Migliori, Richard E. Richards, Kenneth Ringer and Sergio Rivas - Reply Brief. Copies: 7. (IDR) [Entered: 04/22/2022 08:53 AM] ECF FILER: ENTRY OF APPEARANCE from Joshua S. Mazin on behalf of Appellee(s) Lehigh County 04/22/2022 ☐ 66 Board of Elections. [22-1499] (JM) [Entered: 04/22/2022 01:25 PM] 1 pg, 112.75 KB ECF FILER: ARGUMENT ACKNOWLEDGMENT filed by Attorney Joshua Mazin, Esq. for Appellee Lehigh 04/22/2022 County Board of Elections. Certificate of Service dated 04/22/2022. Service made by ECF. [22-1499] (JM) 1 pg, 20.94 KB [Entered: 04/22/2022 01:32 PM] ECF FILER: DIVISION OF TIME FORM filed by Attorney Joshua Mazin, Esq. for Appellee Lehigh County 04/22/2022 68 Board of Elections, Certificate of Service dated 04/22/2022. Service made by ECF. [22-1499] (JM) 1 pg, 28.14 KB [Entered: 04/22/2022 01:33 PM] ECF FILER: SUMMARY OF ORAL ARGUMENT submitted by Attorney Ari J. Savitzky, Esq. for Appellants Ms. Linda Migliori, Richard E. Richards and Sergio Rivas. Case Summary: The Civil Rights Act's Materiality Provision prohibits the County from disenfranchising Appellants for omitting an immaterial handwritten date on the outer envelope of their timely-received mail ballots. Appellants may sue enforce their federal rights... of е

70 1, 26.14 KB 71	ECF FILER: ARGUMENT ACKNOWLEDGMENT filed by Attorney Ari J. Savitzky, Esq. for Appellants Ms. Linda Migliori, Richard E. Richards and Sergio Rivas. Certificate of Service dated 04/22/2022. Service made by ECF. [22-1499] (AJS) [Entered: 04/22/2022 03:45 PM] ECF FILER: SUMMARY OF ORAL ARGUMENT submitted by Attorney Joshua Mazin, Esq. for Appellee Lehigh County Board of Elections. Case Summary: The District Court correctly held the Materiality Provision of the Civil Rights Act does not provide a private cause of action. Appellants waived their attempt to invoked Section 1983. The date requirement is not a undue burden on Plaintiffs right tovote. Post Video:	
71	Lehigh County Board of Elections. Case Summary: The District Court correctly held the Materiality Provision of the Civil Rights Act does not provide a private cause of action. Appellants waived their attempt	
	YES. [22-1499] (JM) [Entered: 04/26/2022 12:17 PM]	
72 g, 124.23 KB	ECF FILER: UNOPPOSED Motion filed by Appellants Francis J. Fox, Ms. Linda Migliori, Richard E. Richards, Kenneth Ringer and Sergio Rivas requesting additional time to argue. Certificate of Service dated 04/26/2022. Service made by ECF. [22-1499] (SAL) [Entered: 04/26/2022 01:29 PM]	
73 g, 104.5 KB	ECF FILER: Motion filed by Amicus Appellant USA for Noah B. Bokat-Lindell to participate in oral argument. Certificate of Service dated 04/26/2022. Service made by ECF. [22-1499] (NB) [Entered: 04/26/2022 01:43 PM]	
74 J. 122.64 KB	ECF FILER: Motion filed by Amicus Appellant Commonwealth of Pennsylvania for Jacob B. Boyer to participate in oral argument. Certificate of Service dated 04/26/2022. Service made by ECF. [22-1499] (JBB) [Entered: 04/26/2022 03:01 PM]	
75 g, 111.42 KB	ORDER (MCKEE, GREENAWAY JR. and MATEY, Circuit Judges) granting Appellants' Uncontested Motion to Divide and Enlarge Oral Argument Time and to Cede Time to the United States and the Commonwealth of Pennsylvania. Motion by Amicus Curiae the United States to Participate in Oral Argument in Support of Appellants. Motion by Amicus Curiae the Commonwealth of Pennsylvania to Participate in Oral Argument in Support of Appellants. Motion by the Speaker of the Pennsylvania House of Representatives Bryan Cutler; Majority Leader of the Pennsylvania House of Representatives, Kerry Benninghoff; President Pro Tempore of the Pennsylvania Senate; Jake Corman, and Majority Leader of the Pennsylvania Senate, Kim Ward to File Brief as Amicus Curiae in Support of the Appellees. Motion filed by The Honest Elections Project to File Brief as Amicus Curiae in Support of the Appellees. Judge McKee, Authoring Judge. (PM) [Entered: 04/28/2022 03:01 PM]	
76 g, 76.93 KB	ECF FILER: DIVISION OF TIME FORM filed by Attorney Ari J. Savitzky, Esq. for Appellants Ms. Linda Migliori, Richard E. Richards and Sergio Rivas. Certificate of Service dated 05/03/2022. Service made by ECF. [22-1499] (AJS) [Entered: 05/03/2022 10:48 AM]	
77 g, 15.88 KB	ECF FILER: DIVISION OF TIME FORM filed by Attorney Joshua Mazin, Esq. for Appellee Lehigh County Board of Elections. Certificate of Service dated 05/05/2022. Service made by ECF. [22-1499] (JM) [Entered: 05/05/2022 12:22 PM]	
78	ARGUED on Wednesday, May 18, 2022. Panel: MCKEE, GREENAWAY JR. and MATEY, Circuit Judges. Noah Bokat-Lindell arguing for Amicus Appellant United States of America; Jacob B. Boyer arguing for Amicus Appellant Commonwealth of Pennsylvania; Joshua Mazin arguing for Appellee Lehigh County	
	74 1, 122.64 KB 75 1, 111.42 KB 76 1, 76 1, 76 1, 76 1, 76 1, 76 1, 78 1, 15.88 KB	

		Board of Elections; Ari J. Savitzky arguing for Appellant Linda Migliori; Joshua J. Voss arguing for Appellee David Ritter. (PM) [Entered: 05/18/2022 12:40 PM]	
05/18/2022	79 1 pg, 54.47 KB	COURT MINUTES OF ARGUED/SUBMITTED CASES. (PM) [Entered: 05/18/2022 12:41 PM]	
05/20/2022	80 3 pg, 111.71 KB	JUDGMENT, This matter is hereby remanded to the District Court and that court is hereby directed to forthwith enter an order that the undated ballots be counted. A formal opinion will follow. The mandate will issue immediately upon filing of the opinion. The time for filing a petition for rehearing will be 5 days from the date that the Court's opinion is entered on the docket. (JK) [Entered: 05/20/2022 04:12 PM]	
05/23/2022	81 12 pg, 232,49 KB	ECF FILER: Motion filed by Appellee David Ritter to Stay the Mandate. Certificate of Service dated 05/23/2022. Service made by ECF. [22-1499] (JJV) [Entered: 05/23/2022 02:30 PM]	
05/23/2022	3 pg, 98.68 KB	AMENDED JUDGMENT, the judgment of the District Court entered on March 16, 2022, is reversed insofau as it found Appellants lack the capacity to bring suit under 52 U.S.C. Section: 10101 as there exists a private right of action under 42 U.S.C. Section: 1983. See Gonzaga Univ. v. Doe, 536 U.S. 273, 28485 (2002). In addition, inasmuch as there is no dispute that ballots that have the wrong date were counted in the election, it is further ORDERED and ADJUDGED that, the dating provisions contained in 25 Pa. Cons. Stat. Section:Section: 3146.6(a) and 3150.16(a) are immaterial under Section: 10101(a)(2)(B). Accordingly because it is undisputed that all the undated ballots that have been set aside in the November 2, 2021 election for Judge of the Common Pleas of Lehigh County were received by the deadline, there is no basis on this record to refuse to count them. This matter is hereby remanded to the District Court and that court is hereby directed to forthwith enter an order that the undated ballots be counted. A formal opinion will follow. The mandate will issue immediately upon filing of the opinion. The time for filing a petition for rehearing will be five (5) days from the date that the Court's opinion is entered on the docket. (JK) [Entered 05/23/2022 04:28 PM]	
05/25/2022	83 16 pg, 166.14 KB	ECF FILER: Response filed by Appellants Ms. Linda Migliori, Richard E. Richards and Sergio Rivas to motion Mandate (recall, stay or issue). Certificate of Service dated 05/25/2022. [22-1499] (AJS) [Entered: 05/25/2022 09:29 AM]	
05/25/2022	84 2 pg, 84.34 KB	ECF FILER: JOINDER filed by Appellee Zachary Cohen in Opposition to Motion to Stay the Mandate. Certificate of Service dated 05/25/2022 by ECF. [22-1499][Edited 05/25/2022 by JK] (ACB) [Entered: 05/25/2022 10:27 AM]	
05/27/2022	85 2 pg, 75.37 KB	ORDER (MCKEE, GREENAWAY JR. and MATEY, Circuit Judges) The Court's judgment, entered May 20, 2022 and amended on May 23, 2022, is hereby revised to the extent that it stated that the judgment will issue immediately upon filing of the opinion. Instead, the Clerk will issue the mandate 7 days after the entry of the Court's opinion on the docket. The motion to stay the mandate is dismissed as moot. MCKEE, Authoring Judge. (JK) [Entered: 05/27/2022 10:26 AM]	
05/27/2022	86 20 pg, 374.7 KB	PRECEDENTIAL OPINION. Coram: MCKEE, GREENAWAY, JR. and MATEY, Circuit Judges. Total Pages: 20. Judge: MCKEE Authoring, Judge: MATEY Concurring. (JK) [Entered: 05/27/2022 12:10 PM]	
05/31/2022	87 1 pg, 67,17 KB	COPY OF ORDER OF SUPREME COURT OF THE UNITED STATES at No. 21A772 dated 05/31/2022 signed by SAMUEL A. ALITO, JR, staying issuance of the mandate pending further order of the U.S. Supreme Court. (JK) [Entered: 06/01/2022 10:54 AM]	
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06/13/2022	89 25 pg, 641.03 KB	MANDATE ISSUED. (JK) [Entered: 06/13/2022 04:09 PM]	
06/22/2022	90 5 pg, 283.73 KB	ECF FILER: Motion filed by Appellants Francis J. Fox, Ms. Linda Migliori, Richard E. Richards, Kenneth Ringer and Sergio Rivas for Extension of Time to file Application for Fees until/for 47 days. Certificate of Service dated 06/22/2022. Service made by ECF. [22-1499] (RTT) [Entered: 06/22/2022 08:00 PM]	
06/23/2022	□ 91	TEXT ONLY ORDER (Clerk) Appellants' motion an extension of time is granted at the direction of the Court. Appellants must file any application for fees and costs on or before August 8, 2022. (KAG) [Entered: 06/23/2022 03:46 PM]	
07/11/2022	□ 92	NOTICE from U.S. Supreme Court. Petition for Writ of Certiorari filed by David Ritter on 07/07/2022. Supreme Court Case No. 22-30. (TMK) [Entered: 07/12/2022 02:56 PM]	

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Case: 22-1499 Document: 16 Page: 1 Date Filed: 03/21/2022

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 22-1499

LINDA MIGLIORI, et al.,

Appellants,

V.

LEHIGH COUNTY BOARD OF ELECTIONS, et al.,

Appellees.

Appeal from the United States District Court for the Eastern District of Pennsylvania No. 5:22-cv-00397 Honorable Joseph F. Leeson, Jr.

AMICUS BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA IN SUPPORT OF APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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March 21, 2022

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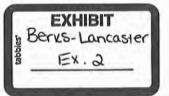


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STATEMENT OF INTEREST

This matter raises important questions concerning the interplay of federal voting rights law and the Commonwealth of Pennsylvania's election procedures. The parties have invoked the Commonwealth's position with respect to these matters in their briefing before this Court. *See* Appellants' Emergency Motion at 24, 27 (ECF No. 6-1); Intervenor-appellee Response in Opp'n ("Response") at 7 n.2 (ECF No. 11-1). The Commonwealth therefore respectfully submits this brief to address these issues and, in particular, to correct certain inaccurate statements in the brief submitted by Intervenor-appellee about the state of Pennsylvania law. *See* Response at 5-7 & n.2.

Further, the Commonwealth of Pennsylvania has an interest in properly resolving whether "undated ballots"—the sort of ballots at issue here—should be counted and included in a county's election results. This derives from the Commonwealth's further interest in all its political subdivisions' lawfully exercising their authority. Finally, the Commonwealth has an interest in ensuring all Pennsylvanians who lawfully cast a ballot have their voted counted.

ARGUMENT

This Court should grant appellants' emergency motion for an injunction so that it may address the critical and meritorious voting rights questions appellants

¹ No party authored this brief in any part or contributed money for the preparation of this brief.

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raise, and so that the Commonwealth of Pennsylvania's elections can proceed in accord with federal law and with needed certainty. The Commonwealth agrees with appellants that the district court incorrectly concluded that 52 U.S.C. § 10101(a)(2)(B) may not be enforced by private parties, and also agrees that ordering a county to void undated ballots violates that federal provision. This Court should enter an injunction pending appeal because the appellants are likely to succeed on the merits, and to allow the Court time to address these important questions.

In consecutive general elections, some Pennsylvania counties have included in their election results lawfully cast absentee and mail-in ballots even if the voter did not date the outer envelope used to return the ballot, while other counties have not. Although the respective decisions have generated multiple lawsuits, Pennsylvania courts have not yet definitively resolved whether Pennsylvania law requires counties to include so-called "undated ballots" in their election results. Litigation over that question remains on-going. *See, e.g., Montgomery Cnty. Bd. of Elections v. Chapman*, 339 MD 2021 (Oct. 1, 2021 Pa. Commw. Ct.).

Independent of what state law requires, final resolution of whether to count undated ballots also demands analyzing if, as a matter of federal law, the date a voter is asked to include on a ballot return envelope is "material in determining

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whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). To date, no court has squarely addressed that question.

The Commonwealth of Pennsylvania has participated in this litigation, as it did in related state-court litigation, to explain why the date a voter is asked to place on their ballot return envelope does not in any way aid in determining that voter's qualification to vote under Pennsylvania law. *See* App'x at 191-96. If the Court grants appellants' motion for an injunction, the Commonwealth would again participate as amicus to describe what Pennsylvania election law requires, why the date on a voter's return envelope is immaterial, and why no one, including the parties in this case, has plausibly argued otherwise.

Intervenor-appellee's assertion that "as a matter of [Pennsylvania] law, the date is material," *see* Response at 5-7 & n.2, is incorrect.² In fact, *no* Pennsylvania court has conclusively analyzed whether the date on a voter's return envelope is "material in determining whether such individual is qualified under State law to vote in such election," for purposes of § 10101(a)(2)(B). The analysis that has been done supports the immateriality of the date.

² Intervenor-appellee's arguments about proper interpretation of § 10101(a)(2)(B) are similarly mistaken, including patently incorrect claims about what federal courts have "uniformly" held, Response at 11; *see also id.* at 13, and arguments about § 10101(a)(2)(B)'s "plain language" that are based on statutory headings rather than statutory text, *id.* at 10-11.

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The *only* Pennsylvania Supreme Court case to consider whether Pennsylvania counties may count undated ballots resulted in no majority opinion, with the Court holding that, as a matter of Pennsylvania law, undated ballots would be counted for the 2020 election. In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058, 1079 (Pa. 2020) (opinion announcing judgment of the Court). Although application of § 10101(a)(2)(B) was not squarely before the Court, a majority of the Justices acknowledged that interpreting the Pennsylvania Election Code to require voiding undated ballots could offend § 10101(a)(2)(B). In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058, 1074 n.5 (Pa. 2020) (opinion announcing judgment of the Court); id. at 1089 n.54 (Wecht, J., concurring and dissenting). The Court's plurality opinion described one party as having argued with "persuasive force" that there would be a conflict, id. at 1074 n.5, further noting that "a signed but undated declaration . . . does not implicate any weighty interest," id. at 1078. A minority of the Court, in dissent, suggested that the date written on the outer envelope served important purposes, but the accompanying explanations made inaccurate assumptions about Pennsylvania elections, id. at 1090 (Dougherty, J., concurring and dissenting).3

³ While not specifically ruling on the merits, the district court here relied on the dissent to conclude that the date requirement "is an important guard against fraud." App'x at 29. This claim, too, reflects a misunderstanding of Pennsylvania

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And the *only* Pennsylvania Commonwealth Court decision to directly address § 10101(a)(2)(B) agreed that a ballot envelope's date "does not, in any way, relate to whether that elector has met the qualifications necessary to vote in the first place," despite incorrectly holding in a nonprecedential decision that the federal statute applies to only voter registration laws. *Ritter v. Lehigh Cnty. Bd. of Elections*, 1322 CD 2021, 2022 WL 16577 (Pa. Commw. Ct. Jan. 3, 2022). The dissenting judge in *Ritter* likewise described the date on the ballot envelope a "technicality" akin to the color ink a voter uses. *Id.* at *11 (Wojcik, J., dissenting).

The remaining Commonwealth Court case that intervenor-appellee cites, another nonprecedential decision, decided only that the Pennsylvania Supreme Court's fractured 2020 decision demanded that the Commonwealth Court void undated ballots as a matter of Pennsylvania law. *In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, No. 1381 CD 2021, 2022 WL 96156, at *3 (Pa. Commw. Ct. Jan. 10, 2022). The lone judge in that case to consider what purpose the date rule serves agreed that the date on a ballot envelope is an insignificant technicality. *Id.* at *7-10 (Covey, J., concurring and dissenting).

law. The requirement that a voter date the outer envelope could not, in any way, protect against fraud. Under Pennsylvania law, whether a ballot is timely depends on when it is *received*, not when it is filled out by the voter. 25 P.S. §§ 3146.6(c), 3150.16(c). Counties do not look to the date written on the outer envelope to determine whether a ballot is timely, so "back-dating" an envelope or otherwise writing an inaccurate date on it would accomplish nothing for purposes of determining a voter's eligibility. Indeed, as discussed below, *infra* at 6, Pennsylvania counts ballots with dates that are obviously incorrect.

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Similarly, the Pennsylvania Department of State has instructed counties to count ballots with dates that are obviously "wrong"—such as those in which the voter wrote the wrong year, or mistakenly wrote their date of birth—further underscoring that the date itself is not relevant. *See* Email from Jonathan Marks, Deputy Secretary for Elections & Commissions, Dep't of State, to County Election Officials (June 1, 2021), Exh. 6 to Plfs.' Compl. (ECF No. 1-8), *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 5:22-cv-00397-JFL (E.D. Pa. Jan. 31, 2022).

Thus, whether the date included on a ballot return envelope is "material" for purposes of § 10101(a)(2)(B), and whether that federal statute prohibits disenfranchising voters because of a trivial error, very much presents a meritorious question warranting the injunction needed for this Court's review. And while the district court described the predicate question—whether there is a private right of action to enforce §10101(a)(2)(B)—as not "particularly close," App'x at 34, the only two circuit courts to consider that issue reached opposing conclusions.

Compare Schwier v. Cox, 340 F.3d 1284, 1294-97 (11th Cir. 2003) with McKay v. Thompson, 226 F.3d 752, 756 (6th Cir. 2000). The Commonwealth respectfully submits that an injunction is appropriate to permit the Court to address the district court's errors.

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CONCLUSION

For the reasons above, appellants' emergency motion for an injunction pending appeal should be granted.

March 21, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this amicus brief has been served on all counsel of record using the Court's CM/ECF system.

/s/ Jacob B. Boyer

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IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 22-1499

LINDA MIGLIORI, et al.,

Plaintiffs-Appellants,

V.

LEHIGH COUNTY BOARD OF ELECTIONS, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Pennsylvania No. 5:22-cv-00397 Honorable Joseph F. Leeson, Jr.

AMICUS BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA IN SUPPORT OF APPELLANTS AND REVERSAL

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April 1, 2022

EXHIBIT

Berks-Lancaster 3 7/28/22

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STATEMENT OF INTEREST

The Commonwealth of Pennsylvania respectfully submits this amicus brief in support of appellants pursuant to Federal Rule of Appellate Procedure 29(a)(2).

The Commonwealth intends for this brief to aid the Court's understanding of Pennsylvania election law and voting processes. In particular, the Commonwealth addresses why, under Pennsylvania law, including a date on the envelope of a mailed ballot is immaterial to determining a voter's eligibility, and why contrary arguments misunderstand Pennsylvania law or rest on ill-informed speculation about the Commonwealth's election procedures.

Additionally, the Commonwealth has an interest in ensuring its political subdivisions exercise their authority in accordance with Pennsylvania and federal law. And resolution of this case may assist Pennsylvania courts as they conclusively interpret the relevant state law provision. *See* 1 Pa.C.S. § 1922(2) (directing that Pennsylvania statutes should be interpreted to be "effective").

Finally, the Commonwealth has an interest in ensuring that no eligible

Pennsylvania voter is unlawfully disenfranchised. Relatedly, the Commonwealth

¹ Mr. Ritter has leveled a bizarre criticism of the Commonwealth's involvement in this matter, suggesting that constitutional concerns about voiding undated ballots should be raised in a different forum. J.A. 808 (Ritter Reply in Supp. Summ. J.). But the Commonwealth has not raised such constitutional concerns, focusing instead on the rights created under federal statutory law. And the Commonwealth is not seeking to invalidate any provision of Pennsylvania law. Rather, the Commonwealth believes that Pennsylvania and federal law can and should be read harmoniously to require the counting of the ballots at issue.

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has an interest in ensuring that there are remedies for violations of its citizens' right to vote. The Commonwealth therefore discusses the misapplication of precedent that led the district court to conclude the voters here have no cause of action.

BACKGROUND

Pennsylvania citizens are qualified to vote if, as of Election Day, they:

(1) will be 18 years old; (2) will have been a citizen for at least one month; (3) will have lived in Pennsylvania and in their election district for at least thirty days; and (4) are not imprisoned for a felony conviction. Pa. Const. art. VII, § 1; 25 P.S. § 2811; 25 Pa.C.S. § 1301(a).² Counties initially assess compliance with these conditions when an individual submits a voter registration application. 25 Pa.C.S. § 1328.

Registered voters that satisfy any of several conditions may vote absentee.

Pa. Const. art. VII, § 14; 25 P.S. § 3146.1. Any qualified, registered voter can vote as a "mail-in elector." 25 P.S. § 3150.11. Voters submit absentee and mail-in ballot applications to their county board of elections. *Id.* §§ 3146.2, 3150.12. County boards must confirm that applicants are eligible to vote before approving their

² See also Mixon v. Commonwealth, 759 A.2d 442, 451 (Pa. Commw. Ct. 2000) (holding that individuals with felony convictions, other than those currently incarcerated, may register to vote); 1972 Op. Atty. Gen. No. 121 (concluding durational residency requirements longer than 30 days are unenforceable); U.S. Const. amend. XXVI (prohibiting denial of right to vote to citizens 18 years of age or older because of age).

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absentee or mail-in ballot application. *Id.* §§ 3146.2b, 3150.12b. Those approvals are final except that challenges based on ineligibility to vote can be made through 5 p.m. on the Friday before Election Day. *Id.* §§ 3146.2b(c), 3150.12b.

Election district registers (*i.e.*, poll books) identify which registered voters have requested absentee or mail-in ballots. *Id.* §§ 3146.6(b)(1), 3150.16(b)(1). Those voters may not vote in-person unless they surrender their blank absentee or mail-in ballot and its return envelope. *Id.* §§ 3146.6(b)(3), 3150.16(b)(3). Otherwise, a voter who attempts to vote in-person having already requested an absentee or mail-in ballot may vote only provisionally. *Id.* §§ 3146.6(b)(2), 3150.16 (b)(2). If a voter returns an absentee or mail-in ballot before the deadline and also casts a provisional ballot at a polling place, only the absentee or mail-in ballot is counted, regardless of the date written on its return envelope. *Id.* § 3050(a.4)(5)(ii)(F).

Functionally identical procedures govern how voters complete and return an absentee or mail-in ballot. Anytime between receiving the official ballot and 8 p.m. on Election Day, the voter secretly marks their ballot, places the ballot in a secrecy envelope, and then places the secrecy envelope in an outer return envelope. *Id.* §§ 3146.6(a), 3150.16(a). The return envelope has a printed declaration that the voter "shall then fill out, date and sign." *Ibid.* Return envelopes have unique barcodes associated with the voter, allowing ballots to be tracked through the

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Statewide Uniform Registry of Electors (SURE). Pa. Dep't of State, *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes* ("Sept. 2020 Guidance") at 2 (Sept. 11, 2020). After sealing the return envelope, the voter delivers the entire package by mail or by hand to their county board of elections. 25 P.S. §§ 3146.6(a), 3150.16(a).

Absentee and mail-in ballots are timely if received by the voter's county board of elections by 8 p.m. on Election Day. *Id.* §§ 3146.6(c), 3150.16(c). To track when a mailed ballot has been received, Department of State Guidance directs counties to "scan the correspondence ID barcode on the outside of the envelope." *See* Sept. 2020 Guidance at 2. Scanning the barcode automatically generates a date stamp that is recorded in the "Date Received" field in the SURE System. *Id.* Voters can use the Department's website to track when their ballot was received. *See* Pa. Dep't of State, *Election Ballot Status*. Timely absentee and mail-in ballots that county boards of elections have verified, that have not been challenged, and for which there is not due proof that the voter has died prior to Election Day, are counted and included with the election results. 25 P.S. § 3146.8(d), (f)-(g).

³ Available at: https://www.dos.pa.gov/VotingElections/OtherServices Events/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf.

⁴ Available at: https://www.pavoterservices.pa.gov/pages/ballottracking.aspx.

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In the last two general elections, absentee and mail-in ballots returned without a date on outer envelope has been a pervasive problem. *See In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1068-69 (Pa. 2020) (identifying thousands of such ballots having been cast in Allegheny or Philadelphia County during the 2020 election).

After the 2020 election, the Pennsylvania Supreme Court issued its only decision about so-called "undated ballots," ruling that, under Pennsylvania law, the ballots could be counted for the 2020 general election. Id. at 1079 (opinion announcing judgment). The Court, however, did not produce a majority opinion. Three Justices concluded that Pennsylvania law forbids disqualifying undated ballots because "a signed but undated declaration is sufficient and does not implicate any weighty interest." Id. at 1078 (opinion announcing judgment). A concurring Justice wrote that Pennsylvania law mandates a date on the outer envelope no matter what interest it serves, but agreed that undated ballots should be counted in 2020 because even diligent voters would not have known the consequence of omitting the date. Id. at 1089 (Wecht, J., concurring). Three other Justices would have voided undated ballots because they considered the date to serve important purposes. Id. at 1090-91 (Dougherty, J., concurring and dissenting).

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In the same case, four Justices identified that voiding ballots for minor errors may conflict with 52 U.S.C. § 10101(a)(2)(B). *Id.* at 1074 n.5 (opinion announcing judgment); *id.* at 1089 n.54 (Wecht, J., concurring). The opinion announcing the judgment described one party as having argued with "persuasive force" that there would be a conflict, *id.* at 1074 n.5, and later explained that, under Pennsylvania law, "any handwritten date [is] unnecessary and, indeed, superfluous," *id.* at 1077 (opinion announcing judgment).

Questions about what Pennsylvania law requires as to undated ballots have persisted since the Pennsylvania Supreme Court's fractured 2020 decision. Three cases filed in Pennsylvania courts in 2021 raised this issue. One case remains pending. *Montgomery Cnty. Bd. of Elections v. Chapman*, No. 339 MD 2021 (Oct. 1, 2021 Pa. Commw. Ct.). Split panels of the Commonwealth Court issued nonprecedential decisions in the other two, each concluding that the court was bound by the concurring Justice's opinion from *In re Absentee & Mail-in Ballots*. *In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, No. 1381 CD 2021, 2022 WL 96156 (Pa. Commw. Ct. Jan. 10, 2022), *appeal denied* 2022 WL 536196 (Pa. Feb. 23, 2022); *Ritter v. Lehigh Cnty. Bd. of Elections*, No. 1322 CD 2021, 2022 WL 16577, at *8 (Pa. Commw. Ct. Jan. 3, 2022), *appeal denied* 2022 WL 244122 (Pa. Jan. 27, 2022).

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SUMMARY OF ARGUMENT

Disenfranchising the 257 qualified voters who failed to date the declaration on their absentee or mail-in ballot's return envelope violates those voters' rights under federal law. That is so because omitting a date is "an error or omission" on a "record or paper relating to . . . [an] act requisite to voting" that is not "material in determining whether such individual is qualified under State law." 52 U.S.C. § 10101(a)(2)(B).

Pennsylvanians are qualified to vote if they meet the state's age, citizenship, and residency requirements as of Election Day. *See* 25 P.S. § 2811(2), (3); *id.* § 3146.8(d); 25 Pa. C.S. § 1301. And mailed ballots are timely if they are received by 8 p.m. on Election Day. 25 P.S. §§ 3146.6(c), 3150.16(c). For each reason, including a date on a ballot return envelope is not "material" to determining a voter's eligibility. Indeed, counties count ballots returned in envelopes with "wrong" dates. Nor does the date serve any purpose in preventing fraud. "Backdating" a ballot envelope after the fact would not allow a voter to avoid Pennsylvania's received-by deadline.

For this election, ballot return envelopes have been made a "record or paper relating to . . . [an] act requisite to voting." Because § 10101 defines "vote" to mean "all action necessary to make a vote effective," a ballot return envelope is a "record or paper relating to . . . [an] act requisite to voting" when, as here,

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completing it in a particular way has been made a precondition for counting a ballot.

Under *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the right that §10101(a)(2)(B) guarantees is presumptively enforceable through 42 U.S.C. § 1983. Nothing overcomes that presumption; rather, both the language of § 10101 and its legislative history establish that the U.S. Attorney General's enforcement authority is a complement to the private suits that have occurred since the 19th century. *See* 52 U.S.C. § 10101(d), (e), (g). Because the district court failed to recognize that this suit was brought under § 1983, it inverted the applicable burden and asked if the voters had established that Congress meant for § 10101 to provide its own remedy. Because § 1983 plainly provides a cause of action here, this Court need not engage in that analysis. Still, the same statutory text and legislative history that confirm § 1983 provides a remedy also establish that § 10101 creates its own cause of action, thus satisfying the standard announced in *Alexander v. Sandoval*, 532 U.S. 275 (2001).

ARGUMENT

I. Disqualifying Undated Ballots Infringes Voters' Rights Under § 10101(a)(2)(B)

Federal law provides:

No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other

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act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

52 U.S.C. § 10101(a)(2)(B).⁵ That statute was enacted to end trivial requirements that "served no purpose other than as a means of inducing voter-generated errors that could be used to justify" denying the right to vote. *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008). Denying eligible Pennsylvania voters' right to vote for merely failing to date the envelope used to return an absentee or mail-in ballot violates § 10101(a)(2)(B).⁶

A. The Date on a Ballot Return Envelope Is Not Material to Determining Voters' Qualifications under Pennsylvania Law

Dating the declaration on an absentee or mail-in ballot return envelope does not assist in determining if the ballot was cast by someone eligible to vote under Pennsylvania law. Therefore, a date is not "material" and omission of a date cannot be used to disenfranchise any Pennsylvania voter.

⁵ When initially passed, the statute read "No person acting under color of law shall . . . deny the right of any individual to vote in any Federal election" Civil Rights Act of 1964, Pub. L. No. 88-352, § 101. Congress later amended the statute to delete "Federal." Voting Rights Act of 1965, Pub. L. No. 89-110, § 15.

⁶ The district court did not reach this question because it incorrectly concluded the voters do not have a cause of action. *Infra* at 19-25. Notwithstanding that, this Court should because the voters' right to relief on this purely legal question is clear.

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To determine whether a denial of the right to vote violates § 10101(a)(2)(B), courts compare the erroneous or omitted information against state law voter qualifications. *See, e.g., Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308-09 (N.D. Ga. 2018); *Wash. Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1270 (W.D. Wash. 2006); *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005). If the error or omission, accepted as true, does not preclude (or at least interfere with) determining a voter's eligibility, the error or omission is not "material." *NAACP*, 522 F.3d at 1175.

In Pennsylvania, a person may vote if, by Election Day, they are 18 years old, have been a citizen for at least one month, have lived in Pennsylvania and in their election district for at least thirty days, and are not imprisoned for a felony conviction. *Supra* at 2. A dated declaration on a return envelope is not relevant to determining compliance with any of these criteria—Election Day is the material date for determining eligibility. In its recent, nonprecedential decision addressing the undated ballots at issue here, the Commonwealth Court, despite ordering that the ballots be excluded, explained that the date "does not, in any way, relate to whether that elector has met the qualifications necessary to vote in the first place." *Ritter*, 2022 WL 16577, at *9.

Nor does a date on the envelope assist in separating timely cast absentee or mail-in ballots from untimely ones. A ballot is timely if it is *received* by 8 p.m. on

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Election Day. Supra at 4. Any ballot received by that time necessarily will have been completed by that time. Further, counties track when a ballot is received. See Sept. 2020 Guidance at 2; In re Absentee & Mail-in Ballots, 241 A.3d at 1077 (opinion announcing judgment) ("[T]he county board stamps the date of receipt on the ballot-return and records the date the ballot is received in the SURE system.").

Three Justices of the Pennsylvania Supreme Court correctly observed that this law and procedure provides "a clear and objective indicator of [a ballot's] timeliness, making any handwritten date unnecessary and, indeed, superfluous." *In re Absentee & Mail-in Ballots*, 241 A.3d at 1077 (opinion announcing judgment). Recent Pennsylvania Commonwealth Court judges who have considered the importance of a dated declaration likewise have concluded that it is a meaningless "technicality." *In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, No. 1381 CD 2021, 2022 WL 96156, at *7-10 (Pa. Commw. Ct. Jan. 10, 2022) (Covey, J., concurring and dissenting); *Ritter*, 2022 WL 16577, at *11 (Wojcik, J., dissenting).

What is more, nothing in Pennsylvania law allows invalidating ballots that include the "wrong" date. As a matter of practice, counties do not invalidate such ballots. *See*, *e.g.*, J.A. 79 (Department of State guidance advising counties that "there is no basis to reject a ballot for putting the 'wrong' date on the envelope"); J.A. 254-55 (testimony from Lehigh Board of Elections' Chief Clerk that Lehigh

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counted ballots with "wrong" dates for 2021 election). Treating errors—such as the "wrong" date—differently from omissions underscores that the underlying information is unimportant and thus immaterial.

Much of the confusion about whether the date is material originates from the dissenting opinion in *In re Absentee & Mail-in Ballots*, which expressed a view that the absence of a date is not "a mere technical insufficiency we may overlook," 241 A.3d at 1090 (Dougherty, J., concurring and dissenting). Respectfully, the dissenting opinion's assertions do not hold up.

First, the date on a mailed ballot does not confirm a voter's "desire to cast it in lieu of appearing in person at a polling place." *Contra id.* A date on the return envelope is no more confirmation of a voter's intent to vote absentee or by mail-in ballot than is completing, signing, and returning the ballot. More critically, whether someone who has cast an absentee or mail-in ballot has misgivings about having done so is irrelevant. Election district registers identify which voters have requested an absentee or mail-in ballot. *Supra* at 3. Those voters may not vote in person unless they surrender their blank absentee or mail-in ballot, and its envelope, to their polling place; otherwise, they may vote only provisionally. *Id.* If a voter returns a completed absentee or mail-in ballot before the deadline and casts a provisional ballot at a polling place, only the absentee or mail-in ballot is counted, regardless of the date written on it. *Id.*

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Second, the date does not "establish[] a point in time against which to measure the elector's eligibility to cast the ballot." *Contra In re Absentee & Mailin Ballots*, 241 A.3d at 1090 (Dougherty, J., concurring and dissenting). Eligibility is assessed as of Election Day. *See, e.g.*, 25 P.S. § 2811(2), (3) (imposing residency requirements for the time period "immediately preceding the election"); *id.* § 3146.8(d) (directing counties to discard absentee and mail-ballots cast by individuals who died before Election Day); 25 Pa. C.S. § 1301 (allowing anyone "who will be at least 18 years of age on the day of the next election" to register).

Third, as already explained, the written date does not "ensure[] the elector completed the ballot within the proper time frame." *Contra In re Absentee & Mailin Ballots* 241 A.3d at 1090 (Dougherty, J., concurring and dissenting). Nor does it "prevent[] the tabulation of potentially fraudulent back-dated votes." *Contra id.*⁷ Relying on Justice Dougherty, the district court repeated that excluding undated ballots is "an important guard against fraud." J.A. 32. The district court hypothesized that "individuals who come in contact with that [undated] outer

⁷ Justice Dougherty made these points after the Pennsylvania Supreme Court had ordered, for the 2020 election only, that ballots postmarked by Election Day could be counted if they were received up to three days later, and that ballots received during this three-day window lacking postmarks would "be presumed to have been mailed by Election Day unless a preponderance of the evidence demonstrates that it was mailed after Election Day." *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 386 (Pa. 2020).

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envelope may, post hoc, fill in a date that is not representative of the date on which the ballot was executed." *Id*.

But because Pennsylvania employs only a "received-by" deadline, *supra* at 4, back-dating is not a way to fraudulently convert an ineligible ballot into a seemingly eligible one. A ballot is received by the deadline (and logged) or it is not. Filling in an incorrect date cannot convert an invalid ballot into a valid one, or vice versa. Pennsylvania law and procedure thus makes the date a voter writes "superfluous." *In re Absentee & Mail-in Ballots*, 241 A.3d at 1077 (opinion announcing judgment). Vague gestures at unidentifiable fraud prevention that are inconsistent with Pennsylvania law do not suggest differently.

Hypothetical scenarios conjured by the parties in this matter only confirm that the date is immaterial to "determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). A voter who may have unexpectedly moved out of state, *see* J.A. 508 (Lehigh Mot. Summ. J.); J.A. 681 (Ritter Opp'n to Summ. J.), or been convicted of a felony, *see* J.A. 682 (Ritter Opp'n to Summ. J.), between completing their ballot and Election Day is ineligible to vote regardless of when they completed their ballot, *supra* at 13 (voter must be eligible as of Election Day). These hypothetical voters are just like a voter

⁸ People who move within Pennsylvania during the 30 days preceding Election Day remain eligible to vote where they already were registered. 25 P.S. § 2811(3); 25 Pa.C.S. §§ 1501(b), 1902.

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who dies between completing a mailed ballot and Election Day. And a person who might try to vote in person after having already requested a mail-in ballot, J.A. 508 (Lehigh Mot. Summ. J.); J.A. 682 (Ritter Opp'n to Summ. J.), would not be permitted to do so unless they surrendered their absentee or mail-in ballot and its return envelope. *Supra* at 3.

Before the district court, Mr. Ritter tried to avoid the irrelevance of his hypotheticals by arguing that the date is needed as evidence of whether a voter whom everyone agrees is ineligible for reasons not having to do with the envelope date also signed a false declaration. See J.A. 681-84 (Ritter Opp'n to Summ. J.)⁹ Under this argument, the written date (assumed to be true) can be used to ferret out false declarations submitted by voters who unexpectedly move or are convicted of a felony prior to the election. The logic of this claim aside, the fact remains that ballots cast by these voters should not be counted no matter what. Whether an ineligible voter may also have falsely completed the return envelope's declaration has no bearing on this conclusion.

⁹ Mr. Ritter has gone so far as to suggest that the date is material because a voter who wrote a false date and was subsequently prosecuted and convicted for doing so would be ineligible to vote in *future* elections. *See* J.A. 684 (Ritter Opp'n to Summ. J.). But the materiality inquiry is "whether such individual is qualified under State law to vote in *such* election," 52 U.S.C. § 10101(a)(2)(B) (emphasis added), not in all current and future elections. Plus, it is still not the date that is material to eligibility, but the conviction.

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Pennsylvania has now conducted four elections with no-excuse mail-in voting, and questions relating to undated ballots have been litigated on multiple occasions. Yet the arguments for disenfranchising voters who omit the date on their return envelope continue to rely on assertions that are unsupported by Pennsylvania law.

B. Section 10101(a)(2)(B) Applies to Errors on Ballot Envelopes

Section 10101(a)(2)(B) forbids denying the right to vote "because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). Without dispute, a mailing envelope is a "record or paper." And in this case dating a return envelope has been made an "act requisite to voting." Section 10101(a)(2)(B) thus forbids disqualifying ballots because the return envelope omits an immaterial date.

Limiting § 10101(a)(2)(B) to errors or omissions made during voter registration would be irreconcilable with the statute's text. The statute applies to errors made on "any record or paper relating to any application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). If the statute covers just records or papers related to an application or registration then "other act requisite to voting" has no meaning, and no party has suggested one. Narrowing § 10101(a)(2)(B) to records or papers related to registration would therefore violate

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the basic rule that statutes should not be interpreted to make language superfluous. See, e.g., Duncan v. Walker, 533 U.S. 167, 174 (2001).

So the phrase "other act requisite to voting" must capture a category of actions distinct from applying and registering to vote. As it is, § 10101 defines that category of action. Congress specifically defined "vote" for purposes of § 10101 to include "all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted " 52 U.S.C. § 10101(e) (emphasis added); see also id. § 10101(a)(3)(A) ("For purposes of this subsection . . . the term 'vote' shall have the same meaning as in subsection (e) of this section."). That means the "other act[s] requisite to voting" encompasses acts "necessary to make a vote effective." There is nothing remotely confusing about following the statute's plain text such that § 10101(a)(2)(B) applies to an "error or omission on any record or paper relating to any application, registration, or other act [necessary to make a vote effective]." Contra J.A. 679 (Ritter Opp'n to Summ. J.).

Consistent with what § 10101 says, one court recently reached the straightforward conclusion that § 10101(a)(2)(B) "isn't limited to . . . voter registration." *Common Cause v. Thomsen*, -- F. Supp. 3d --, No. 19-323, 2021 WL 5833971, at *3 (W.D. Wis. Dec. 9, 2021). Other courts have likewise applied § 10101(a)(2)(B) beyond voter registration, including to denials of the right to vote

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because of errors or omissions made on an absentee ballot envelope. *League of Women Voters of Arkansas v. Thurston*, No. 20-5174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021); *Martin*, 347 F. Supp. 3d at 1308–09.

Lehigh's mistaken argument that § 10101(a)(2)(B) governs only voter registration borrows heavily from Friedman v. Snipes, 345 F. Supp. 2d 1356 (S.D. Fla. 2004), which denied a motion for a temporary restraining order seeking relief under that statute, J.A. 503-05 (Lehigh Mot. Summ. J.). Comparisons to Friedman fail to grasp that the relevant error was that the ballot at issue arrived after Florida's receipt deadline. 345 F. Supp. 2d at 1371. That, the district court reasoned, was not an error made on a "record or paper." Id. at 1371-72. So, the court concluded, even if Congress was "concerned about denials of the right to vote at all stages and components of the voting process—from application to registration to casting to counting," the statute "provides specifically for protections against denials based on errors or omissions on 'records or papers' that are immaterial to the determination of an individual's qualification to vote." Id. (emphasis added). Here, unlike in *Friedman*, the envelopes used to return a ballot are indisputably "records or papers."

Given the statute's own definition of "vote," there is no basis for limiting the meaning of "other act requisite to voting" based on the canon of *ejusdem generis*.

Contra J.A. 677-78 (Ritter Opp'n to Summ. J.). The Supreme Court has rejected

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resorting to such interpretative canons when the statute itself provides an operative definition. *See Bilski v. Kappos*, 561 U.S. 593, 604 (2010). It also has directed that courts should not "woodenly apply [*ejusdem generis*]" just because the disputed phrase appears in a list. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008). The unmodified inclusion of "other act requisite to voting" and the statute's unambiguously broad definition of "vote" should be "read to mean what they literally say," *Ali*, 552 U.S. at 227 (cleaned up), rather than artificially circumscribed.

II. Voters Can Bring Suit to Enforce § 10101(a)(2)(B)'s Protections
The district court erred in holding that voters cannot sue for violations of § 10101(a)(2)(B).

Most fundamentally, the district court neglected to consider if 42 U.S.C. § 1983 expressly authorizes the voters' suit, as the voters pleaded and argued. J.A. 52 (Complaint); J.A. 752 (Voters' Opp'n to Summ. J.). While there is overlap between the analysis the district court performed under *Alexander v. Sandoval*, 532 U.S. 275 (2001), to determine if § 10101 implies a right of action, and that it should have performed under *Gonzaga University v. Doe*, 536 U.S. 273 (2002), to determine if § 10101(a)(2)(B) is enforceable through § 1983, the analyses diverge such that § 1983 allows this suit regardless of whether there also is an implied action.

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Both *Sandoval* and *Gonzaga* direct courts to conduct a two-part inquiry in determining whether a statute creates a private right of action (*Sandoval*) or a private right enforceable under §1983 (*Gonzaga*). The first part of the inquiry is the same: a court must ask "whether Congress intended to create a federal right." *Gonzaga*, 536 U.S. at 283. That inquiry incorporates whether "Congress intended that the statutory provision in question benefits the plaintiff"; "whether the right asserted is so 'vague and amorphous' that its enforcement would strain judicial competence"; and "whether the statute unambiguously imposes a binding obligation on the states." *Grammer v. John J. Kane Reg'l Centers-Glen Hazel*, 570 F.3d 520, 525 (3d Cir. 2009).

The only circuit court to consider if § 10101(a)(2)(B) creates a federal right concluded it does. *Schwier v. Cox*, 340 F.3d 1284, 1296-97 (11th Cir. 2003). The district court concluded the same. J.A. 24, 29. Those conclusions are correct. Section 10101(a)(2)(B)'s focus on the benefitted class—voters—unavoidably follows from its assurance of "the right of any individual to vote in any election." The right it affords is neither vague nor amorphous—it is the right to have your vote counted notwithstanding trivial mistakes. And the statute imposes an indisputable obligation, forbidding denials of the right for those trivial mistakes.

The Sandoval and Gonzaga inquiries diverge at the second step, which is where the district court went astray. Federal rights are enforceable through an Case: 22-1499 Document: 42 Page: 26 Date Filed: 04/01/2022

implied cause of action only if Congress also created a private remedy. *Alexander*, 532 at 286. But federal rights are "presumptively enforceable" in an action under § 1983. *Gonzaga*, 536 U.S. at 283. That presumption is rebutted only if "Congress shut the door to private enforcement either expressly, through specific evidence from the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* at 284 n.4. Because these standards differ, § 1983 may be available where an implied cause of action is not (and vice versa if, for example, the defendant is not a state actor). ¹⁰

By applying the wrong test, the district court flipped the burden and looked for evidence of congressional intent to create a private right of action through § 10101(a)(2)(B), rather than evidence of congressional intent to preclude enforcement by way of § 1983. It faulted the Eleventh Circuit for not applying a similar presumption, J.A. 28-29, but that court got it right, *Schwier*, 340 F.3d at 1294-97. In *Schwier*, the Eleventh Circuit recognized that plaintiffs brought their suit under § 1983; below, the district court did not mention it.

¹⁰ As the dissenting justice in *Sandoval* observed, the Court would not have needed to consider the existence of an implied cause of action had the plaintiff used § 1983 instead. 532 U.S. at 299–300 (Stevens, J., dissenting); *see also McGovern v. City of Philadelphia*, 554 F.3d 114, 120–21 (3d Cir. 2009) (noting § 1983 may be available even when there is no implied cause of action).

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What is more, the district court's analysis of congressional intent was flawed. It concluded that the U.S. Attorney General's enforcement power under § 10101(c) is meant to be exclusive. Yet the Supreme Court already has ruled that federal enforcement of voting rights can coexist with private actions. *Allen v. State Bd. of Elections*, 393 U.S. 544, 556–57 (1969). And here, § 10101's text and the relevant legislative history explicitly presuppose that the Attorney General's authority is complementary.

First, paragraph (d) gives district courts jurisdiction for actions under § 10101 "without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law." 52 U.S.C. § 10101(d). As the voters have explained, this paragraph contemplates actions by voters—the "party aggrieved." Appellants' Br. at 26-27 (Doc. No. 32). Title 52 regularly distinguishes between the "aggrieved" party in a proceeding to enforce voting rights and the U.S. Attorney General. 52 U.S.C. §§ 10302(a), 20105(a), 20510. Plus, the U.S. Attorney General would not need to exhaust administrative remedies. *Schwier*, 340 F.3d at 1296.

Second, paragraphs (e) and (g) contemplate actions brought by a party other than the Attorney General. The former sets out specific procedures that apply to "any proceeding instituted [by the Attorney General]," 52 U.S.C § 10101(e), a preface that would be unnecessary if there was no alternative. Paragraph (g)

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reinforces the same point, again describing procedures specific to "any proceeding brought [by the Attorney General] to enforce subsection (b) of this section." *Id.* § 10101(g). That, too, would be needless prefatory language if the Attorney General's powers were exclusive.

Third, § 121 of the Civil Rights Act of 1957, the same act that invested the U.S. Attorney General with enforcement authority, amended 28 U.S.C. § 1343 to specifically grant district courts jurisdiction over actions to recover damages for violations of the right to vote. Civil Rights Act of 1957, Pub. L. No. 85-315, § 121. The U.S. Attorney General, however, may seek only "preventive relief." 52 U.S.C § 10101(c). Adding the jurisdictional provision while simultaneously eliminating the cause of action needed to invoke that jurisdiction would be inexplicably bizarre.

Because this text unequivocally confirms that § 1983 provides the voters a cause of action, using the *Sandoval* framework to determine if § 10101 independently supplies a cause of action is gratuitous. Still, the same text that confirms that the presumption of § 1983's availability cannot be overcome also signals that § 10101 itself creates a right of action. None of paragraphs (d), (e), and (g), or the specific grant of jurisdiction over actions for damages, makes sense if Congress did not intend for a private remedy to exist.

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While legislative history could not supplant what the statute emphatically communicates, the relevant history substantiates that § 10101 is privately enforceable through § 1983 at a minimum. The voters' brief in this court capably describes the relevant legislative history. Appellants' Br. at 34-37(Doc. No. 32). But it is worth emphasizing how insistent the architect of § 10101(c) was that it would not replace private suits.

Before Congress gave the U.S. Attorney General power to enforce what is now § 10101, private citizens enforced violations of that section's guarantees through § 1983 actions. H.R. Rep. No. 85-291, at 12 (1957) (stating "Section 1983 of Title 42 U.S.C. has been used to enforce the rights . . . contained in Section 1971"); Civil Rights-1957: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary ("Brownell Testimony"), 85th Cong. at 3 (Feb. 14, 1957) (statement and testimony of the Hon. Herbert Brownell, Jr., Attorney General of the United States) (stating private citizens have long used § 1983 actions for violations of the right to vote); Schwier, 340 F.3d at 1295 (collecting cases). Former U.S. Attorney General Herbert Brownell, Jr., had initially proposed the legislation that ultimately gave his office supplementary enforcement authority, and oversaw drafting of the legislation. See Brownell Testimony, 85th Cong. at 1, 203. In his testimony to Congress about the proposal, he was explicit that, "[u]nder the laws amended if this program passes, private

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people will retain the right they have now to sue in their own name and the Attorney General will have the additional right which he does not now have to bring on behalf of the United States for the protection of its citizens the new remedy remedial [sic] actions." *Id.* at 73; *see also id.* at 72 ("Private individuals . . . could still bring their own actions.").¹¹

The House certainly appreciated the complementary nature of the U.S.

Attorney General's enforcement power. Its report introduced the proposed provision as "To Provide Means for Further Securing and Protecting the Right to Vote." H.R. Rep. No. 85-291, at 11.

Therefore, legislative history, just like statutory text, confirms what intuitively must be true: "It is highly unlikely that in enacting civil rights legislation for the first time since the Reconstruction era [Congress] would simultaneously withdraw existing protection from § 10101." *Schwier*, 340 F.3d at 1295 (cleaned up). What is more, it is utterly implausible that Congress silently intended to take such counterintuitive action.

¹¹ The district court used statements from Attorney General Brownell as evidence that civil remedies did not exist before 1957, J.A. 27, but the Attorney General was quite clearly lamenting only the Department of Justice's historic lack of civil enforcement power, *see* Brownell Testimony, 85th Cong. at 3.

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CONCLUSION

For the reasons above, the district court should be reversed and, further, should be directed to enter judgment for the voters on Count I.

April 1, 2022

Respectfully submitted,

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CERTIFICATES

- I, Jacob B. Boyer, hereby certify that:
 - 1. I am a member of the bar of this Court;
 - 2. The text of the electronic version of this brief is identical to the text of the paper copies;
 - A virus detection program was run on the file and no virus was detected; and
 - 4. This brief contains 6,084 words and therefore complies with Federal Rules of Appellate Procedure 29(2)(5) and 32(a)(7)(B). In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

/s/ Jacob B. Boyer

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CERTIFICATE OF SERVICE

I, Jacob B. Boyer, hereby certify that a copy of this amicus brief has been served on all counsel of record using the Court's CM/ECF system.

I further certify that seven hard copies of this brief will be sent by first class mail to the Clerk of the United States Court of Appeals for the Third Circuit in Philadelphia, Pennsylvania.

/s/ Jacob B. Boyer

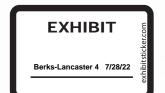
Why are there two envelopes with my mail-in ballot?

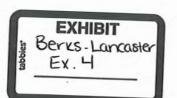
The smaller secrecy envelope is intended to protect the anonymity of your vote. After you fill out your ballot, you must place it in the secrecy envelope and seal it.

Do not make any marks on this envelope. If you fail to place and seal your ballot in this envelope or if you make marks on this envelope, your ballot will not be counted.

The second, larger envelope is the mailing and declaration envelope. You must use it, even if you are dropping your ballot off at a drop box. Place your secrecy envelope (with your ballot inside) into the mailing and declaration envelope. You must seal it and sign and date the declaration before you can return your ballot.

Both of these envelopes must be used in order for your vote to count.





Step 3:



Seal the inner secrecy envelope in the preaddressed outer return envelope. Complete, 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.

Step 4:



Return your voted ballot to the county election board. Absentee and Mail-in Ballots must be received by 8 pm on election day at your county election board. To ensure your ballot is received by the deadline, return the ballot as soon as possible.

What must be included when I return my mail-in or absentee ballot by mail or in person? Do I need a postage stamp?

- 1. When you receive your mail-in or absentee ballot, make sure you read all the instructions, and make sure you vote both sides of the ballot, if applicable.
- Put your voted ballot in the inner secrecy envelope that indicates "Official Election Ballot." Do NOT make any marks on the secrecy envelope.
- 3. Then put the secrecy envelope inside the pre-addressed outer return envelope where the voter signs.
- 4. Complete the voter's declaration by signing and writing the current date. Be sure to seal the outer envelope.
- Return your mail ballot to your county board of elections by mail, in person at your county election office or by dropping it off at another location designated by your county board of elections.
- 6. If you return your ballot by mail, you need a postage stamp for the envelope.

Ritter v. Miglioril, 142 S.Ct. 1824 (Mem) (2022)

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142 S.Ct. 1824 Supreme Court of the United States.

> David RITTER v. Linda MIGLIORII, et al.

> > No. 21A772 | June 9, 2022

Opinion

The application for stay presented to Justice <u>ALITO</u> and by him referred to the Court is denied. The order heretofore entered by Justice <u>ALITO</u> is vacated.

Justice <u>ALITO</u>, with whom Justice <u>THOMAS</u> and Justice <u>GORSUCH</u> join, dissenting from the denial of the application for stay.

This application for a stay pending certiorari involves the counting of undated mail-in ballots in one state-court judicial election. A stay pending certiorari is appropriate only if the Court is likely to grant review; certiorari is discretionary; and the Court now denies the stay. I would agree with that decision were it not for concern about the effect that the Third Circuit's interpretation of 52 U.S.C. § 10101(a)(2)(B) may have in the federal and state elections that will be held in Pennsylvania in November.

The Third Circuit's interpretation broke new ground, and at this juncture, it appears to me that that interpretation is very likely wrong. If left undisturbed, it could well affect the outcome of the fall elections, and it would be far better for us to address that interpretation before, rather than after, it has that effect. I would therefore enter a stay pending certiorari and advise that any petition for certiorari and brief in opposition should be filed expeditiously. If that is done, the Court will be in a position to grant review, set an expedited briefing schedule, and if necessary, set the case for argument in October.

To illustrate why the Third Circuit's interpretation is sufficiently questionable and important to merit review, I offer the following thoughts on the interpretation of the statute in question. As I will explain, 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. It seems plainly contrary to the statutory language, but as is almost always the case when we decide whether to grant emergency relief, I do not rule out the possibility that further briefing and argument might convince me that my current view is unfounded. But with that caveat, I will proceed to discuss the statutory language.

The statutory provision in question reads as follows:

"No person acting under color of law shall ... deny the right of any individual to vote in any election because of an error or omission on any record or paper related to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." § 10101(a)(2)(B).

*1825 This provision has five elements: (1) the proscribed conduct must be engaged in by a person who is "acting under color of law"; (2) it must have the effect of "deny[ing]" an individual "the right to vote"; (3) this denial must be attributable to "an error or omission on [a] record or paper"; (4) the "record or paper" must be "related to [an] application, registration, or other act requisite to voting"; and (5) the error or omission must not be "material in determining whether such individual is qualified under State law to vote in such election." *Ibid.*

The Third Circuit held that the failure to count mail-in ballots that did not include the date on which they were filled out constituted a violation of this provision, but the Third Circuit made little effort to explain how its interpretation can be reconciled with the language of the statute. In my view, however, it appears that elements 2 and 5 are clearly not met.

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EX.5

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I will start with element 2. When 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. "Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules." Brnovich v. Democratic National Committee, 594 U.S. ---, ----, 141 S.Ct. 2321, 2338, 210 L.Ed.2d 753 (2021). A registered voter who does not follow the rules may be unable to cast a vote for any number of reasons. A voter may go to the polling place on the wrong day or after the polls have closed. A voter may go to the wrong polling place and may not have time to reach the right place before it is too late. A voter who casts a mail-in ballot may send it to the wrong address. A State's refusal to count the votes of these voters does not constitute a denial of "the right to vote." Even the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right.

Element 5 weighs even more heavily against the Third Circuit's interpretation. This element requires that the error or omission be "material in determining whether such individual is qualified under State law to vote in such election." There is no reason why the requirements that must be met in order to register (and thus be "qualified") to vote should be the same as the requirements that must be met in order to cast a ballot that will be counted. Indeed, it would be silly to think otherwise. Think of the previously mentioned hypothetical voters whose votes were not counted because they did not follow the rules for casting a vote. None of the rules they violated-rules setting the date of an election, the location of the voter's assigned polling place, the address to which a mail-in ballot must be sent-has anything to do with the requirements that must be met in order to establish eligibility to vote, and it would be absurd to judge the validity of voting rules based on whether they are material to eligibility.

Under Pennsylvania law, a person is qualified to vote if he or she is at least 18 years old on the day of the election, has been a citizen of the State for at least one month, has lived in the relevant election district for at least 30 days, and is not imprisoned for a felony. See 25 Pa. Cons. Stat. § 1301 (2002). Other requirements must be met in order for a mail-in ballot to be counted. Among other things, a statute *1826 provides that a voter "shall ... fill out, date and sign" a declaration printed on the outer security envelope in which the actual ballot is sealed. S. 422, 2020 Gen. Assem., Reg. Sess. (Pa.), codified at Pa. Stat. Ann., Tit. 25. § 3150.16(a) (emphasis added); see also Migliori v. Lehigh County Bd. of Elections, No. 5:22ev-0397, 2022 WL 802159 (E.D. Pa., Mar. 16, 2022), App. to Application 23a-24a. The Pennsylvania Supreme Court has held that the inclusion of the date on which the ballot was filled out is mandatory and that undated ballots cannot be counted, see In re Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 General Election, - Pa. - , 241 A.3d 1058 (2020), but the Third Circuit held that this state-law rule is preempted by 52 U.S.C. § 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? One may argue that the inclusion of a date does not serve any strong purpose and that a voter's failure to date a ballot should not cause the ballot to be disqualified. But 10101(a)(2)(B) does not address that issue. It applies only to errors or omissions that are not material to the question whether a person is qualified to vote. It leaves it to the States to decide which voting rules should be mandatory.

The problem with the Third Circuit's interpretation can be illustrated by considering what would happen if it were applied to a mail-in voting rule that is indisputably important, namely, the requirement that a mail-in ballot be signed. Pa. Stat. Ann., Tit. 25, § 3150.16(a). Suppose a voter did not personally sign his or her ballot but instead instructed another person to complete the ballot and sign it using the standard notation employed when a letter is signed for someone

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else: "p. p. John or Jane Doe." Or suppose that a voter, for some reason, typed his or her name instead of signing it. Those violations would be material in determining whether a ballot should be counted, but they would not be "material in determining whether such individual is qualified under State law to vote in such election." Therefore, under the Third Circuit's interpretation, a ballot signed by a third party and a ballot with a typed name rather than a signature would have to be counted. It seems most unlikely that this is what 52 U.S.C. § 10101(a)(2)(B) means.²

For these reasons, it appears to me that the Third Circuit's interpretation is very likely incorrect, and I would grant a stay to preserve the opportunity to review that decision prior to the elections in November.

All Citations

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Footnotes

- Elements 1 and 3 are satisfied, but for the reasons explained below, see n. 2, *infra*, the Third Circuit's interpretation is not consistent with the most natural reading of element 4.
- In light of what I have written about elements 2 and 5, it is unlikely that element 4 must be addressed, but for the sake of completeness, I will add that the language of that provision must be given a strained meaning in order to make it applicable to the validity of a rule about filling out a mail-in ballot. Element 4 demands that a "record or paper" must be "related to [an] application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). A mail-in ballot is a "record or paper," and it does not appear to be related in any direct sense to any "application" or "registration," so the question is whether it is "related to" some "other act requisite to voting." But the casting of a ballot constitutes the act of voting. Indeed, the statute specifies that "the word 'vote' includes all action necessary to make a vote effective including ... casting a ballot, and having such ballot counted." § 10101(e). It is therefore awkward to describe the act of voting as "requisite to the act of voting."

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From: Marks, Jonathan < <u>imarks@pa.gov</u>>
Sent: Tuesday, June 1, 2021 9:21 AM
To: Marks, Jonathan < <u>imarks@pa.gov</u>>

Subject: DOS Email: Reminder Regarding Requirement to Sign AND Date Declaration Envelopes

County of Lehigh Warning: This is an external email. Please exercise caution.

Good morning everyone.

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.

Thank you for everything that you do.

Kind Regards,

Jonathan M. Marks

Deputy Secretary for Elections & Commissions

PA Department of State

302 North Office Building

Harrisburg, PA 17120

Phone: 717-783-2035

EXHIBIT EXHIBIT
Appendix p. 15 Ste A 7/28/22

No.	

In the Supreme Court of the United States

DAVID RITTER,

Petitioner,

v.

LINDA MIGLIORI, FRANCIS J. FOX, RICHARD E.
RICHARDS, KENNETH RINGER, SERGIO RIVAS, ZAC
COHEN, and LEHIGH COUNTY BOARD OF ELECTIONS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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July 7, 2022

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EXHIBIT

Appendix p. (F3) Sette B 7/28/22

QUESTION PRESENTED

Pennsylvania requires voters to sign and date a declaration when they vote by mail. In a private law-suit filed after a local election, the Third Circuit held that this dating requirement was preempted by the materiality provision of the Civil Rights Act of 1964, 52 U.S.C. §10101(a)(2)(B). That decision "is very likely incorrect," as three Justices have explained, and "could well affect the outcome of the fall elections." *Ritter v. Migliori*, 2022 WL 2070669 (U.S. June 9), at *3, *1 (Alito, J., dissental). Though petitioner planned to ask this Court to review it, he couldn't because the election ended and the results were certified. So the Third Circuit's decision will continue wreaking havoc, but this Court cannot review it on the merits.

The question presented is:

Should this Court vacate the Third Circuit's decision under *United States v. Munsingwear*, *Inc.*, 340 U.S. 36 (1950)?

RELATED PROCEEDINGS

Pennsylvania State Court:

Ritter v. Lehigh Cnty. Bd. of Elections, 2022 WL 16577 (Commw. Ct. Jan. 3)

United States District Court:

Migliori v. Lehigh County Board of Elections, 2022 WL 802159 (E.D. Pa. Mar. 16)

United States Court of Appeals:

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

United States Supreme Court:

Ritter v. Migliori, 142 S. Ct. 1824 (2022)

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JURISDICTION

The Third Circuit issued its decision on May 27, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The materiality provision of the Civil Rights Act of 1964 states:

No person acting under color of law shall ... deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

52 U.S.C. §10101(a)(2)(B).

INTRODUCTION

"Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules." *Brnovich v. DNC*, 141 S. Ct. 2321, 2338 (2021). The Constitution gives state legislatures ample authority to enact those rules. *See* Art. I, §4, cl. 1; Art. I, §1, cl. 2; amend. X. And those rules are particularly important

for mail-in voting, which takes place outside the presence of election officials and presents a heightened risk of fraud. *Brnovich*, 141 S. Ct. at 2348. Hence why laws requiring mail-in voters to follow certain rules—sign and date a declaration, use a sealed secrecy envelope, find a witness, follow deadlines, and more—are ubiquitous. *Republican Party of Penn. v. Degraffenreid*, 141 S. Ct. 732, 736 (2021) (Thomas, J., dissental). These workaday rules serve state interests that are "strong and entirely legitimate." *Brnovich*, 141 S. Ct. at 2340.

But these rules have their detractors—well-funded opponents who've been searching for a theory that would let federal courts invalidate regulations of mailin voting. During the pandemic, opponents tried to argue that the Constitution required federal courts to suspend these laws. This Court disagreed "numerous" times. *DNC v. Wis. State Leg.*, 141 S. Ct. 28, 32 (2020) (Kavanaugh, J., concurral). Then opponents, claiming racially disparate impacts, tried to invalidate these laws under §2 of the Voting Rights Act. This Court closed that door as well, explaining that Congress did not preempt "common" regulations that impose only the "usual burdens of voting." *Brnovich*, 141 S. Ct. at 2346-48.

The detractors' next big theory appears to be the materiality provision of the Civil Rights Act. Passed in 1964, that statute prevents States from denying someone "the right to vote" because they made an error or omission on a "record or paper" that is "requisite to voting," unless the error or omission is "material" to whether the voter is "qualified under State law." 52

U.S.C. §10101(a)(2)(B). This statute bans the practice—common in the Jim Crow South—of registrars denying black voters the right to register due to "minor misspelling errors or mistakes in age or length of residence." H.R. Rep. No. 88-914 (Nov. 20, 1963), 1964 U.S.C.C.A.N. 2391, 2491. But today, litigants are trying to stretch this language to cover laws that govern the mechanics of mail-in voting—rules that voters must follow to ensure their mail-in ballots are counted. These laws are preempted by the materiality statute, the theory goes, unless they prove a voter's qualifications, meaning their age, residency, citizenship, or non-felon status. And, of course, most ballot-validity rules do not do that.

This theory has major proponents. The ACLU, who represents the plaintiffs here, has adopted it. The national Democratic Party has adopted it too. The party is currently telling courts that the materiality statute preempts laws requiring voters to mail ballots to the right county, use a secrecy envelope, and meet the postmarking deadline. Worse, the United States has adopted this theory as well. It wrote amicus briefs for the plaintiffs in this case, and it is currently suing Texas and Arizona for their voter-ID laws. The United States' new position is important because the Civil Rights Act places *it* in charge of enforcing the materiality statute. *See* 52 U.S.C. §10101(c).

This expansive reading of the materiality statute was adopted below. With "little effort to explain how its interpretation can be reconciled with the language of the statute," *Ritter*, 2022 WL 2070669, at *1 (Alito,

J., dissental), the Third Circuit held that the materiality statute preempts Pennsylvania's laws requiring mail-in voters to date a declaration. It thus ordered Lehigh County to count 257 undated ballots in a judicial election where petitioner David Ritter led by only 71 votes. When Ritter moved for an emergency stay, this Court denied his application over the dissent of three Justices.

After this Court denied a stay, the case quickly became moot. The very next day, the district court ordered the board of elections to count the 257 undated ballots. The board did so and, less than a week after this Court denied a stay, Ritter learned that the Third Circuit's decision had flipped the result. Instead of winning the election by 71 votes, Ritter lost the election by 5 votes. The county then certified the results and declared his opponent the winner.

Because this case "has become 'moot while on its way here," this Court should follow its "established practice": it should "vacate the judgment below and remand with a direction to dismiss." Azar v. Garza, 138 S. Ct. 1790, 1792 (2018) (quoting Munsingwear, 340 U.S. at 39). The Court likely would have granted certiorari had the case not become moot. The Third Circuit's decision was important, wrong, and deepened a split among the lower courts. And the equities strongly favor vacatur, regardless of the odds of certiorari. The mootness here was caused by the election calendar, not Ritter, and leaving the Third Circuit's thinly reasoned decision in place would spawn unfortunate and unreviewable consequences. It jeopardizes a wide range of entirely legitimate state election laws.

And it will disrupt the November elections. Vacatur avoids these consequences, with no prejudice to the individual plaintiffs who brought this case. This Court should enter that relief to "clea[r] the path for future relitigation of the issues" and "eliminat[e] a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40.

STATEMENT OF THE CASE

Under Pennsylvania's election code, voters must date a declaration on the envelope of their mail-in ballot. Around 250 voters failed to do that in Lehigh County's 2021 election, and the Pennsylvania courts deemed those undated ballots invalid. Five voters then filed a follow-on suit in federal court, again arguing that the undated ballots must be counted. The voters lost in the district court, the Third Circuit reversed on appeal, and this Court denied an emergency stay. Then, in fast succession, the undated ballots were counted, the result was flipped, and the election was certified. So this controversy ended, but the Third Circuit's precedent remains untouched—inflicting consequences both immediate and far-reaching.

A. Pennsylvania requires mail-in voters to sign and date a declaration.

The Pennsylvania legislature authorized no-excuse mail-in voting for the first time in 2019. To vote this way, Pennsylvanians must place their ballot in an inner secrecy envelope and then place the inner secrecy envelope in an outer mailing envelope. The mailing envelope contains a declaration that the voter must "fill out, *date* and sign." 25 Pa. Stat. §3150.16(a)

(emphasis added); accord §3146.6(a). The declaration affirms that the voter, among other things, is qualified to vote in this election from this address and hasn't voted already. See Envelope Guide, Pa. Dep't of State, bit.ly/3LBsM4Q (last visited July 6, 2022).

According to Pennsylvania's courts, this dating requirement serves "weighty interests." Ritter v. Lehigh Cnty. Bd. of Elections, 2022 WL 16577, at *9 (Pa. Commw. Ct. Jan. 3). It helps prove "when the elector actually executed the ballot." In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058, 1090 (Pa. 2020) (op. of Dougherty, J.). It "establishes a point in time against which to measure the elector's eligibility." *Id.* It helps "ensur[e] the elector completed the ballot within the proper time frame." Id. at 1091. And it prevents third parties from collecting and "fraudulent[ly] back-dat[ing] votes." Id.; accord App.65 ("Where ... the outer envelope remains undated, the possibility for fraud is heightened."). As in other States, dating requirements like Pennsylvania's "deter fraud," "create mechanisms to detect it," and "preserv[e] the integrity of the election process." Republican Party of Penn., 141 S. Ct. at 736 (Thomas, J., dissental) (cleaned up).

B. Ritter runs for a judgeship in 2021 and initially wins the third and final seat.

Lehigh County's court of common pleas is a trial court with general jurisdiction. Its judges serve 10-year terms. They run in partisan elections for their first term and retention elections after that.

In November 2021, Lehigh County held an election for three new judges on the court of common pleas. Six candidates ran—three Republicans and three Democrats—so the top three vote-getters would win the seats. After the votes were tallied, the three Republicans finished in the top three. But the margin between the third-place candidate (David Ritter) and fourth-place candidate (Zac Cohen) was less than 75 votes:

Candidate	Vote Total
Tom Caffrey (REP)	35,301
Tom Capehart (REP)	33,017
David Ritter (REP)	32,602
Zachary Cohen (DEM)	32,528
Maraleen Shields (DEM)	32,041
Rashid Santiago (DEM)	29,453

Caffrey and Capehart were seated. But Ritter was not. His opponent, Cohen, filed a challenge with the county board of elections.

C. In the state contest, the Pennsylvania courts agree with Ritter that undated ballots cannot be counted.

Of the 22,000 absentee votes cast in Lehigh County's 2021 election, 257 had no date on the outer envelope. In other words, 1% of mail-in voters failed to comply with Pennsylvania's dating requirement. After Cohen's challenge, the board of elections decided to count those undated votes, but Ritter challenged that decision in court. The state trial court ruled for

Cohen, but the commonwealth court reversed on appeal.

A three-judge panel of the commonwealth court agreed with Ritter that the 257 undated ballots could not be counted. In addition to state-law claims, the court addressed whether the dating requirement violates the materiality provision of the Civil Rights Act. That statute was "inapplicable," according to the commonwealth court, because the dating requirement does not regulate whether a voter is *qualified* to vote, but whether a qualified voter's ballot is *valid*. 2022 WL 16577, at *9. The materiality statute does not invalidate the dating requirement, which is an election-integrity measure that serves "weighty interests." *Id*.

The commonwealth court instructed the trial court to "issue an order ... directing [Lehigh County] to exclude the 257 [undated] ballots from the certified returns." *Id.* at *10. The commonwealth court's decision became final on January 27, 2022, when the Pennsylvania supreme court denied Cohen's petition to appeal. 271 A.3d at 1286. The trial court promptly directed Lehigh County to "exclude the 257 ballots at issue in this case." CA3 Dkt. 33-2 at JA128.

D. Individual voters file a new federal lawsuit, lose, but win on appeal.

Four days after the state-court proceedings ended, five individual voters filed a new federal lawsuit. The voters claimed that they did not date their mail-in ballots and argued that Pennsylvania's dating requirement violated the materiality statute. Though they claimed to be vindicating their individual right to

vote, they did not ask for only their five ballots to be counted; they asked that Lehigh County be ordered to count all "257" undated ballots. D.Ct. Dkt. 1 at 20-21. Ritter intervened as a defendant, and Cohen intervened as a plaintiff.

The district court quickly entered summary judgment against the plaintiffs. It ruled that the plaintiffs lacked a private right of action to enforce the materiality statute. App.53-62. The court "did not find the question of the existence of a private right of action to be particularly close." *Migliori v. Lehigh Cnty. Bd. of Elections*, 2022 WL 827031, at *1 (E.D. Pa. Mar. 18).

The individual voters (but not Cohen) appealed. D.Ct. Dkt. 58. After expedited briefing and argument, the Third Circuit issued a judgment on May 20. The judgment warned that the court would soon issue an opinion for the plaintiffs, that the opinion would direct the district court to "order that the undated ballots be counted," and that the Third Circuit would "immediately" issue its mandate with the opinion. CA3 Dkt. 82 at 2-3. Ritter asked the Third Circuit to either stay its mandate pending certiorari or delay the issuance of its mandate seven days so that Ritter could seek a stay from this Court. CA3 Dkt. 81. The Third Circuit agreed to delay its mandate seven days. CA3 Dkt. 85.

The Third Circuit issued its decision at the end of May. It held that Congress intended for the materiality statute to be enforced through §1983's private right of action. It discounted the fact that the materiality provision "refers to the Attorney General's enforcement ability," and it supported its conclusion by

consulting legislative history. App.11-18. The Third Circuit then held that Pennsylvania's dating requirement did not comply with the materiality statute. It reasoned that any state election law that does not "g[o] to determining age, citizenship, residency, or current imprisonment for a felony" violates the statute. App.19. It did not explain how the text of the statute reaches ballot-validity requirements in the first place.

Importantly, throughout this litigation, Lehigh County was enjoined from certifying the election. *See* D.Ct. Dkt. 13; CA3 Dkt. 12. The plaintiffs sought that relief at every stage because, "[o]nce the Elections Board certifies the election ..., Plaintiffs lose any opportunity to obtain meaningful redress." D.Ct. Dkt. 3 at 20; *accord* D.Ct. Dkt. 52-1 at 17 (arguing that, if "the County ... certif[ies] the election," then "Plaintiffs will likely lose any opportunity for appellate review"). Certification, they argued, is a "bell" that "cannot be unrung." D.Ct. Dkt. 3 at 20. "[O]nce an election is certified, 'there can be no do-over [or] redress." CA3 Dkt. 6-1 at 24-25; *accord* D.Ct. Dkt. 3 at 19 ("once certified, an excluded vote cannot be restored"); CA3 Dkt. 6-1 at 3 ("irretrievably lost"); *id.* at 7-8 ("permanent loss").

E. The Third Circuit's decision goes into effect and flips the result.

Ritter sought an emergency stay from this Court to prevent the Third Circuit's decision from going into effect. Justice Alito entered an administrative stay, but the full Court later denied Ritter's application.

Justice Alito, joined by Justices Thomas and Gorsuch, dissented. They would have granted the stay,

noting their "concern" that the Third Circuit's decision would affect "the federal and state elections that will be held in Pennsylvania in November." *Ritter*, 2022 WL 2070669, at *1 (Alito, J., dissental). The Third Circuit's interpretation of the materiality statute, they explained, "broke new ground." *Id.* It is "very likely wrong" and "could well affect the outcome of the fall elections." *Id.* These Justices would have entered a stay and ordered expediting briefing so that "the Court will be in a position to grant review, set an expedited briefing schedule, and if necessary, set the case for argument in October." *Id.* at *2.

One day after this Court denied a stay—before the Third Circuit's mandate had even issued—the district court ordered Lehigh County to count the 257 undated ballots. App.31. The board of elections counted them six days later. Though the plaintiffs told this Court that Ritter could not "show that counting the additional votes will change the result," Stay-Opp.3, that's precisely what happened. Instead of winning the election by 71, Ritter lost the election by 5. Lehigh County certified the election for Cohen. See Pratt, Eight Months Later, Lehigh County Certifies 2021 General Election, WLVR (June 28, 2022), bit.ly/3bQwNWX.

The Third Circuit's decision literally changed the outcome of Ritter's election, but the fallout did not end there. Even though the Third Circuit's decision "was issued in the context of the November 2021 election in Lehigh County," the State has ordered all counties to count undated ballots in future elections (unless the Third Circuit's decision is overturned by this Court). Guidance Concerning Examination of Absentee and

Mail-In Ballot Return Envelopes 2-3, Pa. Dep't of State (May 24, 2022), bit.ly/3NLG8x0 (Guidance). And a Pennsylvania judge, relying heavily on the Third Circuit's decision, ordered all counties to count undated ballots in the May primaries. See Dave McCormick for U.S. Senate v. Chapman, Mem. Op., No. 286 M.D. 2022 (Pa. Commw. Ct. Jun. 2, 2022).

Though the plaintiffs told this Court that the Third Circuit's decision would not affect laws other than the dating requirement, see Stay-Opp. 26-27, that assurance quickly proved false. Less than a week after the Third Circuit's decision, a group of plaintiffs sued to invalidate Pennsylvania's law requiring mail-in ballots to be placed in secrecy envelopes. The plaintiffs argued that, under the Third Circuit's decision, this requirement is not "material in determining whether [voters are] qualified under [Pennsylvania] law to vote." Dondiego v. Lehigh Cnty. Bd. of Elections, Dkt. 1 ¶43, No. 5:22-cv-2111-JLS (E.D. Pa. May 31, 2022). The defendants quickly settled. Dondiego, Dkts. 43-44, No. 5:22-cv-2111-JLS (E.D. Pa. June 15, 2022). The settlements will continue, as Pennsylvania's attorney general agrees with the plaintiffs' reading of the materiality statute and has urged courts to invalidate the State's election law. E.g., CA3 Dkt. 42; D.Ct. Dkt. 40.

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision, "[i]f left undisturbed," will leave a dangerous interpretation of the materiality statute on the books, threaten to invalidate countless regulations of mail-in voting, and inject

chaos into the state and federal elections in November. *Ritter*, 2022 WL 2070669, at *1 (Alito, J., dissental). It should not be left undisturbed. Because the case became moot on its way here, this Court should do what it typically does when the election calendar prevents a litigant from obtaining review: *Munsingwear* vacate. *E.g.*, *Bognet v. DeGraffenreid*, 141 S. Ct. 2508 (2021).

This case became "moot while on its way here." *Munsingwear*, 340 U.S. at 39. The parties' dispute was about which ballots would be counted in Lehigh County's 2021 election for the court of common pleas. After the Third Circuit's decision but before this Court granted certiorari, the ballots were counted, the results were certified, and the election ended. As the plaintiffs have argued throughout this case, certification marks the end of the parties' controversy.

When a case becomes moot on its way here, the Court's "established practice" is to invoke *Munsingwear*—to grant certiorari, vacate the judgment, and remand with instructions to dismiss the case as moot. 340 U.S. at 39. That remedy promotes "fairness" by "expung[ing] an adverse decision" that the petitioner could not get this Court to review. *Camreta v. Greene*, 563 U.S. 692, 712 & n.10 (2011). Though the United States has argued that vacatur is inappropriate unless the underlying case would have been certworthy, it admits that vacatur can "still ... be appropriate" even when that's not true. Pet. 23 n.4, *Hargan v. Garza*, 2017 WL 5127296 (U.S. Nov. 3, 2017). Because *Munsingwear* is "rooted in equity," the fact that the case became moot "before certiorari does not

limit this Court's discretion." *Garza*, 138 S. Ct. at 1792-93. But under any standard, the Third Circuit's judgment should be vacated here.

If this case had not become moot, the Court likely would have granted certiorari. The Third Circuit's expansive interpretation of the materiality statute is the kind of disruptive usurpation of the States' authority over elections that this Court hasn't hesitated to review. And the Third Circuit's holding that plaintiffs have a private right of action creates a 2-1 circuit split. Three Justices said they would have granted certiorari at the stay stage. It's likely that at least one more would have joined them at the merits stage—where the facts, law, and stakes would have crystallized and the burdens of granting emergency relief would have dissipated. Compare Moore v. Harper, 142 S. Ct. 1089 (2022) (denying an emergency stay), with Moore v. Harper, 2022 WL 2347621, at *1 (U.S. June 30) (granting certiorari). Or the prospect of certiorari is at least close enough to justify wiping the slate clean under Munsingwear.

Certiorari aside, the equities alone warrant vacatur. The mootness here "occur[red] through happenstance," rather than Ritter's own conduct. *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71 (1997). The case became moot when the new election results were certified over Ritter's rigorous defense of the original results. But that certification left in place a decision that "could well affect the outcome of the fall elections" and is being invoked to attack state election laws across the country. *Ritter*, 2022 WL 2070669, at *2 (Alito, J., dissental). It was issued hastily and did not

address the statutory question at the core of this case. The state election laws that it will jeopardize include legitimate requirements necessary to the administration of the upcoming elections. And vacatur is far less burdensome than an emergency stay or expedited review, which three Justices already indicated they were willing to support. The equities, as they normally do, point to *Munsingwear*.

I. This case became moot on its way here.

Article III courts may decide "only ... ongoing cases or controversies." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). An "actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Alvarez v. Smith*, 558 U.S. 87, 92 (2009).

The controversy underlying this case has ended. The plaintiffs sued so that their undated ballots would be counted in Lehigh County's 2021 election. That election ended, the plaintiffs' ballots were counted, the results were certified, and the offices were filled. Even if Ritter convinced this Court to reverse the Third Circuit, none of that would change. Lehigh County would not (if it even could, legally) uncertify the election, uncount the plaintiff's votes, or remove Cohen from office. As is typical in election cases, this dispute over which votes will be counted became moot once the votes were counted and the election was certified. See, e.g., Bognet, 141 S. Ct. at 2508 (granting pre-certiorari vacatur in a dispute over the validity of certain ballots in Pennsylvania's 2020 election after the case became moot because the election was certified); Brockington v. Rhodes, 396 U.S. 41, 43 (1969) (granting vacatur because a case involving "a particular office in a particular election" becomes "moot" once the "election is over").

The plaintiffs agree. Throughout this case, they asked the lower courts to enjoin Lehigh County from certifying the election, precisely because of certification's case-mooting effect. As they put it, certification is a "bell" that "cannot be unrung." D.Ct. Dkt. 3 at 20. That final act eliminates "any opportunity for appellate review." D.Ct. Dkt. 52-1 at 16. It's the point after which "there can be no ... redress." CA3 Dkt. 6-1 at 24-25. Pennsylvania's chief elections official agrees. See Sec'y-BIO 1, Bognet, 2021 WL 1040374 (U.S. Mar. 15, 2021) ("This case is moot" because "Pennsylvania has officially certified all results" and "Petitioners do not suggest that this Court could, at this late date, change the outcome of a single race."). The plaintiffs cannot argue otherwise now.*

II. Absent mootness, the questions presented are certworthy.

As noted, the United States takes the position that "vacatur under *Munsingwear* is appropriate if, among other things, the case would have merited this Court's plenary review had it not become moot." Reply 2, *Yellen v. U.S. House of Representatives*, 2021

^{*} If the plaintiffs change positions and provide some convincing reason why this case is not moot, then this Court should grant certiorari on the merits. The questions presented should be (1) whether Pennsylvania's dating requirement violates the materiality statute and (2) whether plaintiffs have a private right of action to enforce the materiality statute.

WL 4219332 (U.S. Sept. 2021). Ritter satisfies that standard, as three Justices suggested already at the stay stage. *See Ritter*, 2022 WL 2070669, at *1 (Alito, J., dissental) ("the Third Circuit's interpretation is sufficiently questionable and important to merit review").

This case would have presented two issues that merit this Court's consideration. First, the question whether the materiality statute applies to laws governing the validity of mail-in ballots is important and has significant consequences for the fall elections. Second, the question whether private plaintiffs can enforce the materiality statute has split the circuits 2-1. Both questions would have been certworthy, and either question is a sufficient basis to vacate under *Munsingwear*.

A. The Third Circuit adopted a broad reading of the materiality statute that will disrupt many elections.

The materiality provision of the Civil Rights Act of 1964 bars election officials from deeming individuals unqualified to vote based on small mistakes on their applications:

No person acting under color of law shall ... deny *the right* of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act *requisite to* voting, if such error or omission is not material in determining whether such individual is *qualified* under State law to vote in such election.

52 U.S.C. §10101(a)(2)(B) (emphases added). The statute bars election officials from, for example, denying someone's voter-registration application because he misspelled his name or street address. *See* H.R. Rep. No. 88-914, 1964 U.S.C.C.A.N. at 2491.

The materiality statute does not preempt laws that govern the process of casting mail-in ballots. As Congress explained at the time, the statute is aimed not at "discriminatory laws," but at "the discriminatory application and administration of apparently nondiscriminatory laws." *Id.* At least three parts of the text illustrate why it does not invalidate ordinary laws governing mail-in voting:

- 1. Laws that regulate the casting of mail-in ballots do not deem a voter not "qualified under State law to vote." §10101(a)(2)(B). States determine whether voters are qualified through the process of registration, and the qualifications for voting are minimal: age, residency, citizenship, and non-felon status. See Ritter, 2022 WL 2070669, at *2 (Alito, J., dissental). But the rules governing the validity of mail-in ballots—the where, when, and how of casting these ballots—do not have "anything to do" with a voter's qualifications. *Id*. They serve different purposes, like improving election administration, confirming voters' identities, deterring fraud, and protecting voters' privacy. It would be "silly" and "absurd" to invalidate all these requirements unless they help confirm a voter's age, residency, citizenship, or non-felon status. *Id*.
- 2. Laws that require mail-in voters to follow certain rules also do not "deny the right of any individual

to vote." §10101(a)(2)(B). "When a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied 'the right to vote." *Ritter*, 2022 WL 2070669, at *2 (Alito, J., dissental). The voter's vote is not counted "because he or she did not follow the rules for casting a ballot." *Id.* The failure to follow basic ballot-casting rules "constitutes the forfeiture of the right to vote, not the denial of that right." *Id.*; *see Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973) (explaining that voters who "chose not to" follow the State's election deadline were not "disenfranchise[d]" by the State).

3. Nor do laws governing how a mail-in ballot must be cast regulate an "act requisite to voting." §10101(a)(2)(B). The materiality statute defines "vote" to include "all action necessary to make a vote effective including ... casting a ballot, and having such ballot counted." §10101(e). So dating the declaration *is* "voting" because it is "necessary to make a vote effective." It would be "strained" and "awkward" to "describe the act of voting as 'requisite to the act of voting." *Ritter*, 2022 WL 2070669, at *2 n.2 (Alito, J., dissental).

Yet the Third Circuit concluded otherwise. It held that the materiality statute not only reaches laws that govern the validity of mail-in ballots, but also preempts Pennsylvania's law requiring voters to date the declaration on their mailing envelope. The Third Circuit did not grapple with the textual problems discussed above. It "made little effort to explain how its interpretation can be reconciled with the language of the statute." *Id.* at *1.

Unsurprisingly then, the court's analysis was deeply confused. The Third Circuit spent most of its time explaining why the dating requirement does not help Pennsylvania tell whether a ballot was cast on time, and it put near-dispositive stress on the fact that Pennsylvania already counts ballots that contain the wrong date (as opposed to no date). See App. 18-22. But none of that matters under the Third Circuit's reading of the materiality statute. If dating the declaration is a "requisite to voting" and disqualifying undated ballots deems an individual "[un]qualified" and "den[ied] the right ... to vote"—as the Third Circuit necessarily concluded—then the remaining analysis should have been simple. Timeliness is not a qualification for voting under Pennsylvania law, see 25 Pa. Cons. Stat. §1301, so of course the dating requirement would not be "material in determining whether [an] individual is qualified under State law to vote," 52 U.S.C. §10101(a)(2)(B). That the Third Circuit felt the need to say more proves that even it was uncomfortable with the implications of its interpretation.

And the Third Circuit should have been uncomfortable, as its interpretation of the materiality statute has no real limits. Many, if not most, regulations of mail-in voting do not "g[o] to determining age, citizenship, residency, or current imprisonment for a felony." App.19. They serve other purposes, like confirming voters' identities, deterring and detecting fraud, and protecting voters' privacy. The Third Circuit's decision implicates not just dating requirements, but also laws that require voters to provide certain identifying information, write with certain instruments, use certain envelopes, meet certain deadlines, find certain

witnesses, and the like. Even the requirement that mail-in voters sign a declaration would not be material under the Third Circuit's decision. *Ritter*, 2022 WL 2070669, at *2 (Alito, J., dissental).

Litigants have already seized on the Third Circuit's decision to challenge all sorts of regulations. Immediately on the heels of that decision, private plaintiffs filed a lawsuit challenging Pennsylvania's requirement that mail-in voters use an inner secrecy envelope. Their principal authority was the Third Circuit's decision in this case. See Dondiego, Dkt. 2-1 at 9-10, No. 5:22-cv-2111-JLS (E.D. Pa. May 31, 2022). The national Democratic Party has likewise used the materiality statute to challenge laws requiring mailin voters to include their name, send their ballot to the right place, get a postmark, meet the deadline, use the right envelope, and more. Its lead authority? The Third Circuit's decision in this case. See DCCC v. Kosinski, Dkt. 97 at 18-19, No. 1:22-cv-1029 (S.D.N.Y. June 17, 2022).

These nationwide challenges illustrate why the Third Circuit's decision, which "broke new ground," would have been "sufficiently ... important to merit review" by this Court. *Ritter*, 2022 WL 2070669, at *1 (Alito, J., dissental). As contemplated by this Court's Rule 10(c), certiorari is appropriate, even without a direct circuit split, when it raises an "important question of federal law that has not been, but should be, settled by this Court." The Third Circuit's reasoning is a "de facto green light to federal courts to rewrite dozens of state election laws around the country." Wis. State Leg., 141 S. Ct. at 35 (Kavanaugh, J., concurral).

When federal courts invalidate state election laws or threaten new inroads on States' authority to regulate elections, this Court has not hesitated to grant certiorari without waiting for a classic circuit split. *E.g.*, *Moore*, 2022 WL 2347621; *Brnovich*, 141 S. Ct. at 2336; *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1841 (2018); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 188 (2008) (op. of Stevens, J.).

That's not to say that the proper reading of the materiality statute hasn't divided the lower courts: It has. The Fifth Circuit—fully aware of the Third Circuit's decision here—just rejected the notion that the materiality statute covers "any requirement that may prohibit an individual from voting if the individual fails to comply." Vote.Org v. Callanen, 2022 WL 2389566, at *6 n.6 (5th Cir. July 2) (citing *Ritter*, 2022) WL 2070669, at *2 (Alito, J., dissental)). The Pennsylvania courts too, in this very case, reached a directly contrary result from the Third Circuit. See Ritter, 2022 WL 16577, at *9. And until recently, no case in any jurisdiction suggested that the materiality statute governs "the counting of ballots by individuals already deemed qualified to vote." Friedman v. Snipes, 345 F. Supp. 2d 1356, 1371 (S.D. Fla. 2004).

For all these reasons, this Court likely would have granted certiorari to review the Third Circuit's novel and sweeping interpretation of the materiality statute. Three Justices have already said as much. Especially given what's transpired since then, certiorari is likely enough to justify vacatur now.

B. The Third Circuit deepened a circuit split on whether private plaintiffs can enforce the materiality statute.

Independently, the Third Circuit's decision would have been certworthy because it created a 2-1 circuit split. The Third Circuit joined the Eleventh Circuit in concluding that §1983 gives plaintiffs a private right of action to enforce the materiality statute. See App.11-18; Schwier v. Cox, 340 F.3d 1284, 1293 (11th Cir. 2003). The Sixth Circuit has held the opposite. See Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 630 (6th Cir. 2016) (citing McKay v. Thompson, 226 F.3d 752, 756 (6th Cir. 2000)).

This circuit split is widely recognized. At the stay stage, the plaintiffs acknowledged it. See Stay-Opp.20 (acknowledging that the "Sixth Circuit" has "reach[ed] a contrary conclusion" from the Third and Eleventh Circuits). And several courts have recognized the split as well. E.g., Vote.Org, 2022 WL 2389566, at *5 n.5 ("Courts are divided on this point."); Navajo Nation Hum. Rts. Comm'n v. San Juan Cnty., 215 F. Supp. 3d 1201, 1218 & n.6 (D. Utah 2016) (discussing this "circuit split"); Ne. Ohio Coal., 837 F.3d at 630 (Sixth Circuit recognizing that the Eleventh Circuit had "reached the opposite conclusion"). This "conflict" over an "important" issue is precisely the kind of question that this Court grants certiorari to review. S. Ct. R. 10(a); e.g., Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 422 n.6 (1987) (granting certiorari to resolve a 1-1 split on whether a federal statute could be enforced via §1983).

This split would have been ripe for this Court's review. The issue has percolated for two decades, divided three circuits, and been thoroughly addressed in numerous federal decisions. *E.g.*, *Dekom v. New York*, 2013 WL 3095010, at *18 (E.D.N.Y. June 18) (collecting cases), *aff'd*, 583 F. App'x 15 (2d Cir. 2014); *Duran v. Lollis*, 2019 WL 691203, at *9 (E.D. Cal. Feb. 19); *Navajo Nation*, 215 F. Supp. 3d at 1219; *League of Women Voters of Ark. v. Thurston*, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15). The split is not disappearing, as the Sixth Circuit has reaffirmed its position even after this Court's most recent precedent interpreting §1983. *Ne. Ohio Coal.*, 837 F.3d at 630. And the lower courts will continue to split on this question because there are persuasive points on both sides.

The Sixth Circuit's position best conforms to Congress's design and this Court's precedent. Even if a federal statute creates individual rights, §1983 is not available if Congress "did not intend that remedy" for the statute in question. City of Rancho Palos Verdes v. *Abrams*, 544 U.S. 113, 120 (2005). For the materiality statute, Congress included a public judicial remedy for "the Attorney General" of the United States. 52 U.S.C. §10101(c). That remedy is contained in the same statute and is highly detailed—dictating who can be the defendant, creating special forms of relief, articulating rebuttable evidentiary presumptions, creating new federal jurisdiction, eliminating exhaustion requirements, appointing and compensating private referees, specifying fast deadlines, assigning counsel to defendants, and creating jurisdiction for three-judge district courts and direct appeals to this Court. See §10101(c)-(g). The "express provision of one method of enforcing a substantive rule," especially a "comprehensive enforcement scheme" like this one, means that "Congress intended to preclude others." *Rancho Palos Verdes*, 544 U.S. at 120-21.

That this case would have raised a question that has split the circuits—a classic justification for certiorari—means that vacatur under *Munsingwear* is an easy call now. The logic of the United States' position on pre-certiorari vacatur is presumably rooted in equity: Denying vacatur to a party who would have gotten review is unfair because it falsely treats him as though he got review *and lost. Camreta*, 563 U.S. at 712. And granting vacatur does not prejudice the party who won below because, given the likelihood of this Court's review, that party's win was "only preliminary." *Alvarez*, 558 U.S. at 94. So too here.

III. The equities alone warrant vacatur.

Even if this Court would have denied certiorari, vacatur would still be appropriate. The United States admits that its position on pre-certiorari vacatur is not absolute. See Pet. 23 n.4, Garza, 2017 WL 5127296 (explaining that vacatur can be appropriate "even if review were not otherwise warranted"). And this Court has refused to place any "limit" on its "discretion" to vacate cases that became moot before certiorari. Garza, 138 S. Ct. at 1793; see also Alvarez, 558 U.S. at 94 ("The statute that enables us to vacate a lower court judgment when a case becomes moot is flexible"). This Court has granted vacatur many times in this posture, including recently in cases that were mooted by the 2020 election. See id. (collecting cases); e.g., Bognet, 141 S. Ct. at 2508; Trump v. D.C., 141

S. Ct. 1262 (2021); Trump v. CREW, 141 S. Ct. 1262 (2021); Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021); Yellen v. U.S. House of Representatives, 142 S. Ct. 332 (2021); Slatery v. Adams & Boyle, P.C., 141 S. Ct. 1262 (2021).

Requiring this Court to "undertake a hypothetical disposition of the petition" before it grants pre-certiorari vacatur would impose an "unwarranted burden." 13C Fed. Prac. & Proc. Juris. §3533.10.3 (3d ed.). It might make sense to deny vacatur when it is "apparent that certiorari would not have been granted." *Id.* But that principle cannot be dispositive here, where three Justices have already concluded that the Third Circuit's decision is "sufficiently questionable and important to warrant review." *Ritter*, 2022 WL 2070669, at *1 (Alito, J., dissental).

At bottom, this Court should simply ask the core question that it always asks when deciding whether to invoke *Munsingwear*: Is vacatur equitable under "the conditions and circumstances of the particular case"? *Garza*, 138 S. Ct. at 1792. Vacatur is equitable here for at least four reasons.

1. This Court should vacate because the "mootness occur[red] through happenstance," rather than Ritter's own conduct. *Arizonans for Off. Eng.*, 520 U.S. at 71. This case plainly falls on "the 'happenstance' side of the line" because it was mooted by "the ordinary course of ... proceedings." *Alvarez*, 558 U.S. at 95-96. The disputed ballots were counted, the results were certified, and the election ended. Ritter did not cause any of that to happen; in fact, he tried to stop it by

seeking emergency relief from this Court. And no matter how fast he acted after this Court denied a stay, his petition could not have been granted and resolved before the election ended. When mootness is caused by "the election outcome," as the United States recently explained, then the mootness is "unattributable to any of the parties." Reply 8, *Trump v. D.C.*, 2020 WL 7681471 (U.S. Dec. 2020).

When "happenstance" prevents this Court from reviewing a decision, then "the normal rule" applies and the equities favor vacatur. Camreta, 563 U.S. at 713. "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 25 (1994). "Vacatur then rightly strips the decision below of its binding effect and clears the path for future relitigation." Camreta, 563 U.S. at 713 (cleaned up). This Court has struck that equitable balance in "countless cases," Great W. Sugar Co. v. Nelson, 442 U.S. 92, 93 (1979), and nothing about this case warrants a different result. In short, "mootness by happenstance provides sufficient reason to vacate." Bancorp, 513 U.S. at 25 n.3 (emphasis added).

2. No countervailing purpose would be served by leaving the Third Circuit's decision intact. The primary interest that weighs against vacatur is the notion that "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole." *Id.* at 26. Of course, that interest is not sufficient to

avoid vacatur when mootness occurs due to happenstance. See id. at 25 & n.3. But it has even less purchase here. While three judges of the Third Circuit obviously believe that their decision is correct, three Justices of this Court have concluded that their decision is "very likely incorrect." Ritter, 2022 WL 2070669, at *3 (Alito, J., dissental). So have three Judges of the Fifth Circuit, several Pennsylvania judges, and every federal court until very recently. See Vote.Org, 2022 WL 2389566, at *6 & n.6; Ritter, 2022 WL 16577, at *9; Friedman, 345 F. Supp. 2d at 1371.

Other factors unique to the Third Circuit's decision cut further against its preservation. That decision was issued on a highly "expedited" schedule. App.11 n.24. The entire appeal was briefed, argued, and decided in two months. And the Third Circuit issued its judgment well before its opinion explaining that judgment. Such "rushed, high-stakes, low-information" litigation does not correlate with "good judicial decisions." DHS v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring). Relatedly, the Third Circuit's opinion includes virtually no engagement with the statutory text. See Ritter, 2022 WL 2070669, at *1 (Alito, J., dissental). It dedicates its entire analvsis of the statute to the *interests* served by Pennsylvania's dating requirement, an issue that has no grounding in any element of the statute. Vacatur is thus needed to "clea[r] the path for future relitigation" of the important and nuanced questions surrounding the proper interpretation of the materiality statute, rather than entrenching the Third Circuit's rushed and underdeveloped decision. Arizonans for Off. Eng., 520 U.S. at 71.

3. This Court should vacate the Third Circuit's decision because "it could well affect the outcome of the fall elections." Ritter, 2022 WL 2070669, at *1 (Alito, J., dissental). Absent vacatur, the Third Circuit's decision will invalidate Pennsylvania's dating requirement for all elections in November. See Guidance 2-3. Removing this safeguard against fraud will decrease voter confidence and discourage participation in those elections. Purcell v. Gonzales, 549 U.S. 1, 4-5 (2006). And it could illegitimately change the outcome of individual elections, as it did here. The logic of the Third Circuit's decision, moreover, undermines the legality of many other regulations of mail-in voting. Signing the declaration no more goes to a voter's qualifications than dating it, as Justice Alito explained. Ritter, 2022 WL 2070669, at *2 (Alito, J., dissental). The same could be said of many other regulations of mail-in voting, including requirements that voters sign a declaration, find a witness, use a pen, seal the envelope, write their name, fill out the right address, and more.

These extensions of the Third Circuit's decision are not theoretical and won't be confined to Pennsylvania. Plaintiffs across the country are using the Third Circuit's decision as the lead precedent for challenging all sorts of routine regulations of mail-in voting. The United States participated as an amicus in this case, agreeing with the plaintiffs that the materiality statute invalidates Pennsylvania's dating requirement. See CA3 Dkts. 45, 75. Based on that interpretation, it is now suing Texas for requiring mail-in voters to provide minimal identifying information. See United States v. Texas, Dkt. 1 ¶¶71-76, No. 5:21-cv-

1085 (W.D. Tex. Nov. 4, 2021). And it just sued Arizona for requiring voters to provide certain proof of citizenship. *See United States v. Arizona*, Dkt. 1 ¶¶66-71, No. 2:22-cv-1124 (D. Ariz. July 5, 2022). The Democratic Party, too, is in on the act. It is suing New York on the theory that the materiality statute preempts laws requiring mail-in ballots to be sent to certain places, receive a postmark, avoid identifying marks, and be placed in secrecy envelopes. *See DCCC*, Dkt. 97 at 18-19, No. 1:22-cv-1029 (S.D.N.Y.).

These cases will continue to proliferate, and several more are pending now. E.g., Dondiego, 5:22-cv-2111 (E.D. Pa.); Vote.org v. Callanen, 2022 WL 2181867 (W.D. Tex. June 16); Afr. Methodist Episcopal Church v. Kemp, 2021 WL 6495360 (N.D. Ga. Dec. 9, 2021); Common Cause v. Thomsen, 2021 WL 5833971 (W.D. Wis. Dec. 9); League of Women Voters of Ark., 2021 WL 5312640. Only vacatur can prevent the Third Circuit's "unreviewable decision from spawning any legal consequences" in this new hotbed of litigation. Camreta, 563 U.S. at 713.

4. The *Purcell* principle also favors vacatur here. It is a "bedrock tenet" of election law that "federal courts ordinarily should not enjoin a state's election laws in the period close to an election." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurral). That principle applies with even more force when a federal court changes the rules after the election has already ended. *See Republican Party of Penn.*, 141 S. Ct. at 734-35 (Thomas, J., dissental); *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 925 (7th Cir. 2020). The Third Circuit violated this principle by

granting the plaintiffs' tardy request for sweeping injunctive relief. Especially given its limitless scope, the Third Circuit's decision will confuse voters, candidates, and administrators about what the rules are for the November elections. *Ritter*, 2022 WL 2070669, at *2 (Alito, J., dissental).

Vacating the Third Circuit's decision would not present any similar concerns. That decision does not create a new electoral status quo; it has not been on the books long, and Pennsylvania has warned administrators and voters not to rely on it until this Court resolves this case. See Guidance 2. More broadly, Purcell exists to protect a "state's election laws" from federal judicial intervention, not to protect lower courts from this Court's review. Milligan, 142 S. Ct. at 880 (Kavanaugh, J., concurral). "Correcting an erroneous lower court injunction," as vacatur would do, "does not itself constitute a Purcell problem. Otherwise, appellate courts could never correct a late-breaking lower court injunction of a state election law. That would be absurd and is not the law." Id. at 882 n.3.

Finally, the fact that this Court denied Ritter's emergency application for a stay does not prevent vacatur. While emergency stays are "extraordinary," *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers), vacatur under *Munsingwear* is "ordinary," *Alvarez*, 558 U.S. at 94-95. The two requests present entirely different equitable considerations. And emergency stays must be decided quickly, whereas vacatur decisions can be made after longer study and fuller consideration. The two requests also present different demands on this Court's

time and resources. Here, for example, six Justices might have been unwilling to "enter a stay," "grant review," "set an expedited briefing schedule," and "set the case for argument in October." *Ritter*, 2022 WL 2070669, at *1 (Alito, J., dissental). But vacatur eliminates the negative effects of the Third Circuit's decision with very little expenditure of this Court's time and resources.

Things have also changed since this Court denied a stay. The Fifth Circuit has now weighed in against the Third Circuit's view. See Vote. Org, 2022 WL 2389566, at *6 & n.6. And many of the assurances that the plaintiffs offered in their stay opposition have proven false. The Third Circuit's invalidation of Pennsylvania's dating requirement will not be confined to this one election. Contra Stay-Opp.2, 17. A court applied it to the very next election, and the State has instructed counties to apply it to all future elections (absent action from this Court). The Third Circuit's judgment also does undermine laws other than the dating requirement. Other plaintiffs, the Democratic Party, and the United States have all used it as a basis to attack many routine regulations of mail-in voting. The plaintiffs' assurance that the Third Circuit's decision would not change the outcome of elections was proven false as well, as it flipped the outcome of Ritter's election. And the plaintiffs' main arguments on the equities—that a stay would leave the election unresolved and their votes uncounted—is no longer a concern after the election was certified. See Stay-Opp.36-37.

This Court was closely divided on whether to grant an emergency stay. But important developments have occurred since then, and vacatur under *Munsingwear* is a far lighter lift for the Court. Given the havoc that the Third Circuit's decision threatens to wreak on the upcoming elections, vacatur is the only equitable outcome now.

CONCLUSION

This Court should grant certiorari, vacate the Third Circuit's decision, and remand with instructions to dismiss the case as moot.

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July 7, 2022

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<u></u>	Search documents in this case: Search
No. 22-30	
Title:	David Ritter, Petitioner v. Linda Migliori, et al.
Docketed:	July 11, 2022
Linked with 21A772	
Lower Ct:	United States Court of Appeals for the Third Circuit
Case Numbers:	(22-1499)
Decision Date:	May 27, 2022

DATE	PROCEEDINGS AND ORDERS	
May 27 2022	Application (21A772) for a stay, submitted to Justice Alito.	
	Main Document Lower Court Orders/Opinions Proof of Service	
May 27 2022	Response to application (21A772) requested by Justice Alito, due by noon (EDT), Tuesday, May 31st, 2022.	
May 30 2022	Motion for Leave to File Amici Curiae Brief in Support of Applicant filed by Doctor Oz for Senate and Dr. Mehmet Oz.	
	Main Document Other Other Proof of Service	
May 31 2022	Upon consideration of the application of counsel for the applicant and the responses filed thereto, it is ordered that the mandate of the United States Court of Appeals for the Third Circuit, case No. 22-1499, is hereby stayed pending further order of Justice Alito or of the Court.	
May 31 2022	Response to application from Bonin, Adam C. Zac Cohen filed.	
	Main Document Proof of Service	

EXHIBIT

May 31 2022	Response to application from respondent Linda Migliori, et al. filed.	
	Main Document Proof of Service	
May 31 2022	Letter of respondent Lehigh County Board of Elections filed.	
	Main Document	
Jun 01 2022	Reply of applicant David Ritter filed.	
	Reply Proof of Service	
Jun 02 2022	Supplemental letter on behalf of respondents filed.	
	Main Document	
Jun 03 2022	Supplemental letter of applicant David Ritter filed.	
	Main Document Proof of Service	
Jun 09 2022	Application (21A772) referred to the Court.	
Jun 09 2022	The application (21A772) for stay presented to Justice Alito and by him referred to the Court is denied. The order heretofore entered by Justice Alito is vacated. Justice Alito, with whom Justice Thomas and Justice Gorsuch join, dissenting from the denial of the application for stay. (Detached Opinion)	
Jul 07 2022	Petition for a writ of certiorari filed. (Response due August 10, 2022)	
	Petition Appendix Certificate of Word Count Proof of Service	

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2020 WL 8225383 (W.D.Pa.) (Trial Motion, Memorandum and Affidavit) United States District Court, W.D. Pennsylvania.

Nicole ZICCARELLI, Plaintiff,

THE ALLEGHENY COUNTY BOARD OF ELECTIONS, et al., Defendants.

No. 2:20-cv-001831-NR. December 30, 2020.

Memorandum of Law in Support of Motion of Secretary of the Commonwealth of Pennsylvania Kathy Boockvar to Dismiss the Amended Complaint or, in the Alternative, to Grant Summary Judgment

Mark A. Aronchick, Michele D. Hangley, * Robert A. Wiygul, * John G. Coit, ** Hangley Aronchick Segal Pudlin & Schiller, One Logan Square, 27 th Floor, Philadelphia, PA 19103, Telephone: (215) 496-7050, Email: mhangley@hangley.com, for defendant Kathy Boockvar, in her official capacity as the Secretary of the Commonwealth of Pennsylvania.

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I. INTRODUCTION

Plaintiff, Nicole Ziccarelli, asks this federal court to overrule a decision of the Pennsylvania Supreme Court on an issue of Pennsylvania law. After the November 2020 general election, Plaintiff, a candidate for a state Senate seat, asked the Allegheny County Court of Common Pleas to order the County's Board of Elections to set aside and not count more than 2000 ballots that had arrived in envelopes with undated declarations. The Court of Common Pleas rejected her arguments and held that the Allegheny Board was required to count the ballots. On appeal, the Pennsylvania Supreme Court agreed that the Court of Common Pleas' order should stand and the ballots should be counted. This should have been the final word on whether, under state law, the ballots in question were valid. Now, however, Plaintiff has filed suit in this Court, asking it to hold that the Pennsylvania Supreme Court committed a legal error and that the Allegheny Board must therefore throw out the same ballots that the state courts told it to count. For a number of reasons, this Court should reject what is, in essence, a disappointed litigant's effort to "appeal" an adverse state-court decision to a federal court.

As an initial matter, the Court lacks jurisdiction. Despite several efforts to reframe her allegations, Plaintiff cannot escape the fact that her alleged harm stems from the Pennsylvania Supreme Court's judgment and that her claims necessarily require a finding that the Pennsylvania Supreme Court erred. Under the Rooker-Feldman doctrine, this Court cannot consider such a challenge to a state court's decision. Plaintiff also lacks standing; the Third Circuit has rejected her theory that votes can be "diluted" by votes that are "invalid" under state law, and she cannot assert claims on behalf of other voters. The Court also lacks jurisdiction over the claims against the Secretary because they are in reality state-law claims, for which the Eleventh Amendment confers immunity.

Even putting aside these jurisdictional defects, the Court should dismiss Plaintiff's claims. They are barred by res judicata because Plaintiff has already litigated the same dispute against the primary Defendant, the Allegheny Board. And they are legally insufficient. Plaintiff has not stated a claim of an equal protection violation; she does not allege that she personally received disparate treatment or that the Secretary treated similarly situated voters differently. She can show only that two different counties reached different decisions on the details of election management, and that the state courts agreed with one of those decisions and did not review the other one. These kinds of independent decisions, even if they lead to inconsistent treatment of certain ballots, cannot constitute an equal protection violation, particularly where the state courts have decided the issue. And neither Plaintiff's allegations nor the evidence she presents even arguably rise to the level of a due process violation.

Finally, even if the Court were to find that Plaintiff's claims have merit, there is no relief that this Court could grant. Plaintiff has tied this Court's hands by choosing to pursue claims against the Allegheny Board, which counted undated ballots in compliance with the Pennsylvania Supreme Court's ruling, and not against the Westmoreland County Board of Elections, which refused to count undated ballots (in accordance with Plaintiff's own request). If the Court were to find that the discrepancy between the two counties gives rise to an equal protection claim, the only acceptable remedy would be to order the Westmoreland Board to count its undated ballots; the alternative demanded by Plaintiff—disenfranchising hundreds or thousands of Allegheny County voters—would create a far more serious Constitutional violation than the one it would remedy. But Plaintiff has not brought the Westmoreland Board before this Court. Accordingly, even if Plaintiff could show that she was wronged, her strategic decisions would leave her without a remedy.

II. STATEMENT OF FACTS

A. Relevant Aspects of Pennsylvania Election Law

1. The Responsibilities of Pennsylvania's County Boards of Elections and the Secretary

Pennsylvania's Election Code, 25 P.S. § 2601 et seq., provides for a decentralized election system. Primary responsibility for administering elections lies with the boards of elections of the Commonwealth's 67 counties. "The Election Code vests county boards of elections with discretion to conduct elections and to implement procedures intended to ensure the honesty, efficiency, and uniformity of Pennsylvania's elections." Donald J. Trump for President, Inc. v. Boockvar, — F. Supp. 3d – 2020 WL 5997680, at *9 (W.D. Pa. Oct. 10, 2020) ("Trump I"); see id. at *30-31 (outlining areas of county discretion). The Election Code charges county boards with various responsibilities, including "[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors," "[t]o instruct election officers in their duties," and to canvass, compute, and certify election returns. 25 P.S. § 2642(f)–(g), (k). For all but local races, once the county board has certified the returns, it must forward a copy to the Secretary. 25 P.S. § 3158.

The Election Code also gives the Secretary powers and duties, including the duty to "receive from county boards of elections the returns of primaries and elections, to canvass and compute the votes cast ... to proclaim the results of such primaries and elections, and to issue certificates of election to the successful candidates." 25 P.S. § 2621(f); see 25 P.S. § 3159 ("Upon receiving the certified returns of any primary or election from the various county boards, the Secretary ... shall forthwith proceed to tabulate, compute and canvass the votes cast"). While the Secretary issues guidance to the county boards, nothing in the Election Code gives her the authority to refuse to accept returns or to decide which ballots are to be counted and which are not. "The Secretary ... has no authority to declare ballots null and void.... Moreover, the Secretary has no authority to order the sixty-seven county boards of election to take any particular actions with respect to the receipt of ballots." In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election, No. 29 WAP 2020, 2020 WL 6866415, at *15 n.6 (Pa. Nov. 23, 2020) (Opinion Announcing the Judgment of the Court, or "OAJC").

If a candidate or elector is dissatisfied with a county board of elections' canvassing decision, the remedy is to appeal to the state courts, not to the Secretary. See 25 P.S. § 3157(a) (procedures for appeals by "person[s] aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election, or regarding any recount or recanvass thereof"). The Code provides that while such an appeal is pending, "the county board shall suspend any official certification of the votes cast" in any election district that is the subject of an appeal. 25 P.S. § 3157(b).

2. The 2019 and 2020 Changes to Vote-by-Mail Procedures

In late 2019, the Pennsylvania General Assembly passed and Governor Wolf signed legislation—Act 77—that made significant changes to the Election Code, including the extension of mail-in voting to all qualified electors. Act of Oct. 31, 2019 (P.L. 552, No. 77), 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421). Further changes to the Election Code followed with Act 12 of 2020. Act of Mar. 27, 2020 (P.L. 41, No. 12), 2020 Pa. Legis. Serv. Act. 2020-12 (S.B. 422). The COVID-19 pandemic sparked extensive voter interest in the new mail-in procedures; heavy use of mail-in balloting, in turn, led to litigation over how the procedures were to be implemented. The jump in numbers of mail ballots

transformed the incentives of probing the mail-in balloting provisions for vulnerabilities in furtherance of invalidating votes. For the first time, a successful challenge arising from a given technical violation of statutory requirements might result in the invalidation of many thousands of no-excuse mail-in ballots rather than scores or hundreds of absentee ballots.

In re Canvass, 2020 WL 6866415, at *24 (Wecht, J., concurring).

Over the last several months, the Pennsylvania state courts have accordingly been called upon to interpret a number of the Code's provisions for the first time—even provisions with language that was in the Code before the passage of Act 77. For example, to the Secretary's knowledge, no reported decision before 2020 analyzed the "fill out, date and sign" language in 25 P.S. §§ 3146.6(a) and 3150.16(a) that Plaintiff highlights in this case.

B. Plaintiff's Unsuccessful State-Court Appeal

In Allegheny County, of the estimated 350,000 mail-in and absentee ballots cast in the November 3, 2020, general election, 2,349 arrived in envelopes with declarations that were signed but undated. Stip. Facts ¶¶ 27, 29. Of these undated ballots, 311 came from voters in Senate District 45, the seat for which Plaintiff was running. Id. ¶ 31. On Tuesday, November 10, 2020, the Allegheny Board voted to count all 2,349 undated ballots. *Id.* ¶ 33.

Plaintiff appealed this decision to the Allegheny County Court of Common Pleas. Id. ¶ 34. After a hearing, at which counsel for Plaintiff and the Allegheny Board appeared, Judge Joseph James affirmed the Allegheny Board's decision to count the ballots. He concluded that the date provision in Section 3150.16(a) is directory, not mandatory, and that "ballots containing mere minor irregularities should only be stricken for compelling reasons." Ziccarelli v. Allegheny Cnty. Bd. of Elections, No. GD 20-011654, 2020 WL 7012634, at *1 (C.P. Allegheny Cnty. Nov. 18, 2020) ("Ziccarelli") (citing Shambach v. Bickhart, 845 A.2d 793, 798 (Pa. 2004)). Judge James' Memorandum concluded that "[T]he [Allegheny] Board properly overruled [Plaintiff's] objections to the 2,349 challenged mail-in ballots. These ballots must be counted. The Petition for Review is denied and the Board's decision [to count the ballots] is affirmed." *Id.* at *2.

Plaintiff appealed Judge James' decision to the Commonwealth Court, which reversed the decision and ruled in Plaintiff's favor. In re 2,349 Ballots in the 2020 Gen. Election, No. 1162 C.D. 2020, 2020 WL 6820816 (Pa. Commw. Ct. Nov. 23, 2020). The Pennsylvania Supreme Court then granted the Allegheny Board's petition for allowance of appeal, reversed the Commonwealth Court's decision, and reinstated the decision of the Court of Common Pleas. *In re Canvass*, 2020 WL 6866415, at *16. In the OAJC, three Justices concluded that the Allegheny Board should count the undated ballots because a voter's failure to date a ballot envelope was a technical violation of the Election Code that should not result in disenfranchisement. Id. Justice Wecht concurred with much of the OAJC, but disagreed with its conclusion that the Election Code does not mandate that voters date their ballot envelopes. He opined, however, that his interpretation should apply "only prospectively," because he could not "say with any confidence that even diligent electors were adequately informed as to what was required to avoid the consequence of disqualification in this case [I]t would be unfair to punish voters for the incidents of systemic growing pains." Id. at *16, 24 (Wecht, J., concurring).

Accordingly, Justice Wecht joined the three signers of the OAJC in reinstating the Court of Common Pleas' decision that the Allegheny Board had acted "properly" and that the undated ballots "must be counted." Ziccarelli, 2020 WL 7012634, at *2 (emphasis added); see ECF 29 ¶ 33 (acknowledging that "four justices had voted to reverse the Commonwealth Court and reinstate the Allegheny County Court of Common Pleas decision"). Plaintiff filed an Emergency Application for Reargument, in which she asserted that the Supreme Court had committed a legal error when it held the Allegheny Board should count undated ballots. The Supreme Court denied the Application. Stip. Facts, Ex. G.

On November 23, 2020, before the Pennsylvania Supreme Court ruled, the Allegheny Board certified a set of election results that did not include the undated ballots. Stip. Facts ¶ 51; ECF 3, at 6. On November 25, after the ruling, the Allegheny Board submitted an amended certification of vote totals to the Secretary that included the undated ballots. Stip. Facts ¶¶ 52, 54.

C. Westmoreland County's Unchallenged Decision to Set Aside Undated Ballots

The Westmoreland County Board of Elections received approximately 60,000 mail-in and absentee ballots for the 2020 general election; of these, 343 were signed but undated. Stip. Facts ¶¶ 56-57. The Board did not count the undated ballots after the election. On November 13, 2020, and again on November 30, 2020, one of the Board members proposed a motion to count the undated ballots. At the November 30 meeting, Plaintiff's counsel urged the Board not to consider the motion and not to count the undated ballots. The motion did not receive a second and the undated ballots remained uncounted. Id. ¶¶ 58–65.

On November 30, 2020, the Westmoreland Board certified its final election results; this certification did not include any count of the undated ballots. Id. ¶65. Unlike in neighboring Allegheny County, there was no court challenge to the Westmoreland Board's decisions. Id. ¶ 66. Indeed, as discussed below, Plaintiff's counsel urged the Westmoreland Board not to count the ballots.

D. The Current Proceedings

1. Plaintiff's Original Complaint and Motion for Injunctive Relief

On November 25, 2020, Plaintiff filed her original Complaint, which alleged that the Pennsylvania Supreme Court's decision was the foundation of her injuries. Indeed, the first sentence of the first paragraph stated that "[t]his is an action concerning, inter alia, the Pennsylvania Supreme Court's recent decision ... where a majority of the Court concluded that 2,349 signed but undated mail-in ballots ... in Allegheny County ... should be counted." ECF 1 ¶ 1. According to the Complaint, the Pennsylvania Supreme Court's decision had injured Plaintiff because it would cause the Allegheny Board to amend its certification to include the undated ballots, which would cause her to lose the election. ECF 1 ¶¶ 30, 39–43. Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction, filed the same day, similarly alleged that the Pennsylvania Supreme Court had violated the rights of Plaintiff and other voters. ECF 3, at 9 ("Because the Pennsylvania Supreme Court simultaneously ruled that mail-in ballots lacking the statutorily-required date information are invalid but applied its ruling prospectively, it engaged in arbitrary and disparate treatment").

At the telephonic hearing on Plaintiff's Motion, Defendants' and Intervenors' counsel argued that because Plaintiff alleged that her injuries arose from a state court's ruling, her claims were barred under the Rooker-Feldman doctrine. Transcript dated November 25, 2020, ECF 15, at 19–22. The Court observed that to the extent Plaintiff could state an equal protection claim based on the Allegheny and Westmoreland Boards' procedural differences, the potential ways to even the playing field would be to "level up"—ordering the Westmoreland Board to count its undated ballots—or to "level down"—ordering the Allegheny Board to remove those ballots from its count. Id. at 13-14. The Court noted that Plaintiff had not named Westmoreland County as a defendant. Id. at 14-15. Plaintiff's counsel responded that, in Plaintiff's view, the Allegheny Board had counted "invalid" votes, the Westmoreland Board had not, and "we don't need Westmoreland here because they did what the Election Code requires." Id. at 15–17. The Court denied relief, stating that the order Plaintiff sought—a direction that the Allegheny Board should not certify the undated ballots—would not be in the public interest, because it would disenfranchise and harm thousands of Allegheny County voters. Id. at 28-29.

On November 30, 2020, Intervenors' counsel told the Westmoreland Board about the Pennsylvania Supreme Court's ruling and asked it to count Westmoreland County's undated ballots. Stip. Facts ¶ 60 & Ex. I. Later that day, Intervenors' counsel appeared before the Westmoreland Board and again asked it to count those ballots. Plaintiff's counsel also appeared and argued that the Board should not count the ballots. Stip. Facts ¶ 62 & Ex. J. Westmoreland County certified the election results without including the undated ballots. Stip. Facts ¶ 65. No one appealed the Westmoreland Board's determination, and Plaintiff has not taken any steps to add the Westmoreland Board as a defendant in this proceeding.

2. Plaintiff's Amended Complaint

On December 1, 2020, Plaintiff filed an Amended Complaint. ECF 29. This pleading deleted the references to the Pennsylvania Supreme Court quoted above—and even deleted the first paragraph summarizing her complaint. See Appendix hereto (redline comparison of Complaint and Amended Complaint). In the Amended Complaint, Plaintiff no longer points to the Pennsylvania Supreme Court as the source of Plaintiff's alleged injury. Instead, Plaintiff alleges, the Allegheny Board committed the original error by voting to count the undated ballots, and the Pennsylvania Supreme Court and the Allegheny County Court of Common Pleas merely "affirmed" and "ratified" that "independent and intentional decision." ECF 29 ¶¶ 35–36. Plaintiff also alleges that the Secretary somehow violated someone's rights by "intentionally accept[ing]" the Allegheny Board's amended certification. Plaintiff does not explain how the Secretary could lawfully have refused to accept the certification, given the Pennsylvania Supreme Court's decision and the Secretary's statutory obligations.

3. Plaintiff's Motion for Summary Judgment

In her Motion for Summary Judgment, Plaintiff continues her effort to soft-pedal the fact that accepting her claims requires a conclusion that the Pennsylvania Supreme Court erred. Indeed, in the Motion, the specifics of that Court's ruling have faded away, leaving only the incorrect implication that the Court held that the ballots in question were "invalid" and "illegal." According to Plaintiff, a majority of the Supreme Court announced the "legal principle" that all ballots with undated declarations —including the Allegheny County ballots at issue here—are "invalid under the Election Code." ECF 47, at 15. Plaintiff brushes aside Justice Wecht's firmly stated opinion that the Allegheny County undated ballots from the November 2020 election should be counted, characterizing that opinion as a mere "preference." Id. at 14. And she never acknowledges that, by reversing the Commonwealth Court and reinstating the decision of the Court of Common Pleas, a majority of the Court decided that the undated ballots in question should count—and therefore could not, by definition, be "invalid" or "illegal."

Plaintiff's Motion includes several other significant misinterpretations and misstatements of Pennsylvania law. For example, Plaintiff argues that the Secretary was required to ignore the Pennsylvania Supreme Court's decision because, according to Plaintiff, that decision conflicted with guidance and briefs that the Secretary had issued and filed before the Supreme Court ruled. ECF 47 at 1, 16–17, 24–25, 29. Even if Plaintiff's characterizations of the Secretary's guidance and briefs were correct (they are not), these documents are now completely irrelevant. The Court's rulings bind the Secretary, not the other way around; the Secretary does not have the authority to ignore the Court's interpretation of the Election Code in favor of her own.

Plaintiff also offers the following bold, but totally unsupportable, argument: "[A]s a matter of state law, [the Secretary] was, and remains, duty-bound to critically examine the votes she receives from counties ... she cannot simply certify election totals knowing full well they are infected with the fatal disease of arbitrary, disparate treatment of identically situated voters." ECF 47, at 17. Plaintiff manufactures this "duty" from thin air. Nothing in the Election Code requires the Secretary to reject county boards' certifications based on her own independent constitutional analysis; indeed, nothing in the Election Code permits her to do so. The Code provides that appeals of county board decisions go to the state courts, not to the Secretary, and does not authorize the Secretary to overrule decisions of those courts.

III. ARGUMENT

A. This Court Lacks Jurisdiction Over Plaintiff's Claims

1. Plaintiff's Claims Are Barred by the Rooker-Feldman Doctrine

As a threshold matter, this Court lacks jurisdiction over Plaintiff's claims under the Rooker-Feldman doctrine. The doctrine recognizes that "federal district courts lack jurisdiction over suits that are essentially appeals from state-court judgments." Great

W. Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 165 (3d Cir. 2010); see also Hoblock v. Albany Cnty. Bd. of Elections, 422 F.3d 77, 85 (2d Cir. 2005) ("Underlying the Rooker-Feldman doctrine is the principle, expressed by Congress in 28 U.S.C. § 1257, that within the federal judicial system, only the Supreme Court may review state-court decisions."). As clarified by the Supreme Court's decision in Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005), the Rooker-Feldman doctrine applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of the state court's judgments." Id. at 284. Accordingly, the doctrine bars jurisdiction where four requirements are satisfied: "(1) the federal plaintiff lost in state court; (2) the plaintiff complains of injuries caused by the state-court judgments; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state judgments." Great W. Mining, 615 F.3d at 166 (cleaned up). The first and third of these requirements "may be loosely termed procedural," and the second and fourth "may be termed substantive." Hoblock, 422 F.3d at 85.

(a) Plaintiff's Claims Satisfy All the Elements of the Rooker-Feldman Doctrine

Each of these requirements is met here. Plaintiff lost in state court. 1 She contended that 2.349 mail-in ballots returned to the Allegheny Board with a signed but undated declaration were per se invalid under the Pennsylvania Election Code and thus must be excluded from the election returns. The Allegheny County Court of Common Pleas rejected Plaintiff's argument, holding that "[t]he ballots [at issue] must be counted." Ziccarelli, 2020 WL 7012634, at *2 (emphasis added). The Pennsylvania Supreme Court reinstated the decision of the Court of Common Pleas. As a result of the Pennsylvania Supreme Court's holding, the Allegheny Board included the votes from those ballots in its certified returns, and the Secretary included them in her certification. In short, the state-court judgment was directly adverse to Plaintiff's position.

Rooker-Feldman's other procedural requirement is also met: The Pennsylvania Supreme Court's judgment was "rendered before the federal suit was filed." Great W. Mining, 615 F.3d at 166. Indeed, Plaintiff's original and amended complaints repeatedly refer to the Pennsylvania Supreme Court's judgment. See ECF 1 ¶¶ 1, 30–40, 49–52; ECF 29 ¶¶ 28–38.

The two substantive requirements are also satisfied. First, Plaintiff "complains of injuries caused by the state-court judgments." Great W. Mining, 615 F.3d at 166. As discussed above, see supra § II.D.1, she admitted as much in her Complaint. The Complaint likewise makes clear that Plaintiff "is inviting [this Court] to review and reject the state judgments." Great W. Mining, 615 F.3d at 166. At its core, the Complaint contends that the Pennsylvania Supreme Court's judgment is somehow inconsistent with the reasoning of a majority of that Court: "[A] majority of the [Supreme] Court concluded that [the] 2,349 signed but undated mail-in ballots ... were *invalid*, but ... a separate majority of the Court concluded nonetheless [they] should be *counted*." ECF 1 ¶ 1. Moreover, the Complaint expressly alleges that this Court should reject the Pennsylvania Supreme Court's decision on the purported grounds that it violates the federal Constitution: "The Pennsylvania Supreme Court, by simultaneously ruling that mail-in ballots lacking the ... date information are invalid, but applying its ruling prospectively, engaged in arbitrary and disparate treatment that treated voters in the 45th Senatorial District differently depending on which of the two counties comprising that District the voters resides." ECF 1 ¶ 49; accord id. ¶ 51. Indeed, a clearer case of a federal plaintiff complaining about an alleged injury caused by an adverse state-court judgment, and asking a federal district court to review and reject that judgment on purported federal-law grounds, is difficult to imagine. 2 See id. ¶ 52 (alleging that "the Pennsylvania Supreme Court's ruling ... violates the Constitution's mandate of one person, one vote"). The Rooker-Feldman doctrine squarely bars Plaintiff's claims. 3

(b) Plaintiff's Attempt to Plead Around the Rooker-Feldman Doctrine Is Unavailing

After Defendants pointed out the Rooker-Feldman bar at the November 25 hearing, Plaintiff filed her Amended Complaint in an apparent effort to plead around the doctrine. As described supra § II.D.2, the Amended Complaint backed away from the original Complaint's allegations that the Supreme Court's alleged errors had harmed Plaintiff, and shifted to allegations of an injury that the Board caused and the Supreme Court merely "ratified."

For at least two reasons, Plaintiff's "artful pleading is insufficient to bypass Rooker-Feldman." Roberts, 2014 WL 2883418, at *3. First, Plaintiff misunderstands the roles played by the county boards and the Pennsylvania courts. It is true that where "a plaintiff sues his employer in state court for violating ... anti-discrimination law ... and loses," the Rooker-Feldman doctrine does not bar the plaintiff from "bring[ing] the same suit in federal court" (though the federal-court claims may well be barred by preclusion doctrines). Great W. Mining, 615 F.3d at 167 (internal quotation marks omitted). In such cases, the alleged injury is not based on the state-court judgment but solely "on the employer's discrimination. The fact that the state court chose not to remedy the injury does not transform the subsequent federal suit on the same matter into an appeal, forbidden by Rooker-Feldman, of the state-court judgment." Id. But the Allegheny Board is not analogous to a private employer-defendant, and the Pennsylvania Supreme Court's decision is not analogous to a ruling that alleged employment discrimination should not be remedied. Under Pennsylvania law, decisions about whether ballots should be counted are committed to county boards of election in the first instance, subject to appellate review by the Pennsylvania courts. See 25 P.S. § 3157. The question that Plaintiff raises here—whether ballots returned with signed but undated declarations are per se invalid and must be rejected under the Pennsylvania Election Code—is a question of law. The Pennsylvania Supreme Court rejected Plaintiff's position and held that, at least for purposes of the November 2020 election, such ballots are not per se invalid. As Plaintiff's original Complaint recognized, that ruling is the source of Plaintiff's alleged injury. To state the obvious: if the Supreme Court had instead ruled in Plaintiff's favor, the 2,349 ballots would not have been counted, and no injury would exist.

In asserting that the Pennsylvania Supreme Court merely "ratified" the Board's decision, Plaintiff appears to seek support in certain language in the Second Circuit's Hoblock decision. But the attempt is unavailing. Hoblock held that, for Rooker-Feldman purposes, a New York Court of Appeals ruling that certain absentee ballots were invalid under state law did cause the injury the plaintiffs complained of in their subsequent federal lawsuit challenging the Albany County Board of Elections' refusal to tally those ballots. Hoblock, 422 F.3d at 81-83, 88-89. In so holding, the Court observed that "the Board, had it been left to its own devices, would have counted [the absentee ballots]," and that "[t]he state-court judgment did not ratify, acquiesce in, or leave unpunished an anterior decision by the Board not to count the ballots." *Id.* at 89.

Insofar as Plaintiff reads the Hoblock opinion to suggest, in dicta, that the Rooker-Feldman doctrine would not have applied if the Albany County Board had instead been inclined not to count the absentee ballots, and then further contends that such a proposition controls this case, Plaintiff is mistaken. Such an argument ignores the important distinction, noted above, between private defendants and agencies, like the Allegheny Board, that make quasi-judicial decisions subject to appellate review by courts. See Boord v. Maurer, 22 A.2d 902, 904 (Pa. 1941) (Pennsylvania Election Code "clothes [county boards of elections] with quasi-judicial functions"). As courts including the Third Circuit have repeatedly recognized, challenges to state-court decisions can fall within the scope of the Rooker-Feldman bar notwithstanding that they uphold agency decisions. See, e.g., Johnson v. Phila. Hous. Auth., 448 F. App'x 190, 191–92 (3d Cir. 2011) ("[t]o the extent" that a federal civil rights complaint "calls into question the validity" of a Court of Common Pleas judgment denying an appeal from a decision of the Philadelphia Housing Authority, the federal "complaint is barred by Rooker-Feldman"); Davison v. Gov't of Puerto Rico, 471 F.3d 220, 221–23 (1st Cir. 2006) (federal-court challenge to decisions of Puerto Rico courts upholding order of Puerto Rico Firefighters Corps was barred by Rooker-Feldman); Prince v. Ark. Bd. of Exam'rs in Psychology, 380 F.3d 337, 341 (8th Cir. 2004) (Rooker-Feldman barred federal challenge brought by litigant who had pursued state-court appeal of state administrative agency determination).

Moreover, Plaintiff herself alleges that the Allegheny Board did not actually add the 2,349 ballots to its certified vote count until after the Pennsylvania Supreme Court's ruling. See ECF 1 ¶ 30 ("On November 23, 2020, prior to the issuance of the Supreme Court's decision in this matter, the Board certified its election results, excluding any certification of the Disputed Ballots."); ECF 29 ¶ 37 ("Following the Supreme Court's decision, on November 25, 2020, the Board ... canvassed and certified the results from the [undated] Ballots to Secretary Boockvar"). That chronology reflects the Board's indisputable obligation to abide by the Supreme Court's decision with respect to whether the ballots were per se invalid under Pennsylvania law. 4

In addition, Plaintiff's attempt to avoid Rooker-Feldman overlooks that her federal claims would necessarily require this Court to overturn the Pennsylvania Supreme Court's decision. The Pennsylvania Supreme Court held that the 2,349 ballots were properly counted under Pennsylvania law. But Plaintiff insists that counting the ballots was *improper*, and further contends that the proper remedy for the alleged equal protection violation is to "level down"—that is, to enjoin Defendants from counting the 2,349 ballots—because that is what Pennsylvania law purportedly "command[s]." ECF 47, at 28–29; see also Sessions v. Morales-Santana, 137 S. Ct. 1678, 1698 & n.23 (2017) (noting that how the remedy of equal treatment is achieved is a matter of state law that should generally be decided by state courts). To sustain this contention, Plaintiff must take the position—as she does—that the Pennsylvania Supreme Court somehow interpreted Pennsylvania law and violated that interpretation in the same ruling. By inviting this Court to reject the Pennsylvania Supreme Court's decision as to the requirements of state law, not only does Plaintiff run afoul of the principle that state courts—not federal district courts—are the definitive expositors of state law, see Wirth v. Aetna U.S. Healthcare, 469 F.3d 305, 309 (3d Cir. 2006); she also contravenes the Rooker-Feldman doctrine.

Second, and independently, even if the Rooker-Feldman doctrine did not bar Plaintiff's claims against the Allegheny Board (as it does), it would still bar her claims against the Secretary. The action by the Secretary of which Plaintiff complains is the acceptance of the Board's amended certified results containing the 2,349 ballots at issue. As the Amended Complaint alleges, this action occurred after the Pennsylvania Supreme Court's decision. See ECF 29 ¶¶ 37–38. It was also done pursuant to that decision. Plaintiff's suggestion that the Secretary should have excluded those ballots, despite the Pennsylvania Supreme Court's holding that they were properly counted, is as astonishing as it is incorrect. The Pennsylvania Election Code provides for the state judiciary—ultimately, the Pennsylvania Supreme Court—to resolve disputes over which ballots should be counted; for the county boards of election to certify election results, reflecting the resolution of any such disputes, to the Secretary; and for the Secretary to tabulate and certify the votes cast for each race based on the certified returns received. 25 P.S. §§ 3157–3159. As the Second Circuit has explained, "[w]here a state-court judgment causes the challenged third-party action, any challenge to that third-party action is necessarily the kind of challenge to the state judgment that only the Supreme Court [of the United States] can hear." Hoblock, 422 F.3d at 88. Accordingly, just as, "if the state has taken custody of a child pursuant to a state judgment, the parent cannot escape Rooker-Feldman simply by alleging in federal court that he was injured by the state employees who took his child rather than by the judgment authorizing them to take the child," id., so too can Plaintiff not evade Rooker-Feldman by alleging that she was injured by the Secretary who tabulated election results pursuant to the statecourt judgment in Plaintiff's case.

2. Plaintiff Lacks Standing to Assert Third Parties' Claims or to Pursue a "Vote Dilution" Theory

Plaintiff alleges three kinds of injury in her Amended Complaint: (1) that Defendants' alleged acts caused Plaintiff to lose the race for State Senator for the 45th District, ECF 29 ¶ 5; (2) that counting supposedly "invalid" ballots dilutes the votes of "persons who voted in complete compliance with the Election Code in both counties—including Ziccarelli herself," id. ¶¶ 61, 70, 71; and (3) that voters who neglected to date their ballots were treated differently, depending on what county they voted in, because undated ballots were counted in Allegheny County but not in Westmoreland County, id. ¶ 60. Of these alleged injuries, Plaintiff only has standing to assert the first—her loss of the election. ⁵ The second alleged injury, which is critical to much of Plaintiff's case—"dilution" of "valid" votes by "invalid" ones—is foreclosed by binding Third Circuit precedent. Plaintiff also cannot pursue relief for the third alleged injury, because she does not allege that she forgot to date her ballot, and she cannot assert claims on behalf of the 343 Westmoreland County voters who submitted undated ballots.

Plaintiff thus fails to establish the "irreducible constitutional minimum of standing" with respect to any injury other than her loss of the election. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (plaintiff must demonstrate the familiar elements of injury in fact, causation, and redressability). Plaintiff cannot bear the burden of proving each element of standing "with the manner and degree of evidence required at the successive stages of the litigation." Pa. Prison Soc'y v. Cortés, 508 F.3d 156, 161 (3d Cir. 2007). 6

(a) Plaintiff's "Vote Dilution" Theory Cannot Establish Standing

In a recent, precedential opinion that Plaintiff fails to cite, the Third Circuit found that generalized "vote dilution" claims such as Plaintiff's could not establish standing. The Court noted that "the foremost element of standing is injury in fact, which requires the plaintiff to show a harm that is both 'concrete and particularized." Bognet v. Sec'y Commonwealth of Pa., 980 F.3d 336, 352 (3d Cir. 2020) (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547-48 (2016)). Plaintiff's vote dilution allegations fail to meet either criterion.

Bognet considered voter-plaintiffs' allegation that allegedly unlawful votes diluted their votes in violation of the Equal Protection Clause. The Court found that this harm did not meet Article III's standards because "this conceptualization of vote dilutionstate actors counting ballots in violation of state election law—is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment." Bognet, 980 F.3d at 354. Nor is it "particularized," because "the illegal counting of unlawful votes, 'dilute[s]' the influence of all voters in Pennsylvania equally and in an 'undifferentiated' manner and do[es] not dilute a certain group of voters particularly." *Id.* at 356. Plaintiff alleges exactly the same injury—that Defendants' counting of "unlawful" votes dilutes "lawful" votes. See, e.g., ECF 29 ¶¶ 57-64. This injury is not cognizable under Bognet.

To the extent Plaintiff alleges some generic violation of the one-person, one-vote principle announced in Reynolds v. Sims, 377 U.S. 533, 561–62 (1964), the Third Circuit has likewise emphasized that "vote dilution under the Equal Protection Clause is concerned with votes being weighed differently [I]f dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots 'were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity." Bognet, 980 F.3d at 355 (citing Trump I, 2020 WL 5997680, at *45–46). Here, Plaintiff has not shown that any Defendant "weighed" two identical votes differently, and as such the presence of allegedly "unlawful votes" in the overall count does not injure "lawful" voters for purposes of Article III.

(b) Plaintiff Cannot Assert Injuries of Absent Third Parties

Furthermore, Plaintiff cannot assert third-party standing on behalf of absent "Ziccarelli Voters" who neglected to date their Westmoreland County ballots. The Supreme Court has permitted third-party standing only in limited circumstances, by "requiring that a party seeking third-party standing make two additional showings. First, [the Court has] asked whether the party asserting the right has a 'close' relationship with the person who possesses the right. Second, [the Court has] considered whether there is a 'hindrance' to the possessor's ability to protect his own interests." Kowalski v. Tesmer, 543 U.S. 125, 130 (2004). Here, Plaintiff has not alleged any barrier to Ziccarelli voters bringing claims to vindicate their own rights. Nor can she. For one thing, these claims have already been fully litigated in state court. And nothing stands in these voters' way if they want to bring a claim to vindicate their own rights, as Plaintiff purports to do here. Because Plaintiff lacks standing to bring claims on behalf of these absent third parties, the Court should not consider their alleged injuries when analyzing its jurisdiction under Article III.

3. Plaintiff's Claims Are Barred by the Doctrine of Sovereign Immunity

This Court also lacks jurisdiction to adjudicate Plaintiff's claims by virtue of Eleventh Amendment sovereign immunity. Put simply, federal courts lack jurisdiction to hear claims for injunctive and declaratory relief based on a "claim that state officials violated state law in carrying out their official responsibilities." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 121 (1984). See generally 13 Charles Alan Wright et al., Federal Practice & Procedure § 3524.3 (3d ed.). Plaintiff's state-law claims in federal constitutional claims' clothing are precisely that—allegations that the Secretary violated the Election Code (or, more specifically, Plaintiff's incorrect interpretation of the Election Code) in carrying out her duties. Her claims are thus barred, because there is no ongoing violation of federal law and Plaintiff seeks only an order compelling state officials to comply with Plaintiff's incorrect understanding of state law.

First, Plaintiff fails to identify any ongoing violation of federal law that might justify this federal court exercising judicial power under the narrow exception for a litigant seeking prospective injunctive relief premised on a violation of the U.S. Constitution. See Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 269 (1997) (summarizing the rule of Ex parte Young, 209 U.S. 123 (1908)). The Third Circuit has dismissed claims just like Plaintiff's for failure to seek "prospective injunctive relief" when "specific allegations target past conduct, and the ... remedy is not intended to halt a present, continuing violation of federal law." Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 698 (3d Cir. 1996); see also Nemeth v. Office of Clerk of Superior Court of N.J., — F. App'x —, No. 20-2244, 2020 WL 7385082, at *2 (3d Cir. 2020). Other federal courts have emphasized that "[i]n order to state a viable claim for prospective injunctive relief, an event that occurred once in the past does not support a claim of an ongoing violation of federal law in the future." Richards v. Dayton, No. 13-3029, 2015 WL 1522199, at *16 (D. Minn. 2015) (dismissing complaint for lack of subject matter jurisdiction under the Eleventh Amendment because "none of the [Office of Secretary of State] Defendants have any connection with the enforcement of the actions that [Plaintiff] seeks to remedy").

Here, Plaintiff has failed to allege that the Secretary's "actions are currently violating federal law." *Williams ex rel. J.E. v. Reeves*, 954 F.3d 729, 737 (5th Cir. 2020); see also Green v. Mansour, 474 U.S. 64, 68, 73 (1985) ("There is no claimed continuing violation of federal law, and therefore no occasion to issue an injunction."). Plaintiff alleges only that the Secretary "accept[ed]" the vote tallies from Allegheny and Westmoreland counties. See ECF 29 ¶¶ 44, 52. There are no further allegations that the Secretary is now violating, or will in the future violate, Plaintiff's federal constitutional rights. See generally id.

Second, Plaintiff's claims are barred because, properly construed, they derive entirely from state law and are thus an improper attempt to smuggle a state-law claim into the *Ex Parte Young* framework. *See Trump I*, 2020 WL 5997680, at *75 (noting that Secretary may have sovereign immunity as to state-law claims). The only relief Plaintiff seeks is an order compelling Defendants to comply with her incorrect interpretation of the Pennsylvania Election Code. *See* ECF 29 at Prayer for Relief. Although Plaintiff pleads federal constitutional claims, "the determinative question [under *Pennhurst*] is not the relief ordered, but whether the relief was ordered pursuant to state or federal law." *Brown v. Ga. Dep't of Revenue*, 881 F.2d 1018, 1023 (11th Cir. 1989). Creative pleading—alleging that tabulating election results as required by state law raises a federal issue—cannot do an end-run around *Pennhurst. See Williams*, 954 F.3d at 741; *S&M Brands, Inc. v. Georgia ex rel. Carr*, 925 F.3d 1198, 1205 (11th Cir. 2019). Plaintiff's own Amended Complaint reveals as much. Count One explicitly alleges that "the Defective Ballots are invalid under the plain language of the Election Code" and seeks to have the Allegheny ballots removed from the final tally because "disqualifying such ballots reflects the General Assembly's express intent." ECF 29 ¶ 64; *see also id.* ¶ 68 (Count Two, "the Board counted and certified the results of the Defective Ballots even though these ballots are invalid under the Election Code"). The Eleventh Amendment bars this bald attempt to re-litigate the state-law claim Plaintiff lost before the Pennsylvania Supreme Court.

B. Plaintiff's Claims Are Barred by Res Judicata

Even if the *Rooker-Feldman* doctrine did not bar Plaintiff's claims, those claims would be precluded under the doctrine of res judicata. *See Great W. Mining*, 615 F.3d at 170 ("should the *Rooker-Feldman* doctrine not apply such that the district court has jurisdiction, disposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law"; "the *Rooker-Feldman* inquiry is distinct from the question of whether claim preclusion (res judicata) or issue preclusion (collateral estoppel) defeats the federal suit").

A "federal court must 'give the same preclusive effect to a state-court judgment as another court of that State would give." *Id.* (quoting *Exxon Mobil*, 544 U.S. at 293). Under Pennsylvania's doctrine of res judicata, "[a]ny final, valid judgment on the merits by a court of competent jurisdiction precludes any future suit between the parties or their privies on the same cause of action." *Hammond v. Krak*, No. 17-00952, 2020 WL 1032296, at *3 (W.D. Pa. Mar. 3, 2020) (quoting *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995)). "A claim is barred by res judicata when the former and current actions share the same four conditions: '(1) the thing sued upon or for; (2) the cause of action; (3) the persons and parties to the action; and (4) the capacity of the parties to sue or be sued."" *Id.* (quoting *Turner v. Crawford Square Apartments III, L.P.*, 449 F.3d 542, 548 (3d Cir. 2006)). Because the doctrine serves the essential purpose of "reliev[ing] the parties of the cost and vexation of multiple lawsuits, conserv[ing] judicial resources, prevent[ing] inconsistent decisions, and encourag[ing] reliance on adjudications," *id.* (quoting *Turner*, 449 F.3d at 551), Pennsylvania jurisprudence holds that "res judicata 'must be liberally construed and applied

without technical restriction." *Id.* (quoting *Radakovich v. Radakovich*, 846 A.2d 709, 715 (Pa. Super. Ct. 2004)); *see also Tobias v. Halifax Twp.*, 28 A.3d 223, 226 (Pa. Commw. Ct. 2011) ("it is well-settled that res judicata will not be 'defeated by minor differences of form, parties, or allegations" (internal quotation marks omitted)).

All four elements exist here. First, "the thing sued upon or for" element is met. Here, as in the underlying state-court proceedings, Plaintiff seeks to exclude the undated ballots from the vote count in her race. Second, both proceedings involve the same "cause of action." Importantly, the fact that Plaintiff did not actually assert her federal equal protection or due process claims in the state-court proceedings is irrelevant, as res judicata "bars litigation of claims that were or could have been raised in a prior action which resulted in a final judgment on the merits, so long as the claims derive from the same cause of action." *Id.* (quoting *In re Estate of Plance*, 175 A.3d 249, 258 (Pa. 2017)); *accord Tobias*, 28 A.3d at 227 ("a party cannot avoid res judicata simply by varying the legal theory for relief"). "Pennsylvania courts have instructed that causes of action are identical when the 'subject matter' and the 'ultimate issues' are the same in both the 'old and new proceedings.' A 'cause of action' or 'claim' is to be defined 'broadly in transactional terms, regardless of the number of substantive theories advanced in the multiple suits by the plaintiff." *Cemex, Inc. v. Indus. Contracting & Erecting, Inc.*, No. 02-1240, 2006 WL 1785564, at *5 (W.D. Pa. June 26, 2006) (citations omitted), *aff'd*, 254 F. App'x 148 (3d Cir. 2007). Here, both the state-court and federal-court proceedings arise from the same subject matter and involve the same ultimate issues—namely, the November 2020 election and whether 2,349 specific mail-in ballots may lawfully be counted. Further, nothing prevented Plaintiff from asserting her federal equal protection and due process claims during the state-court proceedings. Accordingly, the earlier and present proceedings demonstrate an identity of "causes of action."

The third element—identity of parties—is also satisfied. Plaintiff and the Allegheny Board were both parties to the state-court proceedings. Although Plaintiff has added additional Defendants to this federal proceeding—namely, each member of the Board and the Secretary— these additions do not defeat res judicata. "Where," as here, "res judicata is invoked against a plaintiff who has twice asserted essentially the same claim against different defendants, courts have ... enlarged the area of res judicata beyond any definable categories of privity between the defendants." *Hammond*, 2020 WL 1032296, at *4 (quoting *Bruszewski v. United States*, 181 F.2d 419, 422 (3d Cir. 1950)); *see also Cicchiello v. SEIU 1199P Union Serv. Employees Int'l Union*, No. 361 M.D. 2015, 2016 WL 1639015, at *4 (Pa. Commw. Ct. Apr. 26, 2016) ("as observed by the federal courts, merely naming additional defendants will not convert one cause of action into a second cause of action if both actions involve the same liability-creating conduct on the part of the defendants and the same alleged invasion of the plaintiff's rights"). Here, in both the state-and federal-court proceedings, Plaintiff has complained that Pennsylvania election officials are unlawfully counting certain specific ballots that, in Plaintiff's view, should not be counted. The connections between the Defendants are more than close enough to satisfy the third element of the res judicata test.

Finally, the fourth element of res judicata is satisfied because the capacity of the parties is the same in both the state- and federal-court proceedings. Accordingly, under the doctrine of res judicata, the Pennsylvania Supreme Court's judgment precludes Plaintiff's claims in this action.

C. Defendants Are Entitled to Judgment as a Matter of Law on Both Claims

1. The Court Should Dismiss the Equal Protection Claim

(a) Independent County Procedures, Even if Inconsistent, Do Not Give Rise to an Equal Protection Claim

Plaintiff fails to state a claim under the Equal Protection Clause because variation in canvassing decisions between county boards is not an equal protection violation. Plaintiff relies heavily on *Bush v. Gore*, which turned on "a statewide recount under the authority of a single state judicial officer," and the "the minimum procedures necessary to protect the fundamental right of each voter" in the process. 531 U.S. 98, 109 (2000). But *Bush* expressly stated that it was *not* addressing "whether local entities ... may develop different systems for implementing elections." *Id.* And Third Circuit precedent makes clear that county-by-

county variation does not offend the Equal Protection Clause; only a *statewide* decision or rule that fails to provide "rudimentary requirements of equal treatment and fundamental fairness" gives rise to equal protection claims, *id*.

Two Third Circuit cases have recently clarified the boundaries to equal protection claims under *Bush v. Gore*. In *Bognet*, the Third Circuit noted that "*Bush v. Gore* does not require us to perform an Equal Protection Clause analysis of Pennsylvania election law as interpreted by the Pennsylvania Supreme Court." *Bognet*, 980 F.3d at 355 n.11. Likewise, in *Donald J. Trump for President, Inc. v. Boockvar* ("*Trump II*"), the Third Circuit held that "Pennsylvania's Election Code gives counties specific guidelines. To be sure, counties vary in implementing that guidance, but that is normal. Reasonable county-to-county variation is not discrimination." 830 F. App'x 377, 388 (3d Cir. 2020). Two counties independently deciding close questions of the Election Code differently cannot suffice to state an equal protection claim under *Bush v. Gore* because Plaintiff has alleged no statewide action, and no discrimination. This is true *a fortiori* where, as here, Pennsylvania law provides a readily available mechanism to obtain a uniform statewide result—namely, appeal to an appellate court with statewide jurisdiction; that court has clearly indicated that it *would* impose a uniform result, *see In re Canvass*, 2020 WL 6866415; and the only reason there remains variation among counties is that Plaintiff, knowing what the result would be, has voluntarily declined to seek judicial review of one county's decision. This Court should therefore dismiss Count One because it seeks to extend equal protection beyond the limits of *Bognet* and *Trump II*.

(b) Even if Inter-County Variations Could Support an Equal Protection Claim, Plaintiff Cannot Allege or Prove That Anyone Violated *Her* Right to Equal Protection

To state a claim under the Equal Protection Clause, a § 1983 plaintiff "must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class." *Trefelner ex rel. Trefelner v. Burrell Sch. Dist.*, 655 F. Supp. 2d 581, 589 (W.D. Pa. 2009) (citing *Tillman v. Lebanon Cnty. Corr. Facility*, 221 F.3d 410, 423 (3d Cir. 2000)). Protected classes include those based upon suspect distinctions, such as race, religion, and alienage, and those impacting fundamental rights. *Artway v. Attorney Gen.*, 81 F.3d 1235, 1267 (3d Cir. 1996). Stripped of its third party and vote dilution theories of injury, which are foreclosed by *Bognet*, Plaintiff's Amended Complaint cannot state a claim under the Equal Protection Clause because it fails to allege that Plaintiff is a member of a protected class or that her fundamental rights have been burdened.

First, and most significantly, Plaintiff fails to allege that any Defendant discriminated against her. "To bring a successful claim under 42 U.S.C. § 1983 for a denial of equal protection, plaintiffs must prove the existence of purposeful discrimination. They must demonstrate that they 'receiv[ed] different treatment from that received by other individuals similarly situated," *Andrews v. City of Phila., 895 F.2d 1469, 1478 (3d Cir. 1990) (citations omitted); *see also Kasper v. County of Bucks, 514 F. App'x 210, 214–15 (3d Cir. 2013) (finding plaintiff's "§ 1983 assertions are plainly defective in that they fail to allege disparate treatment relative to other similarly situated people"). Plaintiff's Amended Complaint does not make this basic, threshold allegation. Plaintiff simply alleges that two county boards of elections made different decisions concerning whether to count absentee or mail-in votes with undated ballot envelopes, and that the Secretary "accepted the certified final returns." ECF 29 ¶¶ 38, 52. No allegation shows a Defendant treated Plaintiff differently than another similarly-situated individual. Indeed, both parties simply carried out mandatory duties under state law with an even hand; the Allegheny Board obeyed the Pennsylvania Supreme Court's order reinstating the Allegheny County Court of Common Pleas' ruling that the undated ballots "must be counted," *see Ziccarelli, 2020 WL 7012634, at *2, and the Secretary accepted ballots as required by 25 P.S. § 2621(f). Not only has Plaintiff failed to allege that she received "different treatment," she has shown that each Defendant did exactly what state law required. This failure to allege differential treatment is, by itself, fatal to Plaintiff's equal protection claim.

To the extent Plaintiff argues there was different treatment because the Secretary failed to properly "count" or "canvass" returns from Allegheny and Westmoreland counties, ⁸ Plaintiff misconceives the role of the Secretary in the Commonwealth's election process and fails to adduce necessary proof for an equal protection claim. As discussed *supra* § II.A.1, the Secretary may not independently determine whether a vote is lawful, or second-guess canvassing decisions of county boards of elections. *See In re Canvass*, 2020 WL 6866415, at *15 n.6; *see also id.* at *20 (Wecht, J., concurring). This is especially so when the Pennsylvania Supreme Court has reinstated a decision that the ballots in question "must be counted." *Ziccarelli*, 2020 WL 7012634, at *2.

Therefore, because the Election Code and the Pennsylvania Supreme Court prevent the Secretary from canvassing returns as Plaintiff alleges she should have, Plaintiff fails to show any alleged failure on the Secretary's part treated her unequally. Without an allegation that Defendants treated Plaintiff differently, Plaintiff cannot state an equal protection claim.

Even if Plaintiff could allege differential treatment, Plaintiff cannot show any burden to her fundamental rights, or that such a burden outweighs the state's interest in an orderly election process. As this Court has held, to the extent *Anderson-Burdick* applies to these types of "square peg, round hole" situations of "burden[ing] the right to vote through **inaction**," the Court must "weigh any burden stemming from the government's alleged failures against the government's interest in enacting the broader election scheme it has erected." *Trump I*, 2020 WL 5997680, at *47 (emphasis in original). Here, the burden on Plaintiff is slight, if it exists at all; apart from her foreclosed vote dilution claims, she articulates no direct burden on her own fundamental rights, and the Secretary cannot imagine one. Whatever this burden adds up to is easily overcome by the state's interest in an orderly, timely-certified election. Pennsylvania's regulatory interests in a uniform election pursuant to established procedures are more than sufficient to withstand scrutiny. *Timmons*, 520 U.S. at 358; *Trump I*, 2020 WL 5997680, at *63. Not only is Pennsylvania's interest sufficient on its own, but the type of independent ballot-by-ballot constitutional review Plaintiff seems to be asking for would not only bring the election process to a standstill; it would ask the Secretary to issue proclamations on the lawfulness of votes in conflict with the judgment of the Supreme Court of Pennsylvania. That is not the law of the Election Code, and that cannot be what the Equal Protection Clause requires. Because Plaintiff has not provided any evidence to show how the burden to her individual rights outweighs the significant benefits to the Commonwealth in a uniform election pursuant to established procedures, this Court should grant judgment as a matter of law to Defendants on Count One. ⁹

2. The Court Should Dismiss the Due Process Claim

In Count Two, Plaintiff claims that the Secretary violated her rights under the Due Process Clause when the Secretary accepted the counties' election results. This argument does not come close to meeting Plaintiff's heavy burden to make out a due process claim.

This Court has held that substantive due process challenges that rely on the same allegations as equal protection challenges "demand[] even stricter proof," and "exist[] in only the most extraordinary circumstances." *Trump I*, 2020 WL 5997680, at *51. In the Third Circuit, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense"—the "executive action must be so ill-conceived or malicious that it 'shocks the conscience." *Id.* (quoting *Miller v. City of Phila.*, 174 F.3d 368, 375 (3d Cir. 1999) (cleaned up)). It is only when "the election process itself reaches the point of patent and fundamental unfairness[] [that] a violation of the due process clause may be indicated." *Acosta v. Democratic City Comm.*, 288 F. Supp. 3d 597, 645 (E.D. Pa. 2018) (citation omitted). Indeed, the federal courts have historically intervened in state elections only where there has been "purposeful or systematic discrimination against voters of a certain class, geographic area, or political affiliation," or "willful conduct which undermines the organic processes by which candidates are elected." *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975) (collecting cases).

The fact that the Allegheny County Board of Elections decided to count ballots timely returned by eligible voters with signed declarations, where there is no allegation or evidence of any fraud—and that the Secretary later carried out the straightforward task of accepting and tabulating vote totals, in compliance with the Election Code and the Pennsylvania Supreme Court's judgment—hardly "shocks the conscience." Count II is simply another species of the "vote dilution" argument in Count One, and should be dismissed for the same reasons. ¹⁰

Plaintiff also advances a broad "fundamental unfairness" argument, alleging that "certification effectively changed the rules of the election after the election had already been conducted." Plaintiff alleges that the Secretary altered the "rules" by certifying election results that (according to Plaintiff) conflicted with a previous guidance and brief. ECF 47, at 23–24. Plaintiff is wrong that the Secretary is "contraven[ing] a rule that she articulated." *Id.* at 25. Even if the guidance and brief had the meaning that

Plaintiff ascribes to them (they do not), "it is the Election Code's express terms that control, not the written guidance provided by the Department." *In re Scroggin*, 237 A.3d 1006, 1021 (Pa. 2020).

Plaintiff attempts to rely on Roe v. Mobile County Appointing Board for the proposition that counting a set of ballots found valid post-election by a state supreme court "changed the rules of the election after the election had already been conducted." ECF 47, at 22–23 (citing Roe, 43 F.3d 574 (11th Cir. 1975)). In Roe, however, the Eleventh Circuit confronted a state supreme court decision that, after the election, had retroactively eliminated the requirement that absentee ballots contain "the signature of two witness or a notary"; the Eleventh Circuit explicitly relied on the finding that candidates would have changed their campaign strategies and "supporters of [the plaintiff candidates] who did not vote would have voted" had they known that the state supreme court would change the rule. 43 F.3d at 582 (emphasis added). ¹¹ Here, Plaintiff can point to no evidence that any voter or candidate would have changed their conduct based on a belief that undated ballots would be counted. Moreover, on remand in Roe, the District Court found the "rule" that had been changed by the state court decision had previously been a consistent practice of all counties in Alabama but one for over fifteen years. 904 F. Supp. 1315, 1335 (S.D. Ala. 1995), aff'd sub nom. Roe v. Alabama, 68 F.3d 404 (11th Cir. 1995). Here, by contrast, Justice Wecht observed that "[one] cannot say with any confidence that even diligent electors were adequately informed as to what was required to avoid the consequence of disqualification in this case." In Re Canvass, 2020 WL 6866415, at *24 (Wecht, J., concurring). Plaintiff's additional theory for a due process violation should be rejected, and the claim should be dismissed, or summary judgment entered in Defendants' favor.

D. If There Is a Constitutional Violation Here, the Remedy Cannot Be to Create More Constitutional Violations

Even if the Court were to find a constitutional violation here, the proper remedy should not be to create at least hundreds or thousands of new constitutional violations for the sake of remedying one. Judge Brann persuasively summarized the remedies available to a District Court in these cases:

When remedying an equal-protection violation, a court may either "level up" or "level down." This means that a court may either extend a benefit to one that has been wrongfully denied it, thus leveling up and bringing that person on par with others who already enjoy the right, or a court may level down by withdrawing the benefit from those who currently possess it. Generally, "the preferred rule in a typical case is to extend favorable treatment" and to level up. In fact, leveling down is impermissible where the withdrawal of a benefit would necessarily violate the Constitution. Such would be the case if a court were to remedy discrimination by striking down a benefit that is constitutionally guaranteed.

Trump II, 2020 WL 6821992, at *12 (citations omitted). As Judge Brann rightly pointed out, "[i]t is not in the power of [a District] Court to violate the Constitution." Id. (citing Marbury v. Madison, 5 U.S. 137, 147 (1803)).

That is precisely what "leveling down" here would mean: The relief Plaintiff asks for would without question violate the constitutional rights of other Pennsylvania voters, something this Court cannot do. Even if the disparity between Allegheny and Westmoreland's processes amounted to a constitutional violation, this occurrence could not possibly justify cancelling the votes of 311 Pennsylvania voters. Such a remedy would place an undue burden on those 311 voters' rights to vote, and force the Allegheny County Board to do what Plaintiff suggests it cannot—count one tranche of undated mail-in or absentee ballots, but not another. See Ne. Ohio Coalition for Homeless v. Husted, 696 F.3d 580, 595, 597-98 (6th Cir. 2012) (rejecting ballots invalidly cast due to poll worker error likely violates due process). And "[t]he disenfranchisement of even one person validly exercising his right to vote is an extremely serious matter." Perles v. Cnty. Return Bd. of Northumberland Cnty., 202 A.2d 538, 540 (Pa. 1964). This Court cannot "level down" as a matter of law, and should not do so at Plaintiff's request here.

There are federalism reasons to refuse to "level down" as well. The Third Circuit made this clear in rejecting another, more significant remedy that would have cancelled the votes of other Pennsylvania voters without sufficient reason to do so: The Pennsylvania Supreme Court has long "liberally construed" its Election Code "to protect voters' right to vote," even when a ballot violates a technical requirement. Shambach v. Bickhart, 577 Pa. 384, 845 A.2d 793, 802 (2004). "Technicalities should not be used to make the right of the voter insecure." Appeal of James, 377 Pa. 405, 105 A.2d 64, 66 (1954) (internal quotation marks omitted). That court recently reiterated: "[T]he Election Code should be liberally construed so as not to deprive, inter alia, electors of their right to elect a candidate of their choice." Pa. Dem. Party, 238 A.3d at 356. Thus, unless there is evidence of fraud, Pennsylvania law overlooks small ballot glitches and respects the expressed intent of every lawful voter. In re: Canvass of Absentee and Mail-in Ballots, 2020 WL 6875017, at *1 (plurality opinion). In our federalist system, we must respect Pennsylvania's approach to running elections. We will not make more of ballot technicalities than Pennsylvania itself does.

Trump II, 830 F. App'x at 391. Although this decision was non-precedential, its persuasive analysis of federalism concerns suggests the relief requested here would create at least as many constitutional problems as it purports to solve.

There are also two key and dispositive differences between the cases Plaintiff cites to support a "level down" remedy and the one before this Court. First, Sessions v. Morales-Santana teaches that rescinding a benefit based on an interpretation of "what [] the legislative body [would] have done with the equal treatment violation had it been presented with it" is appropriate for a federal district court only when construing federal law; the Court in Sessions interpreted what Congress would do with a federal law, and noted that "[b]ecause the manner in which a State eliminates discrimination is an issue of state law ... upon finding state statutes constitutionally infirm, we have generally remanded to permit state courts to choose between extension and invalidation." 137 S. Ct. 1678, 1698, n.23 (2017). Here, the Pennsylvania Supreme Court has already determined the proper application of Pennsylvania law to the ballots at issue: the ballots should be counted. Second, any court "leveling down" may do so only going forward, and cannot grant the type of retrospective relief Plaintiff seeks here. Although the Court in Sessions leveled down, it made clear that its ruling would only do so "prospectively." See id. at 1701; cf. Andino v. Middleton, 141 S. Ct. 9, 10 (2020) (staying a district court order prospectively, but holding that "any ballots cast before this stay issues and received within two days of this order may not be rejected") (emphasis added). No other case Plaintiff cites supports awarding retrospective relief. See ECF 47, at 28. 12

IV. CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court dismiss all claims in the Amended Complaint with prejudice or, in the alternative, grant summary judgment in favor of the Secretary on Counts One and Two.

Respectfully submitted,

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Dated: December 30, 2020

Footnotes

- Admitted pro hac vice
- Pro hac vice motion to be filed
- That Plaintiff added, as defendants in this action, certain parties who were not parties to the state-court proceeding is 1 irrelevant to the Rooker-Feldman analysis. See Russo v. GMAC Morg., LLC, 549 F. App'x 8, 10 (2d Cir. 2013) ("It does not matter that the plaintiff added parties to the federal action who were not parties to the state action. The Rooker-Feldman doctrine bars 'cases ... brought by state-court losers complaining of injuries caused by state-court judgment rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." (citing Exxon Mobil, 544 U.S. at 284 (emphasis added))); Sheikhani v. Wells Fargo Bank, 577 F. App'x 610, 611 (7th Cir. 2014); Udoh v. Minn. Dep't of Human Servs., No. 16-3119, 2017 WL 2683975, at *1 (D. Minn. June 21, 2017); Roberts v. Perez, No. 13-5612, 2014 WL 3883418, at *2-3 (S.D.N.Y. Aug. 7, 2014).
- 2 That Plaintiff did not actually assert her federal constitutional claims in the state-court proceedings is irrelevant. "When a federal plaintiff brings a claim, whether or not raised in state court, that asserts injury caused by a state-court judgment and seeks review and reversal of that judgment, the federal claim is ... barred from review." Mikhail v. Kahn, 991 F. Supp. 2d 596, 615 (E.D. Pa. 2014) (quoting Great W. Mining, 615 F.3d at 170) (emphasis in Mikhail), aff'd, 572 F. App'x 68 (3d Cir. 2014); accord Hoblock, 422 F.3d at 87 ("[A] federal plaintiff cannot escape the Rooker-Feldman bar simply by relying on a legal theory not raised in state court.").
- 3 The "Amicus Brief of Legislative Leaders" asserts an additional argument: that the Pennsylvania Supreme Court's decision in In re Canvass somehow violated the Elections Clause in Article I, § 4 of the U.S. Constitution. See ECF 49-1. This argument, which Plaintiff does not raise, fails for at least three reasons. First, it is well settled that, "in the absence of exceptional circumstances" not present here, courts do not consider "new issues raised by an amicus." A.D. Bedell Wholesale Co. v. Philip Morris Inc., 263 F.3d 239, 266 (3d Cir. 2001). Second, like Plaintiff's claims, amici's argument is barred by, inter alia, the Rooker-Feldman and preclusion doctrines. Third, amici fail to state any Elections Clause claim as a matter of law: The Elections Clause applies only to federal elections, not to state elections like the one here.
- Plaintiff's Amended Complaint emphasizes "the absence of a court order requiring the Board to count the [Disputed] Ballots." ECF 29 ¶ 37. But that argument exalts form over substance. The Court of Common Pleas decision that the Supreme Court reinstated held that, under Pennsylvania law, the 2,349 ballots in dispute "must be counted." Ziccarelli, 2020 WL 7012634, at *2 (emphasis added).

- As discussed below, although Plaintiff may have standing to seek relief for this injury, she is unable to state a claim for relief.
- This Court also lacks jurisdiction over Plaintiff's claims because 28 U.S.C. § 1344 is the only statute that confers jurisdiction upon federal courts to hear election disputes for state offices, and that statute does not apply here. *Keyes v. Gunn*, 890 F.3d 232, 237 (5th Cir. 2018) (reversing and remanding with instructions to dismiss equal protection claim because district court lacked jurisdiction over state election contest for a legislative seat under 28 U.S.C. § 1344).
- 7 Count Two of the Amended Complaint purports to speak for all voters. ECF 29 ¶ 72. Plaintiff's Motion, however, argues for relief only for Plaintiff and her voters. Either way, the analysis is the same: Plaintiff cannot assert claims on behalf of any third-party voters.
- An allegation Plaintiff does not make in her Amended Complaint, but raises for the first time in her brief in support of motion for summary judgment. *See* ECF 47, at 16-17.
- Plaintiff also argues that the Secretary has violated the Equal Protection Clause by accepting "incomplete results," because ballots with certain flaws—missing secrecy envelopes, for example—were not counted. ECF 47, at 17-18. This argument is simply another challenge to the Pennsylvania Supreme Court's determination that under state law, different balloting flaws have different consequences. It also ignores the fact that under the Election Code, county boards of elections, and not the Secretary, determine when results are "complete."
- Plaintiff frames her due process claim as seeking to protect the fundamental right to vote, citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). ECF 29 ¶ 66. The Amended Complaint alleges that "dilution of the votes of the Ziccarelli Voters violates the Due Process Clause of the Constitution" and also alleges an injury to "each voter's fundamental right to vote." *Id.* ¶ 72. For the reasons highlighted above, Plaintiff lacks standing to bring this claim under *Bognet*. Once the vote dilution theory is removed from this case, as it must be, the Amended Complaint alleges no further violation of Plaintiff's fundamental rights.
- It is worth noting that, to the extent earlier portions of the *Roe* opinion could be read to suggest that the alleged "dilution" of votes cast in accordance with the witness/notary signature requirement was itself sufficient to make out a due process claim, the court backed away from that position in addressing the First Circuit's decision in *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825 (1st Cir. 1980). As *Partido Nuevo* recognized, "claims [by plaintiffs] that votes were 'diluted' by the votes of others, not that [the plaintiffs] themselves were prevented from voting," do not state a constitutional injury. *Id.* at 828. *Roe* distinguished *Partido Nuevo* solely on the ground that, in *Roe*, unlike in *Partido Nuevo*, candidates and voters had detrimentally relied on the requirement eliminated by the state supreme court. *Roe*, 43 F.3d at 581–82. Significantly, in a precedential decision issued earlier this month, the Eleventh Circuit expressly agreed with *Bognet* that vote "dilution" of the sort alleged here is not a cognizable injury. *Wood v. Raffensperger*, 981 F.3d 1307, 1314–15 (11th Cir. 2020).
- In fact, in the tax context Plaintiff cites, it has long been the Supreme Court's "practice, for reasons of federal-state comity, to abstain from deciding the remedial effects of such a holding." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 427 (2010) (internal citations omitted).
- * Admitted pro hac vice
- ** Pro hac vice motion to be filed

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241 A.3d 1058 Supreme Court of Pennsylvania.

IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION

Appeal of: Donald J. Trump for President, Inc. In re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election Appeal of: Donald J. Trump for President, Inc. In re: Canvass of Absentee and Mail-in

Ballots of November 3, 2020 General Election Appeal of: Donald J. Trump for President, Inc.

In re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election Appeal of: Donald J. Trump for President, Inc.

In re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election Appeal of: Donald J. Trump for President, Inc. In re: 2,349 Ballots in the 2020 General Election Appeal of: Allegheny County Board of Elections

> No. 31 EAP 2020 No. 32 EAP 2020 No. 33 EAP 2020 No. 34 EAP 2020 No. 35 EAP 2020 No. 29 WAP 2020 Submitted: November 18, 2020 Submitted: November 20, 2020 Decided: November 23, 2020

Synopsis

Background: Presidential campaign challenged decision of the county board of elections to count 8,329 absentee and mail-in ballots on grounds that the voters who submitted them failed to handwrite their name, street address or the date (or some combination of the three) on the ballot-return outer envelope. The Court of Common Pleas, Philadelphia County,

J-118A-E-2020, James Crumlish, J., upheld the board's decision. Campaign appealed, and the Supreme Court granted the board's application to exercise extraordinary jurisdiction. In separate proceeding, candidate for state senator initiated a statutory appeal from a decision by the county board of elections to canvass and count 2,349 absentee or mail-in ballots for the general election, notwithstanding the lack of a date of signature by the elector on the statutorily required elector declaration on the outside envelope of the ballots. The Court of Common Pleas, Allegheny County, No. GD 20-011654, Joseph M. James, Senior Judge, affirmed. Candidate appealed, and the Commonwealth Court, No. 1162 CD 2020, 2020 WL 6820816, reversed. Board filed emergency petition for appeal, which was granted, and appeals were consolidated.

Holdings: The Supreme Court, Nos. 31-35 EAP 2020 and 29 WAP 2020, Donohue, J., held that:

absentee or mail-in voter's failure to handwrite name and/or address under the full paragraph of the declaration on the back of the outer envelope was not a material violation of statutory directive to "fill out" the declaration, and

Per concurring opinion of Wecht, J., statutory requirement that absentee or mail-in ballot voter date and sign the voter declaration was not a minor irregularity which could be overlooked and thus, in future elections, the omission of either item would be sufficient, without more, to invalidate the ballot in question.

Affirmed; Commonwealth Court reversed.

Wecht, J., concurred in the result and filed concurring and dissenting opinion.

Dougherty, J., concurred in part and dissented in part with opinion in which Saylor, Chief Justice, and Mundy, J., joined.

Procedural Posture(s): On Appeal; Petition for Discretionary Review; Judgment.

*1061 Appeal from the Order of the Commonwealth Court entered November 19, 2020 at No. 1162 CD 2020, reversing the Order of the Court of Common Pleas of Allegheny County entered November 18, 2020 at No. GD 20-011654 and remanding.

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SAYLOR, C.J., BAER. TODD. DONOHUE. DOUGHERTY, WECHT, MUNDY, JJ.

Justice Donohue announces the judgment of the Court, joined by Justices Baer, Todd and Wecht, and files an opinion joined by Justices Baer and Todd

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

JUSTICE DONOHUE

These appeals present the question of whether the Election Code requires a *1062 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. Pursuant to our longstanding jurisprudence, central to the disposition of these appeals is whether the information is made mandatory by the Election Code or whether the inclusion of the information is directory, i.e., a directive from the Legislature that should be followed but the failure to provide the information does not result in invalidation of the ballot.

We are guided by well-established interpretive principles including that where the language of a statute is unambiguous, the language shall be controlling. 1 Pa.C.S. § 1921(b). In the case of ambiguity, we look to ascertain the legislative intent, and in election cases, we adhere to the overarching principle that the Election Code should be liberally construed so as to not deprive, inter alia, electors of their right to elect a candidate of their choice. Pa. Democratic Party v. Boockvar, —, 238 A.3d 345, 356 (2020). Stated more fully:

> Election laws will be strictly enforced to prevent fraud, but ordinarily will be construed liberally in favor of the right to vote. All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor. Where the elective franchise is regulated by statute, the regulation should, when and where possible, be so construed as

to insure rather than defeat the exercise of the right of suffrage. Technicalities should not be used to make the right of the voter insecure. No construction of a statute should be indulged that would disfranchise any voter if the law is reasonably susceptible of any other meaning.

Appeal of James, 377 Pa. 405, 105 A.2d 64, 65-66 (1954).

Guided by these principles and for the reasons discussed at length in this opinion, we conclude that the Election Code does not require boards 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 date, where no fraud or irregularity has been alleged.

In connection with five of these consolidated appeals, Petitioner Donald J. Trump for President, Inc. (the "Campaign") challenges the decision of the Philadelphia County Board of Elections (the "Philadelphia Board") to count 8,329 absentee and mail-in ballots. The Campaign does not contest that these ballots were all timely received by the Philadelphia Board prior to 8:00 p.m. on November 3, 2020 (election day); that they were cast and signed by qualified electors; and that there is no evidence of fraud associated with their casting. The Campaign instead contends that these votes should not be counted because the voters who submitted them failed to handwrite their name, street address or the date (or some combination of the three) on the ballot-return outer envelope. The Philadelphia County Court of Common Pleas, per the Honorable James Crumlish, upheld the Philadelphia Board's decision to count the ballots, ruling that the Election Code does not mandate the disqualification of ballots for a failure to include the challenged information, stressing that the inclusion or exclusion of this information does not prevent or promote fraud. The Campaign pursued an appeal to the Commonwealth Court. This Court granted the Philadelphia Board's application to exercise our extraordinary jurisdiction, *1063 42 Pa. C.S. § 726, over these cases then pending in the Commonwealth Court.

At or around the same time that the matters were being litigated in Philadelphia, across the state in Allegheny County, Nicole Ziccarelli, a candidate for the Pennsylvania Senate in the 45th Senatorial District (Allegheny-Westmoreland counties) 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. Again, all of the outer envelopes were signed, they are conceded to be timely and there are no allegations of fraud or illegality. On November 18, 2020, the Court of Common Pleas of Allegheny County, per the Honorable Joseph James, upheld the decision of the Allegheny County Board to count the ballots. Ziccarelli v. Allegheny County Board of Elections, No. GD-20-011654 (Allegheny Cty. Ct. Com. Pl.). Ziccarelli filed an appeal to the Commonwealth Court and an application in this Court requesting that we exercise extraordinary jurisdiction over her appeal. During the pendency of the request to this Court, on November 19, 2020, a three-judge panel of the Commonwealth Court, with one judge dissenting, reversed the common pleas court decision.

On November 20, 2020, the Allegheny County Board filed an emergency petition for allowance of appeal, which we granted, limited to whether the ballots contained in undated outer envelopes should be invalidated. We stayed the order of the Commonwealth Court pending the outcome of this appeal and consolidated it with the Philadelphia Board cases.

In these appeals, we are called upon to interpret several provisions of the Election Code. We set them forth at the outset since they guide the resolution of these appeals.

Section 3146.6(a) provides as follows with respect to absentee ballots:

> (a) 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 blueblack 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. § 3146.6(a) (emphasis added).

Section 3150.16(a) sets forth the procedure for the submission of a mail-in ballot:

> (a) General rule.--At any time after receiving an official mail-in ballot, but on 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 blueblack 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 *1064 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) (emphasis added).

Sections 3146.4 and 3150.14(b) delegate to the Secretary of the Commonwealth the responsibility to prescribe the form of the elector's declaration on the outer envelope used to mail the absentee and mail-in ballots:

§ 3146.4. Envelopes for official absentee ballots

The county boards of election shall provide two additional envelopes for each official absentee ballot of such size and shape as shall be prescribed by the Secretary of the Commonwealth, in order to permit the placing of one within the other and both within the mailing envelope. On the smaller of the two envelopes to be enclosed in the mailing envelope shall be printed, stamped or endorsed the words "Official Election Ballot," and nothing else. On the larger of the two envelopes, to be enclosed within the mailing envelope, shall be printed the form of the declaration of the elector, and the name and address of the county board of election of the proper **county**. The larger envelope shall also contain information indicating the local election district of the absentee voter. Said form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain among other things a statement of the electors qualifications, together with a statement that such elector has not already voted in such primary or election. The mailing envelope addressed to the elector shall contain the two envelopes, the official absentee ballot, lists of candidates, when authorized by section 1303 subsection (b) of this act, the uniform instructions in form and substance as prescribed by the Secretary of the Commonwealth and nothing else.

25 P.S. § 3146.4 (emphasis added).

§ 3150.14. Envelopes for official mail-in ballots

* * *

(b) Form of declaration and envelope.--The form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain, among other things, a statement of the elector's qualifications, together with a statement that the elector has not already voted in the primary or election.

25 P.S. § 3150.14(b) (emphasis added).

The pre-canvassing or canvassing of absentee and mail-in ballots proceed in accordance with the dictates of 25 P.S. § 3146.8(g)(3), as follows:

§ 3146.8. Canvassing of official absentee ballots and mail-in ballots

When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the "Registered Absentee and Mailin Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the "Registered Absentee *1065 and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File" verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3) (emphasis added).

Pursuant to the authority granted in § 3150.14(b), the Secretary of the Commonwealth developed the following declaration used in connection with the 2020 General Election:

I hereby declare that I am qualified to vote from the below stated address at this election; that I have not already voted in this election; and I further declare that I marked my ballot in secret. I am qualified to vote the enclosed ballot. I understand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand I may only vote by provisional ballot at my polling place, unless I surrender my balloting materials, to be voided, to the judge of elections at my polling place.

[BAR CODE]

X		_	
Date of signing (MM/D	D/YYYY)/Fed	hade firme (M	M/DD/YYYY)
Voter, print name/Vota	nte, nombre (en letra de imp	reta
Voter, address (street)	Notante, dirre	eccion (calle)	

Voter, sign or mark here. Votente firme o marque aqui

[LABEL – Voters' name and address]

In addition, the Secretary issued guidance to the county boards of elections with respect to the examination of ballot return envelopes. First, on September 11, 2020, she issued the following guidance:

3. EXAMINATION OF DECLARATION ON BALLOT **RETURN ENVELOPES:**

The county board of elections is responsible for approving ballots to be counted during pre-canvassing.

To promote consistency across the 67 counties, the county boards of elections should follow the following steps when processing returned absentee and mail-in ballots.

After setting aside ballots of elector's who died prior to the opening of the polls, the county board of elections shall examine the Voter's Declaration on the outer envelope of each returned ballot and compare the information on the outer envelope, i.e., the voter's name and address, with the information contained in the "Registered Absentee and Mail-in Voters File, the absentee voter's list and/or the Military Veterans' and Emergency Civilians Absentee Voters File."

If the Voter's Declaration on the return envelope is blank, that ballot return envelope *1066 must be set aside and not counted. If the board determines that a ballot should not be counted, the final ballot disposition should be noted in SURE. The ballot return status (Resp Type) should be noted using the appropriate drop-down selection.

If the Voter's Declaration on the return envelope is signed and the county board is satisfied that the declaration is sufficient, the mail-in or absentee ballot should be approved for canvassing unless challenged in accordance with the Pennsylvania Election Code.

Guidance Concerning Examination of Absentee and Mailin Ballot Return Envelopes, 9/11/2020, at 3. On September 28, 2020, the Secretary offered additional guidance on the treatment of ballot return envelopes:

With regard to the outer ballot-return envelope:

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.

A ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted. Ballot-return envelopes must be opened in such a manner as not to destroy the declarations executed thereon.

All ballot-return envelopes containing executed declarations must be retained for a period of two years in accordance with the Election Code.

Pre-canvass and Canvass Procedures

At the pre-canvass or canvass, as the case may be, the county board of elections should:

- · Segregate the unopened ballots of voters whose applications were challenged by the challenge deadline (5:00 PM on the Friday before the election).
 - o These ballots must be placed in a secure, sealed container until the board of elections holds a formal hearing on the challenged ballots.
 - o Ballot applications can only be challenged on the basis that the applicant is not qualified to vote.
- Set aside the ballot of any voter who was deceased before election day.
- · Set aside any ballots without a filled out, dated and signed declaration envelope.
- Set aside any ballots without the secrecy envelope and any ballots in a secrecy envelope that include text, mark, or symbol which reveals the identity of the

voter, the voter's political affiliation (party), or the voter's candidate preference.

The Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis.

No challenges may be made to mail-in or absentee ballot applications after 5:00 pm on the Friday before the election.

No challenges may be made to mail-in and absentee ballots at any time based on signature analysis.

NOTE: For more information about the examination of return envelopes, please refer to the Department's September 11, 2020 Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes.

Guidance Concerning Civilian Absentee and Mail-in Ballot Procedures, 9/28/2020, at 5, 8-9.

*1067 I. FACTUAL AND PROCEDURAL BACKGROUND

Pursuant to the General Assembly's passage of Act 77 of 2019, voters in Pennsylvania may cast their ballots in elections by absentee or no-excuse mail-in ballots. To do so, they must submit applications to county boards of elections. and in connection therewith must provide the address at which they are registered to vote. They must also sign a declaration affirming, among other things, that they are "eligible to vote by mail-in [or absentee] ballot at the forthcoming primary or election," and that "all of the information" supplied in the mail-in or absentee ballot application is "true and correct." 25 P.S. §§ 3150.12, 3146.2. Upon receipt of the application, the county board of elections must confirm the elector's qualifications and verify that the elector's address on the application matches the elector's registration. Upon the county board of elections' approval of the application, the elector is provided with a ballot, an inner "secrecy envelope" into which the ballot is to be placed, and an outer envelope into which the secrecy envelope is to be placed and returned to the board. The outer envelope has pre-printed on it (1) a voter's declaration, (2) a label containing the voter's name and address, and (3) a unique nine-digit bar code that links the outer envelope to the voter's registration file contained in the Statewide Uniform Registry of Electors ("SURE") system. After receiving the outer envelope, the board of elections stamps the date of receipt on it and then scans the unique nine-digit bar code, which links the voter's ballot to his or her registration file.

The pre-canvassing or canvassing of absentee and mail-in ballots then proceeds in accordance with the dictates of 25 P.S. § 3146.8(g)(3):

When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File" verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3).

Pursuant to this section, on November 9, 2020, the Philadelphia Board met to determine whether ballots separated into nine categories were "sufficient" to be precanvassed or canvassed. It concluded that four categories were not sufficient to be pre-canvassed or canvassed: (1) 472 ballots where the outer envelope lacked a signature and any other handwritten information; (2) 225 ballots where the outer envelope was not signed by the voter; (3) 112 ballots where the individual who completed the declaration appeared to be different from the individual who had been assigned the ballot; and (4) 4,027 ballots that were not submitted in a secrecy envelope.

In contrast, the Philadelphia Board approved as sufficient to be pre-canvassed or canvassed the ballots in five categories: (1) 1,211 ballots that lacked a handwritten date, address, and printed name on the back of the outer envelope (but were *1068 signed); (2) 1,259 ballots that lacked only a handwritten date on the back of the outer envelope (but were signed and contained a handwritten name and address); (3) 533 ballots that lack only a handwritten name on the back of the outer envelope (but were signed and dated and contained a handwritten address); (4) 860 ballots that lack only a handwritten address on the back of the outer envelope (but

were signed and dated and contained a handwritten name); (5) 4,466 ballots that lack only a handwritten name and address on the back of the outer envelope (but were signed and dated).

On November 10, 2020, the Campaign filed five pleadings entitled "Notice of Appeal via Petition for Review of Decision by the Philadelphia County Board of Elections," one for each of the five categories referenced above that the Philadelphia Board approved as sufficient to be pre-canvassed or canvassed. In each petition for review, the Campaign alleged that this Court, in Pa. Democratic Party v. Boockvar, -238 A.3d 345 (2020), declared that absentee and mail-in ballots cast in violation of the Election Code's mandatory requirements are void and cannot be counted. Petition for Review, 11/10/2020, ¶ 14. The Campaign further alleged that failures to include hand-written names, addresses and dates constituted violations of mandatory obligations under Sections 3146.6(a) and/or 3150.16(a) of the Election Code. Id. at 15-16. Accordingly, the Campaign alleged that the Board's decisions with respect to the absentee and mail-in ballots in the above-referenced five categories were based on a clear error of law and must be reversed. Id. at 32.

On November 13, 2020, Judge Crumlish held oral argument on the issues raised in the Petition for Review. In response to questions from Judge Crumlish, counsel for the Campaign agreed that the Petition for Review was "not proceeding based on allegations of fraud or misconduct." Transcript, 11/13/2020, at 13-14. She further agreed that the Campaign was not challenging the eligibility of the 8,329 voters in question and did not contest either that all of the ballots at issue were signed by the voters or that they had been timely received by the Board. Id. at 30-31, 37. Instead, she indicated that the Campaign was "alleging that the ballots were not filled out correctly." *Id.* at 14. Counsel for the DNC ¹ argued that the failures to handwrite names, addresses and dates "are, at most, minor technical irregularities that the Supreme Court of Pennsylvania has repeatedly said do not warrant disenfranchisement." Id. at 14. Counsel for the Philadelphia Board added that the Election Code includes no provision requiring "absolute technical perfection" when filling out the declaration on the outer envelope containing an absentee or mail-in ballot. Id. at 38.

Later that same day, Judge Crumlish entered five orders affirming the Philadelphia Board's decision to count the contested ballots. In his orders, Judge Crumlish noted that while the declaration contained a specific directive to the voter to sign the declaration, it made no mention of filling out the date or other information. Trial Court Orders, 11/13/2020, ¶ 2. He further found that while the Election Code provides that while the voter shall "fill out" and date the declaration, the term "'fill out' is not a defined term and is ambiguous." Id. at ¶ 4. He indicated that the outer envelope already contains a pre-printed statement of the voter's name and address, and that "[n]either a date nor the elector's *1069 filling out of the printed name or of the address are requirements necessary to prevent fraud." Id. at ¶ 5-6. Concluding that "[t]he Election Code directs the Court of Common Pleas in considering appeals from the County Board of Elections to make such decree as right and justice may require[,]" id. at ¶ 8 (quoting 25 P.S. § 3157), Judge Crumlish upheld the decision of the Philadelphia Board.

The Campaign filed appeals from Judge Crumlish's orders in the Commonwealth Court on November 14, 2020, and the next day the Commonwealth Court issued an order consolidating the five appeals and setting an expedited briefing schedule. On November 17, 2020, the Philadelphia Board filed an application with this Court to exercise its extraordinary jurisdiction, 42 Pa.C.S. § 726, over the consolidated appeals, which we granted by order dated November 18, 2020.

In our order granting the Philadelphia Board's application for the exercise of extraordinary jurisdiction, we stated the issue to be decided as follows:

> Does the Election Code require county boards of elections to disqualify mailin or absentee ballots submitted by qualified electors who signed their ballot's outer envelopes but did not handwrite their name, their address, and/or a date, where no fraud or irregularity has been alleged?

On November 10, 2020, the Allegheny County Board decided to canvass 2,349 mail-in ballots that contained a signed but undated declaration. Ziccarelli challenged the decision in an appeal to the court of common pleas ultimately heard and decided by the Honorable Joseph James. It was not disputed that all 2,349 voters signed and printed their name and address on the outer envelopes and returned the ballots to the Allegheny County Board on time. Each of the ballots was processed in the Statewide Uniform Registry of Electors ("SURE") system and was time-stamped when it was delivered to the Allegheny County Board on or before November 3, 2020. At a hearing, via Microsoft Teams, on November 17, 2020, the Democratic Party and James Brewster (Ziccarelli's opponent in the 45th Senatorial District race) moved to intervene, which motion was granted. At the hearing, Ziccarelli stated that she was not claiming voter fraud regarding the challenged ballots.

In an opinion and order dated November 18, 2020, Judge James affirmed the Allegheny County Board's decision to count the ballots. He concluded that the date provision in Section 3150.16(a) is directory, not mandatory, and that "ballots containing mere minor irregularities should only be stricken for compelling reasons," citing Shambach v. Bickhart, 577 Pa. 384, 845 A.2d 793, 798 (2004). Noting that the ballots were processed in the SURE system and timestamped when delivered to the Allegheny County Board, he found that the technical omission of the handwritten date on a ballot was a minor technical defect and did not render the ballot deficient.

Ziccarelli immediately appealed Judge James' decision to the Commonwealth Court and contemporaneously filed an application to this Court requesting our exercise of extraordinary jurisdiction, noting that the issue presented was accepted by this Court as part of the Philadelphia Board appeals. While the application was pending, the Commonwealth Court ordered expedited briefing and on November 19, 2020, issued an opinion and order reversing the Court of Common Pleas of Allegheny County and remanded. In Re: 2,349 Ballots in the 2020 General Election; Appeal of: Nicole Ziccarelli, 241 A.3d 694, 1162 C.D. 2020 (Commw. Ct. 2020). Ziccarelli then withdrew her application for extraordinary jurisdiction.

*1070 On November 20, 2020, this Court granted the Allegheny County Board's Petition for Allowance of Appeal limited to the question of whether the ballots contained in undated but signed outer envelopes should be invalidated. The opinion of the Commonwealth Court will be discussed, as necessary, in the analysis that follows. The order was stayed pending our disposition of these consolidated cases.

The pertinent scope and standard of review follow: the Court of Common Pleas' decision is reviewed on appeal "to determine whether the findings are supported by competent evidence and to correct any conclusions of law erroneously made." In re Reading Sch. Bd. of Election, 535 Pa. 32, 634 A.2d 170, 171-72 (1993). The Court of Common Pleas, in turn, could reverse the Philadelphia Board's decision only for an abuse of discretion or error of law. See Appeal of McCracken, 370 Pa. 562, 88 A.2d 787, 788 (1952). As the issue involves the proper interpretation of the Election Code, it presents a question of law and our standard of review is de novo and our scope of review is plenary. See, e.g., Banfield v. Cortés, 631 Pa. 229, 110 A.3d 155, 166 (2015).

II. ARGUMENTS OF THE PARTIES

Although more fully developed in our analysis set forth later in this opinion, we here briefly summarize the arguments of the parties and intervenors.

The Campaign argues that the General Assembly set forth in the Election Code the requirements for how a qualified elector can cast a valid absentee or mail-in ballot. Campaign's Brief at 22. One of those requirements is for each elector to "fill out, date, and sign" the declaration on the Outside Envelope. Id. (citing 25 P.S. §§ 3146.6(a) and 3150.16(a)). According to the Campaign, this Court has repeatedly ruled that the requirements of the sections of Election Code relevant here impose mandatory obligations, and that ballots cast in contravention of the these requirements are void and cannot be counted. Id. at 23. As a result, the Campaign insists that the trial court erred in affirming the Board's decision to count the 8,329 non-conforming absentee and mail-in ballots. Id.

The Philadelphia Board, conversely, contends that the Election Code does not require the Philadelphia Board to set aside timely-filed ballots by qualified electors that are merely missing handwritten names, street addresses, and/or dates on the signed voter declaration. Philadelphia Board's Brief at 12. Contrary to the Campaign's contention that the provisions of the Election Code at issue here impose exclusively mandatory requirements, the Philadelphia Board argues that Pennsylvania courts have long held that minor errors or omissions should not result in disenfranchisement, particularly in cases where the errors or omissions do not implicate the board's ability to ascertain the voter's right to vote or the secrecy or sanctity of the ballot. Id. Here, the Philadelphia Board notes that the Campaign does not allege that the voters at issue here were not qualified to vote and have not asserted that any fraud or other impropriety has occurred. Id. As such, it concludes that it acted properly and within its discretion in determining that these omissions were not a basis for setting aside those ballots. Id.

The DNC largely concurs with the Philadelphia Board's arguments, indicating that there is no statutory requirement that voters print their full name or address on the outer envelopes and that adding a date to the envelope serves no compelling purpose. DNC's Brief at 9-10.

Ziccarelli argues further that, in regard to outer envelopes not containing a voter-supplied date, this Court's opinion in *1071 In Re: Nov. 3, 2020 General Election, -Pa. —, 240 A.3d 591 (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 Ziccarelli's reliance on In Re Nov. 3, 2020 General Election by noting that Ziccarelli'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 Ziccarelli relies.

III. ANALYSIS

We begin by recognizing from the outset that it is the "longstanding and overriding policy in this Commonwealth to protect the elective franchise." Shambach v. Bickhart, 577 Pa. 384, 845 A.2d 793, 798 (2004). "The Election Code must be liberally construed so as not to deprive ... the voters of their right to elect a candidate of their choice." Ross Nomination Petition, 411 Pa. 45, 190 A.2d 719, 719 (1963). It is therefore a well-settled principle of Pennsylvania election law that "[e]very rationalization within the realm of common sense should aim at saving the ballot rather than voiding it." Appeal of Norwood, 382 Pa. 547, 116 A.2d 552, 554-55 (1955). It is likewise settled that imbedded in the Election Code is the General Assembly's intent to protect voter privacy in her candidate choice based on Article VII, Section 4 of the Pennsylvania Constitution and to prevent fraud and to otherwise ensure the integrity of the voting process.

We agree with the Campaign's observation that in Sections 3146.6(a) and 3150.16(a), the General Assembly set forth the requirements for how a qualified elector may cast a valid absentee or mail-in ballot. Campaign's Brief at 22. We further agree that these sections of the Election Code specifically provide that each voter "shall fill out, date, and sign" the declaration on the outside envelope. Id. We do not agree with the Campaign's contention, however, that because the General Assembly used the word "shall" in this context, it is of necessity that the directive is a mandatory one, such that a failure to comply with any part of it requires a board of elections to declare the ballot void and that it cannot be counted. It has long been part of the jurisprudence of this Commonwealth that the use of "shall" in a statute is not always indicative of a mandatory directive; in some instances, it is to be interpreted as merely directory. See, e.g., Commonwealth v. Baker, 547 Pa. 214, 690 A.2d 164, 167 (1997) (citing Fishkin v. Hi–Acres, Inc., 462 Pa. 309, 341 A.2d 95 (1975)); see also Commonwealth ex rel. Bell v. Powell, 249 Pa. 144, 94 A. 746, 748 (1915) (quoting Bladen v. Philadelphia, 60 Pa. 464, 466 (1869) ("It would not perhaps be easy to lay down any general rule as to when the provisions of a statute are merely directory, and when mandatory and imperative.")). The Campaign's reliance on this Court's recent decision in Pa. Democratic Party v. Boockvar, — Pa. —, 238 A.3d 345 (2020) for the proposition it asserts is misplaced.

In Pa. Democratic Party, we held that the requirement in Section 3150.16(a) that a mail-in voter place his or her ballot in the inner secrecy envelope was a mandatory requirement and thus a voter's failure to comply rendered the ballot void. Pa. Democratic Party, 238 A.3d at 380. In concluding that the use of the secrecy envelope was a mandatory, rather than a discretionary directive, we reviewed our prior decisions on the distinction between mandatory and discretionary provisions in the Election Code, including Shambach v. Bickhart, 577 Pa. 384, 845 A.2d 793 (2004), *1072 In re Luzerne County Return Board, Appeal of Elmer B. Weiskerger, 447 Pa. 418, 290 A.2d 108 (1972), and In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, Appeal of John Pierce, 577 Pa. 231, 843 A.2d 1223 (2004).

In Shambach, the Court declined to invalidate a write-in vote cast for a candidate who was named on the ballot, in direct violation of the Election Code's instruction that a voter could only write in a person's name if the name of said individual was "not already printed on the ballot for that office." Shambach, 845 A.2d at 795. In reaching that conclusion, the Court observed that "[m]arking a ballot is an imprecise process, the focus of which is upon the unmistakable registration of the voter's will in substantial conformity to the statutory requirements." Id. at 799 (quoting Appeal of Gallagher, 351 Pa. 451, 41 A.2d 630, 632 (1945)).

In Weiskerger, this Court refused to invalidate a ballot based upon the "minor irregularity" that it was completed in the wrong color of ink. The provision of the Election Code in question provided that "' '[a]ny ballot that is marked in blue, black or blue-black ink ... shall be valid and counted.'

Weiskerger, 290 A.2d at 109 (citing 25 P.S. § 3063). In providing that ballots completed in the right color must be counted, we noted that the General Assembly "neither stated nor implied that ballots completed in a different color must not be counted." *Id.* We thus treated the instruction to use blue, black or blue-black ink as merely directory.

In Pa. Democratic Party, we compared these cases to our decision in In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, Appeal of John Pierce, 577 Pa. 231, 843 A.2d 1223 (2004), where we held that the Election Code's "inperson" ballot delivery requirement, see 25 P.S. § 3146.6, was mandatory, and that votes delivered by third persons must not be counted. Appeal of Pierce, 843 A.2d at 1231. There, we recognized that the in-person requirement served important purposes in the Election Code, including "limit[ing] the number of third persons who unnecessarily come in contact with the ballot[,] ... provid[ing] some safeguard that the ballot was filled out by the actual voter, ... and that once the ballot has been marked by the actual voter in secret, no other person has the opportunity to tamper with it." Id. at 1232. We thus explained in Pa. Democratic Party that "the clear thrust of Appeal of Pierce, ... is that, even absent an express sanction, where legislative intent is clear and supported by a weighty interest like fraud prevention, it would be unreasonable to render such a concrete provision ineffective for want of deterrent or enforcement mechanism." Pa. Democratic Party, 238 A.3d at 380 (citing *Appeal of Pierce*, 843 A.2d at 1232).

Based upon this comparison between *Shambach*, *Weiskerger* and Appeal of Pierce, in Pa. Democratic Party we determined that the decision in *Appeal of Pierce* provided the appropriate guidance for the analysis of the secrecy envelope requirement. We held that "[i]t is clear that the Legislature believed that an orderly canvass of mail-in ballots required the completion of two discrete steps before critical identifying information on the ballot could be revealed. The omission of a secrecy envelope defeats this intention." Pa. Democratic Party, 238 A.3d at 380. Unlike in Shambach and Weiskerger which involved "minor irregularities," the use of a secrecy envelope implicated a "weighty interest," namely secrecy in voting protected expressly by Article VII, Section 4 of our state charter. Id. As such, we recognized the use of a secrecy envelope as a mandatory requirement and that failures to comply with the requirement required that the ballot must be disqualified." Id.; see also id. at 378 (quoting JPay, Inc. v. Dep't of Corr. & Governor's Office of Admin., 89 A.3d 756, 763 (Pa. Commw. 2014) ("While *1073 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.")).

To determine whether the Election Code's directive that the voter handwrite their names, address and the date of signing the voter declaration on the back of the outer envelope is a mandatory or directory instruction requires us to determine whether the intent of the General Assembly was clear and whether the failure to handwrite the information constitutes "minor irregularities" or instead represent "weighty interests," like fraud prevention or ballot secrecy that the General Assembly considered to be critical to the integrity of the election.

(1) Failures to include handwritten names and addresses

Beginning with the Campaign's contention that ballots may not be counted if a voter fails to handwrite their name and/ or address under the full paragraph of the declaration on the back of the outer envelope, we conclude that given the factual record in this case and the mechanics of the pre-canvassing and canvassing procedures including the incorporation of reliance on the SURE system, this "requirement" is, at best, a "minor irregularity" and, at worst, entirely immaterial. More to the point, the direction to the voter to provide a handwritten name and/or address is not only not mandatory, it is not a directive expressed in the Election Code. Thus, these directions do not meet the first prong of the test used in Pa. Democratic Party: the clear intent of the General Assembly.

The Election Code does not require that the outer envelope declaration include a handwritten name or address at all. Instead, Sections 3146.4 (absentee) and 3150.14(b) (mail-in) provide only that the declaration must include "a statement of the elector's qualifications, together with a statement that the elector has not already voted in the primary or election." 25 P.S. §§ 3146.4, 3150.14(b). Aside from this information (none of which is relevant to the present issue), the General Assembly delegated to the Secretary of the Commonwealth the obligation to prescribe the form of declaration and envelope for absentee and mail-in ballots, presumably to allow the inclusion of information that would be helpful for administrative or processing purposes. Id. ² As such, the decision to include spaces in the declaration for handwritten names and addresses was made solely by the Secretary of the Commonwealth, not the General Assembly.

It would be a stretch to divine that the General Assembly was advancing any weighty interest for the inclusion of handwritten names and addresses in the declaration such that a voter's failure to include them should result in the ballot not being counted. Moreover, the Campaign does not argue that the Secretary's request for handwritten names and addresses implicated any "weighty interests" that would compel a finding that the request to provide them constituted a mandatory requirement.³

*1074 The Campaign argues that we should read the "handprinted name and address" requirement into the directives in Section 3146.6(a) and 3150.16(a) that the voter "fill out" the declaration. Campaign's Brief at 30. Citing to dictionary definitions, the Campaign contends that "fill out" means "to write or type information in spaces that are provided for it." Id. at 32. Because 8,349 voters did not "fill out" one or more spaces provided on the outer envelope provided in the declaration (including the voter's name and/ or address), the Campaign argues that those ballots were nonconforming and could not be counted. Id. at 29. The directive to "fill out" does not give any legislative definition to the specific information to be placed in the blank spaces. It is the weight of the information that must be tested in the analysis. As stated, since the General Assembly did not choose the information to be provided, its omission is merely a technical defect and does not invalidate the ballot.

Further, as Judge Crumlish observed, the term "fill out" is ambiguous. ⁴ Trial Court Opinion, 11/13/2020, ¶ 4. As Judge Crumlish recognized, the term "fill out" is not a defined term under the Election Code. Id. Moreover, and contrary to the Campaign's contention that no alternative understanding of the term "fill out" has been proffered, the Campaign has failed to recognize, the voter's name and address are already on the back of the outer envelope on a pre-printed label affixed no more than one inch from the declaration itself. A voter could reasonably have concluded that the blanks requesting his or her name and address needed to be "filled out" only if the name and/or address on the label was incorrect or incomplete, as it was unnecessary to provide information that was already on the back of the outer envelope. 5 To add *1075 further confusion, the declaration itself can be read to refer to the label: "I hereby declare that I am qualified to vote from the below stated address" can be read to mean the address as already stated on the label.

The text of the Election Code provides additional evidence of the directory nature of the provisions at issue. With regard to individuals who are not able to sign their name due to illness or physical disability, the General Assembly imposed a requirement that the declarant provide his or her "complete address." 25 P.S. § 3146.6(a)(3); 25 P.S. § 3150.16(a.1). These provisions demonstrate that the General Assembly clearly knew how to impose such a requirement when it wishes to do so. In re Nov. 3, 2020 Gen. Election, — Pa. —, 240 A.3d 591, 610-11 (2020) (stating that the General Assembly's prior inclusion of a signature comparison requirement demonstrated that "it understands how to craft language requiring signature comparisons at canvassing when it chooses to do so"). Moreover, Sections 3146.6(a)(3) and 3150.16(a.1) contain a precise form of declaration, crafted by the General Assembly, pertaining to voters with disabilities evidencing the General Assembly's understanding of how to mandate a precise declaration without resort to delegating non-essential information to the Secretary.

Finally, the text of the Election Code further demonstrates the lack of any need for handwritten names and addresses. Section 3146.8(g)(3), which relates to the canvassing of official absentee ballots and mail-in ballots, provides, in relevant part:

When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable.

25 P.S. § 3146.8(g)(3). The county board of elections' duty to keep a "Military Veterans and Emergency Civilians Absentee Voters File," which is not relevant to the current dispute, is governed by 25 P.S. § 3146.2c(b). Section 3146.2c(a) previously housed the board's duty to keep a "Registered Absentee and Mail-in Voters File." However, the General Assembly recently eliminated this directive. See 2020, March 27, P.L. 41, No. 12, § 8, imd. effective (deleting subsection (a), which required county board of elections to maintain at its office "a file containing the duplicate absentee voter's temporary registration cards of every registered elector to whom an absentee ballot has been sent"). By virtue of this amendment, the General Assembly eliminated one of the reference points that still appear in Section 3146.8(g)(3). The current Section 3146.2c(c) directs the county board to maintain the "the absentee voters' list" referenced in Section 3146.8(g)(3). The General Assembly also amended Section 3146.2c(c), which previously only directed the chief clerk to "prepare a list for each election district showing the names and post office addresses of all voting residents thereof to whom official absentee ballots shall have been issued," to include such voting residents who were issued mail-in ballots. *See* 2019, Oct. 31, P.L. 552, No. 77, § 5.1, imd. effective (inserting "or mail-in" twice in subsection (c)).

*1076 As such, as relevant for our purposes, Section 3146.8(g)(3) directs that "the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the ... the absentee voters' list," which, pursuant to Section 3146.2c(c), now also contains voters who received mail-in ballots. A close reading of the language chosen by the General Assembly here is telling. Section 3146.8(g)(3) directs the board to "examine the declaration on the envelope" and "compare the information thereon" to the absentee (and mailin) voters' list. 25 P.S. § 3146.8(g)(3) (emphasis added). Reading these phrases together, it is clear that the General Assembly intended that the information to be compared to the absentee (and mail-in) voters' list is the information on the outer envelope which includes the pre-printed name and address. If the General Assembly intended for the information written by the voter to be compared to the absentee voters' list, it would have used the term "therein," thus directing the board to compare the information contained "within" the declaration (the handwritten name and address).

The following sentence in this section further suggests that the General Assembly intended such bifurcation. Section 3146.8(g)(3) next states:

If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the ... the absentee voters' list ... verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3). Here, the board is directed to consider whether the declaration is sufficient (i.e., the examination contained in the previous sentence) and also ensure that the absentee voters' list confirms the voter's right to vote (i.e., the comparison of the printed information to the relevant list from the prior sentence).

(2) Failures to include dates

Both the Campaign and Ziccarelli argue that the requirement to state the date on which declaration was signed is a mandatory obligation requiring disenfranchisement for lack of compliance. We disagree, as we conclude that dating the declaration is a directory, rather than a mandatory, instruction, and thus the inadvertent failure to comply does not require that ballots lacking a date be excluded from counting. As reviewed hereinabove, in our recent decision in Pa. *Democratic Party*, we reiterated that the distinction between directory and mandatory instructions applies with respect to a voter's obligations under the Election Code, and that only failures to comply with mandatory obligations, which implicate both legislative intent and "weighty interests" in the election process, like ballot confidentiality or fraud prevention, will require disqualification. Pa. Democratic Party, 238 A.3d at 379-80.

The Commonwealth Court and Ziccarelli relied upon the Election Code's use of the of "shall ... date" language in construing the date obligation as mandatory. In Re: 2,349 Ballots in the 2020 General Election, Appeal of: Nicole Ziccarelli, 241 A.3d 694, 1162 C.D. 2020, 10 (Pa. Comm. 2020). Although unlike the handwritten name and address, which are not mentioned in the statute, the inclusion of the word "date" in the statute does not change the analysis because the word "shall" is not determinative as to whether the obligation is mandatory or directive in nature. That distinction turns on whether the obligation carries "weighty interests." The date that the declaration is signed is irrelevant to a board of elections' comparison of the voter declaration *1077 to the applicable voter list, and a board can reasonably determine that a voter's declaration is sufficient even without the date of signature. Every one of the 8,329 ballots challenged in Philadelphia County, as well as all of the 2,349 ballots at issue in Allegheny County, were received by the boards of elections by 8:00 p.m. on Election Day, so there is no danger that any of these ballots was untimely or fraudulently back-dated. Moreover, in all cases, the receipt date of the ballots is verifiable, as upon receipt of the ballot, the county board stamps the date of receipt on the ballotreturn and records the date the ballot is received in the SURE system. The date stamp and the SURE system provide a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superflous.

Ziccarelli offers two alternative "weighty interests" for our consideration. She first contends that the date on which the declaration was signed may reflect whether the person is a "qualified elector" entitled to vote in a particular election. Pursuant to Section 3150.12b (entitled "Approval of application for mail-in ballot"), a board of elections may have determined that the person was a qualified elector and thus entitled to receive a mail-in ballot. Pursuant to Section 2811, however, to be a qualified elector, "[h]e or she shall have resided in the election district where he or she shall offer to vote at least thirty days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within thirty days preceding the election." 25 P.S. § 2811. As a result, Ziccarelli contends that the person may have been qualified to vote in a particular voting district at the time of applying for a mail-in ballot, but no longer a qualified elector in that voting district on Election Day. Ziccarelli's Brief at 16.

This unlikely hypothetical scenario is not evidence of a "weighty interest" in the date on the document for assuring the integrity of Pennsylvania's system for administering mailin voting. Among other things, the canvassing statute, 25 P.S. $\S 3146.8(g)(3)$, directs the board to examine the declaration on the envelope of each ballot and compare the information thereon with that contained in the now defunct "Registered Absentee and Mail-in Voters File." See discussion supra pp. 1073-75. The date of signing the declaration will not be of any benefit in performing this task, as the name of the voter at issue will be on this list (as a result of his or her approval to receive a mail-in ballot), and the date of signing will provide no information with respect to whether or not he or she has left the voting district in the interim. Most critically, our current statutory framework includes no requirement that a county board of elections investigate whether an individual who had been confirmed as a qualified elector at the time of approval to receive a mail-in ballot remains as a qualified elector on Election Day. If the General Assembly had so intended, it would certainly have expressly stated it, as opposed to nebulously tucking such an unprecedented requirement into the instructions to the Secretary for designing the declaration. Second, Ziccarelli argues that the date of signature of the declaration will serve to prevent double voting, as "whether an elector has already voted in the election for which the ballot is issued, by its very nature, depends on the date on which the declaration was signed." Ziccarelli's Brief at 16. Boards of elections do not use signatures or any handwritten information to prevent double voting. Duplicate voting is detected by the use of bar codes through the SURE system, and the board identifies the earlier cast vote by referencing the date it received the ballot, not the date on which the declaration was signed.

*1078 Ziccarelli and the Commonwealth Court insist that this Court "has already held that mail-in ballots with undated declarations are not 'sufficient' and, thus, must be set aside." Ziccarelli's Brief at 9; In Re: 2,349 Ballots in the 2020 General Election, 1162 C.D. 2020, at 10. In support of this contention, they reference an observation in our recent decision in In re November 3, 2020 General Election, — Pa. —, 240 A.3d 591 (2020), that when assessing the sufficiency of a voter's declaration, "the county board is required to ascertain whether the return envelope has been filled out, dated, and signed - and if it fails to do so then the ballot cannot be designated as "sufficient" and must be set aside. 6 Id. at 608-09. This statement is being taken out of context. Our statement in 2020 General Election was in reference to the limitations on what an election board is directed by the statute to do when assessing the sufficiency of a voter's declaration for the express purpose of indicating what they were not to do, i.e., signature comparisons. The question in In Re: Nov. 3, 2020 General Election was a narrow one. We did not address (as it was not at issue) whether a county board of elections could find a declaration as sufficient even though it was undated. That question requires an entirely different analysis that depends in significant part on whether dating was a mandatory, as opposed to a directive, requirement. We have conducted that analysis here and we hold that a signed but undated declaration is sufficient and does not implicate any weighty interest. Hence, the lack of a handwritten date cannot result in vote disqualification.

IV. CONCLUSION

As we recognized in Pa. Democratic Party, "while both mandatory and *1079 directory provisions of the Legislature are meant to be followed, the difference between a mandatory and directory provision is the consequence for noncompliance: 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. Here we conclude that while failures to include a handwritten name, address or date in the voter declaration on the back of the outer envelope, while constituting technical violations of the Election Code, do not warrant the wholesale disenfranchisement of thousands of Pennsylvania voters. As we acknowledged in Shambach, "ballots containing mere minor irregularities should only be stricken for compelling reasons." Shambach, 845 A.2d at 799; see also Appeal of Gallagher, 351 Pa. 451, 41 A.2d 630, 632 (1945) ("[T]he power to throw out a ballot for minor irregularities ... must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons."). Having found no compelling reasons to do so, we decline to intercede in the counting of the votes at issue in these appeals.

The decision of the Philadelphia Court of Common Pleas is hereby affirmed. The decision of the Commonwealth Court is hereby reversed and the decision of the Allegheny County Court of Common Pleas is reinstated.

Justices Baer and Todd join the opinion.

Justice Wecht concurs in the result and files a concurring and dissenting opinion.

Justice Dougherty files a concurring and dissenting opinion in which Chief Justice Saylor and Justice Mundy join.

CONCURRING AND DISSENTING OPINION

JUSTICE WECHT

I agree with the conclusion that no mail-in or absentee ballot should be set aside solely because the voter failed to hand print his or her name and/or address on the declaration form on the ballot mailing envelope. These items are prescribed not by statute but by the Secretary of the Commonwealth under legislatively delegated authority. Absent evidence of legislative intent that what in context amounts to redundant information must be furnished to validate a mail ballot, their omission alone should not deny an elector his or her vote. But I part ways with the conclusion reflected in the Opinion Announcing the Judgment of the Court ("OAJC") that a voter's failure to comply with the statutory requirement that voters date the voter declaration should be overlooked as a "minor irregularity." This requirement is stated in unambiguously mandatory terms, and nothing in the Election Code 1 suggests that the legislature intended that courts should construe its mandatory language as directory. Thus, in future elections, I would treat the date and sign requirement as mandatory in both particulars, with the omission of either item sufficient without more to invalidate the ballot in question.² However, under the circumstances *1080 in which the issue has arisen, I would apply my interpretation only prospectively. So despite my reservations about the OAJC's analysis, I concur in its disposition of these consolidated cases.

Concurring in this Court's recent decision in Pennsylvania Democratic Party v. Boockvar, I expressed my increasing discomfort with this Court's willingness to peer behind the curtain of mandatory statutory language in search of some unspoken directory intent.

[If this Court is] to maintain a principled approach to statutory interpretation that comports with the mandate of our Statutory Construction Act, ³ if we are to maximize the likelihood that we interpret statutes faithfully to the drafters' intended effect, we must read mandatory language as it appears, and we must recognize that a mandate without consequence is no mandate at all. 4

There, I wrote separately in support of this Court's ruling requiring the invalidation of mail-in ballots that were returned to boards of elections not sealed in their secrecy envelopes as required by statutory language. The secrecy envelope requirement at issue in that case was no less ambiguous than the "fill out, date and sign" mandate at issue in this case. 5 Nonetheless, departing from that holding for reasons that do not bear close scrutiny, the OAJC concludes that invalidation should not follow for failure to comply with the Election Code provisions requiring that "the elector shall ... fill out, date and sign the declaration printed on" the ballot mailing envelope, even though this requirement appears in precisely the same statutory provisions as were at issue in *PDP*.

Section 3150.16 of the Election Code, governing "[v]oting by mail-in electors"—and its counterpart for absentee ballots, which employs the same operative language ⁶—provides:

> At any time after receiving an official mail-in ballot, but on 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 *1081 franked, or deliver it in person to said county board of election. 7

While this Court has not reviewed every constituent step this provision prescribes, we have addressed several of the requirements, taking it upon ourselves to weigh in each instance whether to interpret the mandatory statutory language as being mandatory in fact. The law those cases now comprise is so muddled as to defy consistent application, an inevitable consequence of well-meaning judicial efforts to embody a given view of what is faithful to the spirit of the law, with the unfortunate consequence that it is no longer clear what "shall" even means.

Nearly fifty years ago, this Court considered whether a ballot completed in red or green ink should be counted given that the statute provided by its terms only for the canvassing of ballots completed in blue/black ink. ⁸ Then-applicable Section 3063 of the Election Code provided that "[a]ny ballot that is marked in blue, black or blue-black ink, in fountain pen or ball point pen, or black lead pencil or indelible pencil, shall be valid and counted." ⁹ The Court determined that the Code did not require the invalidation of ballots completed in other colors, holding that the mandatory language was merely directory in effect:

[T]he power to throw out a ballot for minor irregularities should be sparingly used. It should be done only for very compelling reasons. Marking a ballot in voting is a matter not of precision engineering but of an unmistakable registration of the voter's will in substantial conformity to statutory requirements. In construing election laws[,] while we must strictly enforce all provisions to prevent fraud over overriding concern at all times must be to be flexible in order to favor the right to vote. Our goal must be to enfranchise and not to disenfranchise. This section of the code merely assures the validity of ballots marked in blue, black or blue-black ink. It does not ... specify that any other type of marking will necessarily be void. We have noted in other cases that the dominant theme of this section is to prevent ballots from being identifiable. A ballot should not be invalidated under [25 P.S. § 3063] unless the voter purposely makes a mark thereon or commits some other act in connection with this ballot to distinguish and identify it. The proper interpretation of this portion of the statute considering the occasion for its enactment, the mischief to be remedied, and the policy to liberally construe voting laws in the absence of fraud, is that the ballot is valid unless there is a clear showing that the ink used was for the purpose of making the ballot identifiable. 10

As this Court later stressed in *Appeal of Pierce*, *Weiskerger* "was decided before the enactment of the Statutory Construction Act [("SCA")], which dictates that legislative intent is to be considered only when a statute is ambiguous." 11 Thus, while *Pierce* focused on distinguishing *1082 Weiskerger, it nonetheless implicitly called into question the Weiskerger Court's casual dismissal of the language of the statute there at issue because the various factors the Weiskerger Court cited as relevant to its decision not to give "shall" mandatory effect are relevant under the SCA only when the statute is susceptible of two or more reasonable interpretations. 12

In insisting that a court's goal should be to "enfranchise and not to disenfranchise" and to be "flexible" in furtherance of that goal, the Weiskerger Court found itself awash in language so slippery as to defy consistent application. The Court posited the existence of "minor irregularities," a term we repeat often but have yet to define with suitable rigor, ¹³ and posited that ballots should be invalidated only for "very compelling reasons." 14 It also blessed "substantial conformity," and directed courts to "be flexible in order to favor the right to vote"—evidently even when doing so runs counter to statutory directives stated in mandatory terms. ¹⁵

Perhaps most troublingly, the Court posited that its "goal must be to enfranchise and not to disenfranchise." ¹⁶ A court's only "goal" should be to remain faithful to the terms of the statute that the General Assembly enacted, employing only one juridical presumption when faced with unambiguous language: that the legislature meant what it said. And even where the legislature's goal, however objectionable, is to impose a requirement that appears to have a disenfranchising effect, it may do so to any extent that steers clear of constitutional protections. In any event, even if the Weiskerger Court faithfully applied the common-law principles it cited, it did so inconsistently with the SCA's contrary guidance, which issued later the same year and binds us today. ¹⁷

*1083 But the advent of the SCA did not prevent this Court from repeating the same mistake even decades later. In Shambach v. Bickhart, ¹⁸ a voter wrote in a candidate for office despite the fact that the candidate appeared on the official ballot for that office. This facially violated the Election Code, which provided that the voter shall, in the designated area, "write the identification of the office in question and the name of any person not already printed on the ballot for that office, and such mark and written insertion shall count as a vote for that person for such office." ¹⁹ Echoing Weiskerger, the Shambach Court observed that, "although election laws must be strictly construed to prevent fraud, they ordinarily will be construed liberally in favor of the right to vote." ²⁰ Thus, the Court

"[has] held that ballots containing mere irregularities should only be stricken for compelling reasons." ²¹ In support of this particular proposition, though, the Court cited only decisions that predated the SCA. 22 Much as in Weiskerger, the Court held that the absence of statutory language requiring the invalidation of a ballot completed in violation of the mandatory language of Section 3031.12(b)(3), combined with the amorphous principles it drew from the Court's prior cases, precluded the invalidation of a nonconforming ballot, effectively writing unambiguous language out of the Election Code entirely.

We restored a greater degree of rigor in *Pierce*. In that case, we considered whether absentee ballots delivered by third persons on behalf of non-disabled voters were invalid under the Election Code, which provided that "the elector shall send [the absentee ballot] by mail, postage prepaid, except where franked, or deliver it in person to said county board of election." ²³ There, in a step the *Shambach* Court tacitly bypassed, the Court underscored the SCA's direction that a court's sole objective in construing a statute is to "ascertain and effectuate the intention of the General Assembly," and that, "[g]enerally speaking, the best indication of legislative intent is the plain language of a statute." ²⁴ "[I]t is only when the words of a statute 'are not explicit' that a court may resort to other considerations, such as the statute's perceived 'purpose,' in order to ascertain legislative intent." ²⁵ In this light, the Court turned to the legislature's use of the word "shall." "Although some contexts may leave the precise meaning of the word 'shall' in doubt," the Court opined, "this *1084 Court has repeatedly recognized the unambiguous meaning of the word in most contexts." ²⁶ As noted *supra*, this Court in *Pierce* declined to treat *Weiskerger* as controlling in part because it was decided before the enactment of the SCA. While we did not assert Weiskerger's abrogation, we certainly cast doubt upon its probity, as well, by extension, as all similarly permissive Election Code case law relying upon the presumption to count votes that violated the Code's unambiguous directives.

In *In re Scroggin*, ²⁷ too, we applied the relevant statutory language strictly in conformity with its terms, despite colorable arguments that doing so would deny ballot access to a candidate who had "substantially complied" with the statutory requirements. And at issue in that case was not merely the votes of a small percentage of otherwise qualified voters, but whether a political body's Presidential candidate would appear on the ballot at all in the wake of a placeholder nominee's failure to satisfy the Code's mandatory affidavit requirement. "[T]he provisions of the election laws relating to the form of nominating petitions and the accompanying affidavits are not mere technicalities," we explained, "but are necessary measures to prevent fraud and to preserve the integrity of the election process. ... Thus, the policy of the liberal reading of the Election Code cannot be distorted to emasculate those requirements necessary to assure the probity of the process." 28

Finally, in *PDP*, we held that the failure strictly to comply with the Election Code's mandatory requirement that mail-in ballots be sealed in the provided "Official Election Ballot" envelope required invalidation. Again, we specifically rejected the appellants' reliance upon Weiskerger and Shambach, relying instead upon Pierce. As in Pierce, we found that to interpret "shall" as directory rather than mandatory would render the Code's requirements "meaningless and, ultimately, absurd," notwithstanding the absence of an express, statutorily-prescribed sanction for non-compliance. 29 While we did not go out of our way to express as jaundiced a view of our cases holding that "minor irregularities" might be overlooked, the gravamen of our decision in that case, as in *Pierce*, was clear: shall means shall. 30

Although I joined the Majority in that case, I wrote separately to underscore the difficulties endemic to judicial efforts to discern ulterior meanings ostensibly obscured by the legislature's use of mandatory language. I observed that relying upon such unbounded investigations invited courts "to bend unclear texts toward whatever ends that they believe to be consonant with legislative intent, but with little or no contemporaneous insight into whether they have done so successfully." ³¹ Acknowledging that legislation is sometimes less than a model of clarity, and that this Court consequently will continue to face invitations to treat mandatory language as something less, I wrote: "[I]f we are to *1085 maintain a principled approach to statutory interpretation that comports with the mandate of [the SCA], if we are to maximize the likelihood that we interpret statutes faithfully to the drafters' intended effect, we must read mandatory language as it appears, and we must recognize that a mandate without consequence is no mandate at all." 32

It is against this case law, and particularly the views I expressed in PDP, that I review the question now before us, briefly addressing the Secretary-imposed name and address requirement first, before proceeding to consider the statutory requirement that the voter date and sign the voter declaration.

As to the former question, I agree with the OAJC's conclusion, although I subscribe to the narrower approach briefly set forth by Justice Dougherty in his Concurring and Dissenting Opinion and developed variously in the OAJC's analysis. But while the OAJC acknowledges the reasons that Justice Dougherty cites as militating against invalidation, it supplements them with the minor-irregularity analysis familiar from Weiskerger and Shambach, which is neither necessary nor advisable. Justice Dougherty's approach requires no reliance upon cases that *Pierce* and *PDP* rightly have called into question. Rather, the fact that the name and address requirement does not stem from mandatory statutory language, 33 as well as questions about the Secretary's authority to compel county boards of elections to conform with whatever guidance the Secretary offers. 34 combined with our presumption in favor of treating qualified voters' ballots as valid absent clear legal mandates to the contrary where statutory language is less than clear, ³⁵ collectively recommend against invalidating ballots for this omission alone. ³⁶ That is enough for me.

The same cannot be said about the date and sign requirement, which derives from an unmistakable statutory directive. Drawing upon our less rigorous case law, and relying heavily upon the interpretive latitude this Court has arrogated to itself sporadically for generations, the OAJC assumes that our mission is to determine whether the apparent mandate is in fact directory, hanging the entire inquiry upon the question of mandatory versus directory effect. That reading, in turn, must rely upon the "minor irregularity" / "weighty interest" dichotomy underlying the cases that Pierce and PDP have called into question.

> To determine whether the Election Code's directive that the voter handwrite their names, address, and the date of signing the voter declaration on the back of the outer envelope is a mandatory *1086 or directory instruction requires us to determine whether the intent of the General Assembly was clear and whether the failure to handwrite

the information constitutes "minor irregularities" or instead represent[s] "weighty interests" ... that the General Assembly considered to be critical to the integrity of the election. ³⁷

To be clear, the OAJC offers a commendably thorough analysis, but its length and involution is necessary only because of the open-ended inquiry it embarks upon. And it is no surprise that, like the cases upon which it relies, the OAJC involves protean characterizations of voting requirements as "technicalities," 38 "minor irregularities," 39 and even "superfluous." ⁴⁰ As illustrated in my review of earlier case law, the OAJC does not conjure this terminology from the ether—all but the last of these terms have been central to this Court's decisional law going back decades. But properly understood, all of these terms signal (and implicitly bless) the substitution of judicial appraisals for legislative judgments.

The OAJC's approach ultimately requires that in any case requiring interpretation of the Election Code to determine the validity of votes nonconforming with facially mandatory requirements, the Court must assess the effect of that language de novo before deciding whether the legislature intended for it to be interpreted as mandatory or merely directory. 41 Thus, while a court embracing that test might take it as obvious, e.g., that the signature requirement should be construed as mandatory, it could not merely have taken its mandatory effect as a given by virtue of the statutory language alone. If the mandatory/directory *1087 inquiry is ever appropriately applied to mandatory language, then the Court can only conclude that mandatory language must be applied as such after applying its balancing test, with cases that seem obvious merely reflecting that the Court deemed the "interest" to be protected so "weighty" that its omission clearly cannot be viewed as a "minor irregularity."

The only practical and principled alternative is to read "shall" as mandatory. Only by doing so may we restore to the legislature the onus for making policy judgments about what requirements are necessary to ensure the security of our elections against fraud and avoid inconsistent application of the law, especially given the certainty of disparate views of what constitute "minor irregularities" and countervailing "weighty interests."

I do not dispute that colorable arguments may be mounted to challenge the necessity of the date requirement, and the OAJC recites just such arguments. 42 But colorable arguments also suggest its importance, as detailed in Judge Brobson's opinion as well as Justice Dougherty's Concurring and Dissenting Opinion. ⁴³ And even to *indulge* these arguments requires the court to referee a tug of war in which unambiguous statutory language serves as the rope. That reasonable arguments may be mounted for and against a mandatory reading only illustrates precisely why we have no business doing so.

Ultimately, I agree with Judge Brobson's description of the greatest risk that arises from questioning the intended effect of mandatory language on a case-by-case basis:

> While we realize that our decision in this case means that some votes will not be counted, the decision is grounded in law. It ensures that the votes will not be counted because the votes are invalid as a matter of law. Such adherence to the law ensures equal elections throughout the Commonwealth, on terms set by the General Assembly. The 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 that will have some defective ballots counted and others discarded, depending on the county in which a voter resides. Such a patchwork system does not guarantee voters an "equal" election, particularly where the election involves intercounty and statewide offices. We do not enfranchise voters by absolving them of their responsibility to execute their ballots in accordance with law. 44

We must prefer the sometimes-unsatisfying clarity of interpreting mandatory language as such over the burden of seeking The Good in its subtext. Substantive perfection is the ever-elusive concern of the legislature. Ours must be consistency of interpretive method without fear or favor, a goal that recedes each time a court takes liberties with statutory language in furtherance of salutary abstractions. Because the OAJC favors a more intrusive and ambitious inquiry, I respectfully dissent.

But just because I disagree with the OAJC's interpretation of the date and sign requirement does not inexorably lead me to the conclusion that the votes at issue in *1088 this case must be disqualified. While it is axiomatic that ignorantia legis neminem excusat (ignorance of the law excuses no one), this Court may elect to apply only prospectively a ruling that overturns pre-existing law or issues a ruling of first impression not foreshadowed by existing law. Indeed, we have done so in at least one case under the Election Code. In Appeal of Zentner, 45 we confronted a statute governing candidates' obligation to submit statements of financial interests by a time certain that had been revised specifically to correct our previously fluid interpretations of the predecessor statute. We were forced to consider whether our newly strict construal of the revised statute should result in the invalidation of entire ballots already cast because they included one or more candidates who had failed to satisfy the statutory disclosures. We held, as the legislature clearly intended, that a candidate's "failure to file the requisite financial interests statement within the prescribed time shall be fatal to a candidacy." 46 But we also concluded that to "void the results of an election where all candidates were submitted to the voters, with late but nonetheless filed financial statements which left adequate time for study by the electorate, would be an unnecessary disenfranchisement." ⁴⁷ Thus we determined that our holding should apply prospectively but not to the election at issue. ⁴⁸

It goes without saying that 2020 has been an historically tumultuous year. In October of 2019, the legislature enacted Act 77, 49 introducing no-excuse mail-in voting with no inkling that a looming pandemic would motivate millions of people to avail themselves of the opportunity to cast their ballots from home in the very first year that the law applied. Soon thereafter, Act 12. 50 introduced and enacted with unprecedented alacrity in response to the pandemic, further amended the Election Code to address emergent concerns prompted by the looming public health crisis. While aspects of the new provisions that are relevant to this case were not wholly novel to the Code, as such—for example, the provisions that authorized no-excuse mail-in voting by and large just expanded the pool of voters to whom the rules that long had governed absentee balloting applied —the massive expansion of mail-in voting nonetheless presented tremendous challenges to everyone involved in the administration of elections, from local poll workers to the Secretary of the Commonwealth. Importantly, it transformed the incentives of probing the mail-in balloting provisions for vulnerabilities in furtherance of invalidating votes. For the *1089 first time, a successful challenge arising from a given technical violation of statutory requirements might result in the invalidation of many thousands of no-excuse mail-in ballots rather than scores or hundreds of absentee ballots.

In advance of the 2020 election, neither this Court nor the Commonwealth Court had occasion to issue a precedential ruling directly implicating the fill out, date and sign requirement. Moreover, as the OAJC highlights in multiple connections, the Secretary issued confusing, even contradictory guidance on the subject. ⁵¹ Thus, local election officials and voters alike lacked clear information regarding the consequence of, *e.g.*, failing to handwrite one's address on an envelope that already contained preprinted text with that exact address or record the date beside the voter's declaration signature.

I have returned throughout this opinion to our decision in PDP, and I do so once more. I maintained in that case that the Election Code should be interpreted with unstinting fidelity to its terms, and that election officials should disqualify ballots that do not comply with unambiguous statutory requirements, when determining noncompliance requires no exercise of subjective judgment by election officials. 52 The date requirement here presents such a case. But I also emphasized that disqualification is appropriate "[s]o long as the Secretary and county boards of elections provide electors with adequate instructions for completing the declaration of the elector-including conspicuous warnings regarding the consequences for failing strictly to adhere" to those requirements. 53 I cannot say with any confidence that even diligent electors were adequately informed as to what was required to avoid the consequence of disqualification in this case. As in Zentner, it would be unfair to punish voters for the incidents of systemic growing pains.

In case after case involving the Election Code, especially this year, we have been reminded how important it is that the General Assembly provide unambiguous guidance for the administration of the election process. But it is imperative that we recognize when the legislature has done precisely that, and resolve not to question the legislature's chosen language when it has done so. And perhaps it is a silver lining that many of the problems that we have encountered this year, in which a substantially overhauled electoral system has been forced to make its maiden run in stormy seas, are now clear enough that the legislature and Department of State have notice of what statutory refinements are most needful. It is my sincere hope that the General Assembly sees fit to refine and clarify the Election Code scrupulously in the light of lived experience. In particular, because 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. 54

CONCURRING AND DISSENTING OPINION

JUSTICE DOUGHERTY

*1090 I concur in the decision to affirm the lower courts' orders pertaining to ballots where the qualified electors failed to print their name and/or address on the outer envelope containing their absentee or mail-in ballots. However, 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." Opinion Announcing the Judgment of the Court (OAJC) at 1076–77. I therefore respectfully dissent from the holding at Section III(2) of the OAJC which provides that the undated ballots may be counted.

The applicable statutes require that electors "shall [] fill out, date and sign" the declaration printed on the ballot envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). In my view, the term "fill out" is subject to interpretation. Maybe it means printing one's name and address on the envelope, and maybe it does not. Given that our goal in interpreting the Election Code is to construe ambiguous provisions liberally, in order to avoid disenfranchisement where possible, I do not consider the failure of qualified electors to "fill out" their name and address, particularly where the name and address already appear on the other side of the envelope, to

require disqualification of the ballot. I am further persuaded of this position by the fact that the blank spaces on the envelope indicating where the name and address should be "filled out" were designated by the Secretary, not the General Assembly. 25 P.S. § 3146.4 ("Said form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth[.]"); see also Concurring and Dissenting Opinion at 1084–85 (Wecht, J.). But, the meaning of the terms "date" and "sign" — which were included by the legislature — are self-evident, they are not subject to interpretation, and the statutory language expressly requires that the elector provide them. See In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election, 577 Pa. 231, 843 A.2d 1223, 1231 (2004) ("[A]ll things being equal, the law will be construed liberally in favor of the right to vote but, at the same time, we cannot ignore the clear mandates of the Election Code.") (citation omitted). Accordingly, I do not view the absence of a date as a mere technical insufficiency we may overlook.

In my opinion, there is an unquestionable purpose behind requiring electors to date and sign the declaration. As Judge Brobson observed below, the date on the ballot envelope provides proof of when the "elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place. The presence of the date also establishes a point in time against which to measure the elector's eligibility to cast the ballot[.]" *1091 In Re: 2,349 Ballots in the 2020 General Election, 1162 C.D. 2020, slip op. at 12, 2020 WL 6820816 (Pa. Cmwlth. Nov. 19, 2020) (memorandum). The date also ensures the elector completed the ballot within the proper time frame and prevents the tabulation of potentially fraudulent back-dated votes. Cf. In re Canvass of Absentee Ballots of November 4, 2003 General Election, 843 A.2d at 1232-33 (statutory requirement that ballot be submitted by elector and not thirdparty is mandatory safeguard against fraud). I recognize there is presently no dispute that all undated ballots at issue here arrived in a timely manner. But I am also cognizant that our interpretation of this relatively new statute will act as precedential guidance for future cases.

Chief Justice Saylor and Justice Mundy join this concurring and dissenting opinion.

All Citations

241 A.3d 1058

Footnotes

- DNA Services Corp./Democratic National Committee (hereinafter "DNC") intervened in the proceedings 1 before the trial court.
- 2 None of the parties have challenged whether these provisions constituted improper delegations of legislative authority. Protz v. Workers' Compensation Appeal Board (Derry Area School District), 639 Pa. 645, 161 A.3d 827 (2017).
- Conversely, the Philadelphia Board and the DNC have both selectively relied upon guidance provided by 3 the Secretary to the county boards of election that indicated that a voter's failure to handwrite his/her name and address was not a ground to set the ballot aside. Philadelphia Board's Brief at 19; DNC's Brief at 15. They have directed the Court to the Guidance published on September 11, 2020, in which the Secretary advised that "[i]f the Voter's Declaration on the return envelope is signed and the county board is satisfied that the declaration is sufficient, the mail-in or absentee ballot should be approved for canvassing." Guidance, 9/11/2020, at 3. As discussed infra at n.6, however, on September 28, 2020 the Secretary issued arguably contrary guidance stating that "[a] ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted." Guidance, 9/28/20, at 9. Confusingly, she also incorporated by reference the September 11, 2020 Guidance. Both sets of Guidance are set forth on pages 1064-66 supra.

- 4 Where an election statute is ambiguous, courts apply the interpretative principle that that "election laws ... ordinarily will be construed liberally in favor of the right to vote." Pa. Democratic Party, 238 A.3d at 360–61.
- 5 The DNC argues, with some persuasive force, that the Campaign's requested interpretation of Pennsylvania's Election Code could lead to a violation of federal law by asking the state to deny the right to vote for immaterial reasons. Nobody acting under color of state law may deny anyone the right to vote "in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is gualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B).

Under this section, the so-called "materiality provision" of the Voting Rights Act, federal courts have barred the enforcement of similar administrative requirements to disqualify electors. See, e.g., Schwier v. Cox, 340 F.3d 1284 (11th Cir. 2003) (disclosure of voter's social security number is not "material" in determining whether a person is qualified to vote under Georgia law for purposes of the Voting Rights Act); Washington Ass'n of Churches v. Reed, 492 F.Supp.2d 1264 (W.D. Wash. 2006) (enjoining enforcement of "matching" statute, requiring state to match potential voter's name to Social Security Administration or Department of Licensing database, because failure to match applicant's information was not material to determining qualification to vote); Martin v. Crittenden, 347 F.Supp.3d 1302 (N.D. Ga. 2018), reconsideration denied, 1:18-CV-4776-LMM, 2018 WL 9943564 (N.D. Ga. Nov. 15, 2018) (voter's ability to correctly recite his or her year of birth on absentee ballot envelope was not material to determining said voter's qualifications).

6 In her brief, Ziccarelli cites to the Guidance distributed by the Secretary of the Commonwealth on September 28, 2020 to the county boards of elections, advising that "[a] ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted." As noted in footnote 3 supra, however, the Secretary also issued Guidance on September 11, 2020, which was cited with approval by the Philadelphia Board and the DNC. No party referenced both sets of Guidance, however, even though the September 28 Guidance incorporated the September 11 Guidance. See Guidance, 9/28/2020, at 9 ("For more information about the examination of return envelopes, please refer to the Department's September 11, 2020 Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes.").

In any event, we will not consider this Guidance in making our decision. Neither of the parties explain how the potentially contradictory directives are to be understood. More importantly, the Secretary has no authority to definitively interpret the provisions of the Election Code, as that is the function, ultimately, of this Court. The Secretary also clearly has no authority to declare ballots null and void. "[I]t is the Election Code's express terms that control, not the written guidance provided by the Department and as this Court repeatedly has cautioned, even erroneous guidance from the Department or county boards of elections cannot nullify the express provisions of the Election Code." In re Scroggin, — Pa. —, 237 A.3d 1006, 1021 (2020). Moreover, the Secretary has no authority to order the sixty-seven county boards of election to take any particular actions with respect to the receipt of ballots. 25 P.S. § 2621(f.2).

Finally, with respect to the September 28 Guidance indicating that undated ballots must be set aside, we note that in addition to the Philadelphia and Allegheny County Boards, at least two other boards of elections also did not follow it. Donald J. Trump for President Inc. v. Bucks Cnty. Bd. of Elections, No. 2020-05786 (Bucks Cty. Ct. Com. Pl.); Donald J. Trump for President, Inc., et al. v. Montgomery Cnty. Bd. of Elections, No. 2020-18680 (Nov. 13, 2020). Both the Bucks County and Montgomery County Courts of Common Pleas affirmed the counting of the ballots even though the declarations had not been filled out in full. Each of the courts of common pleas appropriately applied this Court's precedent in doing so.

Act of June 3, 1937, P.L. 1333, art. I, § 101, codified as amended at 25 P.S. §§ 2601, et seq.

- 2 None of the parties or courts involved in these consolidated cases dispute that a voter's failure to sign a mailin or absentee ballot's declaration requires invalidation.
- 3 Act of Dec. 6, 1972, No. 290, § 3, codified as amended at 1 Pa.C.S. §§ 1501, et seq.
- 4 —— Pa. ——, 238 A.3d 345, 391 (2020) (Wecht, J., concurring) (hereinafter "PDP").
- Specifically, 25 P.S. § 3150.16(a) provides that the mail-in ballot elector "shall, in secret, proceed to mark 5 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.' "
- 6 Compare 25 P.S. § 3150.16(a) ("Voting by mail-in electors") with 25 P.S. § 3146.6(a) ("Voting by absentee electors"). Each provision governing the form of mail-in ballots and the voter's obligations in preparing and transmitting them has its verbatim equivalent for absentee ballots, and the issue presented applies equally to both. Hereinafter, for simplicity's sake, I refer exclusively to mail-in ballots and cite and quote only the provisions that apply to mail-in ballots, but my analysis applies identically to both. The OAJC reproduces the relevant sections at length. See OAJC at 1063-65.
- 7 25 P.S. § 3150.16(a) (emphasis added).
- 8 Appeal of Weiskerger, 447 Pa. 418, 290 A.2d 108 (1972).
- 9 25 P.S. § 3063 (applicable through October 30, 2019).
- 10 Weiskerger, 290 A.2d at 109 (cleaned up).
- Appeal of Pierce, 577 Pa. 231, 843 A.2d 1223, 1231 (2004); see 1 Pa.C.S. 1921(b) ("When the words of 11 a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."); see also Oberneder v. Link Computer Corp., 548 Pa. 201, 696 A.2d 148, 150 n.2 (1997) (rejecting a party's reliance upon a 1965 case because it was at odds with the ambiguity-first, reliance-uponrules-of-construction-later approach to statutory construction required by the SCA).
- 12 Without suggesting that the ink color language at issue in that case was ambiguous on its face, the Weiskerger Court suggested that interpreting the language required it to consider, inter alia, "the occasion for its enactment" and "the mischief to be remedied." Weiskerger, 290 A.2d at 109. Section 1921 of the SCA similarly provides that courts may consider "[t]he occasion and necessity for the statute" and "[t]he mischief to be remedied"—but only "[w]hen the words of the statute are not explicit." 1 Pa.C.S. § 1921(c).
- 13 See, e.g., Appeal of Norwood, 382 Pa. 547, 116 A.2d 552, 555 (1955); Appeal of Gallagher, 351 Pa. 451, 41 A.2d 630, 632 (1945).
- 14 Weiskerger, 290 A.2d at 109 (quoting In re Petitions to Open Ballot Boxes, 410 Pa. 62, 188 A.2d 254, 256 (1963)).
- 15 In contrast to Weiskerger's capacious understanding of this principle, the Court adopted a more measured tone in Appeal of Urbano, 411 Pa. 45, 190 A.2d 719 (1963). There, citing the presumption in favor of counting votes, it allowed for relief from the apparent consequences of failing to satisfy mandatory statutory language, but did so specifically because the common-law presumption was in keeping with additional statutory language expressly granting the court discretion to permit amendments to cure even "material errors or defects." Id.

- 16 Weiskerger, 290 A.2d at 109 (emphasis added).
- To be clear, *Weiskerger* was by no means our original sin in this area. In one earlier example cited by the OAJC, this Court discerned reason to disregard the mandatory connotation of "shall" in *Appeal of James*, 377 Pa. 405, 105 A.2d 64 (1954). Indeed, one can detect aspects of the same open-ended analysis in, e.g., our 1922 decision in *In re Fish's Election*, 273 Pa. 410, 117 A. 85, 87 (1922) (quoting *Knight v. Borough of Coudersport*, 246 Pa. 284, 92 A. 299, 300 (1914)) ("If the law declares a specified irregularity to be fatal, the court will follow that command, irrespective of their views of the importance of the requirement. In the absence of such declaration the judiciary endeavor, as best they may, to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a full and free expression of the popular will. ... [If not], it is considered immaterial."). Our willingness to substitute our judgment for that of the legislature perhaps reached its nadir in *Norwood*, where we held that "[e]very rationalization within the realm of common sense should aim at saving [a] ballot rather than void it," 116 A.2d at 554-55, an expression that the OAJC embraces as a "well-settled principle of Pennsylvania election law." OAJC at 1071. Perhaps no passage better illustrates the liberties this Court has taken when probing for reasons to treat mandatory language as anything but mandatory.
- 18 577 Pa. 384, 845 A.2d 793 (2004).
- 19 25 P.S. § 3031.12(b)(3) (emphasis added). The language in question has been amended in the intervening years.
- 20 Shambach, 845 A.2d at 798 (quoting James, 105 A.2d at 65).
- 21 *Id.* at 798.
- See Appeal of Mellody, 449 Pa. 386, 296 A.2d 782, 784 (1972); Reading Defense Committee, 188 A.2d at 256; Gallagher, 41 A.2d at 632. The OAJC similarly relies substantially for these principles on pre-SCA case law. See, e.g., OAJC at 1062 (quoting James, 105 A.2d at 65-66 (Pa. 1954)); id. at 1071 (quoting Urbano, 190 A.2d at 719, and Norwood, 116 A.2d at 554).
- 23 25 P.S. § 3146.6(a) (emphasis added); see *Pierce*, 843 A.2d at 1231.
- 24 Pierce, 843 A.2d at 1230 (citations omitted).
- 25 Id.
- 26 Id. at 1231-32 (citing, inter alia, BRYAN GARNER, DICTIONARY OF MODERN LEGAL USAGE 939 (2d ed. 1995)).
- 27 Pa. ——, 237 A.3d 1006 (2020).
- 28 Id. at 1019 (quoting Appeal of Cubbage, 467 Pa. 491, 359 A.2d 383, 384 (1976)).
- 29 *PDP*, 238 A.3d at 379 (quoting *Pierce*, 843 A.2d at 1232).
- 30 Id. at 380 ("[Pierce] leads to the inescapable conclusion that a mail-in ballot that is not enclosed in the statutorily-mandated secrecy envelope must be disqualified. ... Accordingly, we hold that the secrecy [envelope] language in Section 3150.16(a) is mandatory and the mail-in elector's failure to comply ... renders the ballot invalid.").
- 31 *Id.* at 391 (Wecht, J., concurring).

- 32 ld.
- 33 See Conc. & Diss. Op. at 1090 (Dougherty, J.).
- 34 See OAJC at 1078 n.6.
- 35 See PDP, 238 A.3d at 356 ("[T]he Election Code should be liberally construed so as not to deprive, inter alia, electors of their right to elect a candidate of their choice."). Notably, the OAJC cites PDP for the same proposition, correctly qualifying the principle by noting that liberal construction comes into play only "[w]here an election statute is ambiguous." OAJC at 1074 n.4 (emphasis added).
- 36 I also find cause for concern in the absence of clear instruction on the ballot materials indicating that a ballot lacking a name or address will be disqualified, a concern that informs my preference for prospective application of the statutory date requirement. Cf. Reading, 188 A.2d at 256 (declining to invalidate ballots upon which voters did not signal their intended votes strictly with the X or check mark mandated by statute for various reasons—including a "minor irregularity" approach I reject—especially where the printed instruction on the ballot did not specify that only those two methods of signaling one's vote would be recognized).
- 37 OAJC at 1073.
- 38 See id. at 1062 (quoting James, 105 A.2d at 66 ("Technicalities should not be used to make the right of the voter insecure.")). James's tendentious resort to the word "technicalities," which seldom is used constructively when invoked in connection with the law, is contradicted at least in tenor by subsequent pronouncements. See Pierce, 843 A.2d at 1234 ("[S]o-called technicalities of the Election Code are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed"); Appeal of Weber, 399 Pa. 37, 159 A.2d 901, 905 (1960) ("The technicalities of the Election Law (and they are many) are necessary for the preservation of the secrecy and purity of the ballot and must, therefore, be meticulously observed.").
- 39 See OAJC at 1072-73 (counterposing "minor irregularities" and "weighty interests" as the framework for decision). Notably, the question as to which we granted review quite confused the meaning of "irregularity." We proposed to answer the question whether "the Election Code require[s] county boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed their ballot's outer envelopes but did not handwrite their name, their address, and/or a date, where no fraud or irregularity has been alleged?" Id. at 1069. But this formulation is irreconcilable with the question whether failing to date a ballot declaration is, itself, a "minor irregularity" and, as such, not subject to the sanction of ballot invalidation —the very crux of the case, as the OAJC defines it. I raise this discrepancy because it illustrates how these constructs lend themselves to confusion, complicating what should be simple questions by engrafting unenumerated considerations upon plainly worded statutes.
- 40 See id. at 1077 ("The date stamp and the SURE system provide a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superfluous."); cf. id. at 1073 (characterizing the handwritten name and address requirement as, "at best, a 'minor irregularity' and, at worst, entirely immaterial").
- 41 See id. at 1076 ("Although unlike the handwritten name and address, which are not mentioned in the statute, the inclusion of the word 'date' in the statute does not change the analysis because the word 'shall' is not determinative as to whether the obligation is mandatory or direct[ory] in nature." (emphasis added)).
- 42 See id. at 1076-78.
- 43 See In re 2,349 Ballots in the 2020 General Election, 1162 C.D. 2020, slip op. at 12, 2020 WL 6820816 (Pa. Cmwlth. Nov. 19, 2020) (memorandum); Conc. & Diss. Op. at 1090 (Dougherty, J.).

- 44 In re 2,349 Ballots, slip op. at 12-13.
- 45 533 Pa. 564, 626 A.2d 146 (1993)
- 46 *Id.* at 149.
- 47 Id.
- Cf. Andino v. Middleton, No. 20A55, U.S. —, —, 141 S.Ct. 9, L.Ed.2d —, 2020 WL 5887393, *1 (Oct. 5, 2020) (staying the district court's injunction of an absentee ballot witness requirement, "except to the extent that any ballots cast before this stay issues and received within two days of this order may not be rejected for failing to comply with the witness requirement" in light of the fact that voters cast nonconforming absentee ballots in reliance upon the guidance of state elections officials during the pendency of the injunction); In re Beyer, 631 Pa. 612, 115 A.3d 835, 843-44 (2015) (Baer, J., dissenting) (finding it "reasonable for this Court to rule prospectively that a candidate may only designate his occupation or profession as 'lawyer' on nomination papers after he or she has graduated from law school, passed the bar exam, and is in good standing as an active member of the Pennsylvania Bar," but dissenting because, "at the time Candidate Beyer filed his nomination papers, neither a majority of this Court nor the Commonwealth Court had ever made such an express declaration").
- 49 See Act of Oct. 31, 2019, P.L. 552, No. 77.
- 50 See Act of March 27, 2020, P.L. 41, No. 12.
- 51 See OAJC at 1073-74 n.3, 1078 n.6; see also id. at 1065-66 (reproducing all relevant aspects of the guidance documents pertaining to the issues presented).
- 52 See PDP, 238 A.3d at 389 (Wecht, J., concurring).
- 53 See id. (emphasis added).
- In this regard, the OAJC observes that the Democratic National Committee "argues, with some persuasive force, that the Campaign's requested interpretation of Pennsylvania's Election Code could lead to a violation of [the federal Voting Rights Act] by asking the state to deny the right to vote for immaterial reasons." OAJC at 1074 n.5; see 52 U.S.C. § 10101(a)(2) ("No person acting under color of law shall ... (B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election"). The OAJC does not pursue this argument, except to acknowledge a handful of cases that might be read to suggest that the name and address, and perhaps even the date requirement could qualify as "not material in determining whether such individual is qualified under State law to vote." Given the complexity of the question, I would not reach it without the benefit of thorough advocacy. But I certainly would expect the General Assembly to bear that binding provision in mind when it reviews our Election Code. It is inconsistent with protecting the right to vote to insert more impediments to its exercise than considerations of fraud, election security, and voter qualifications require.

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Appendix 26

YOUR BALLOT WILL NOT BE COUNTED UNLESS:

- ☐ You sign and date the voter's declaration in your own handwriting
- ☐ You seal your ballot inside the [color] secrecy envelope ("Official Election Ballot") and place it in here

EXHIBIT

Joint 1 7/28/22

> Voter's declaration

election; that I have not already voted in this election; and I further declare that I marked my ballot in selection; and I further declare that I marked my ballot in selection; and I further declare that I marked my ballot. I under the individual is an individual hereby declare that I am qualified to vote in

voided, to the judge of elections at my polling place

sign or mark here (Required)



Today's Date (Required)

FOR

COUNTY

ELECTION USE

ONLY

Sign their

윽

Physical Disability: Declaration Because Completed by

Voter

Unable

of my illness or physical disability. I have made or assistance because I am my declaration for voting my ballot without hereby declare am unable to unable to write by reason

mark here



Today's

Witness, address (street)

(city, zip

sign here

Witness,

address

code)

	☐ You	sign and d	late the vo	OT BE COUN ter's declaration de the [color] se	n in your own		tion Ballot	") and pla	ce it in here
Witne	Witne	Witne	Today	Voter	assist of my i receiv my sig	To be Sign Illne: Theret my dee	, –	FOR	- 1

Voter's declaration

I hereby declare that I am qualified to vote in this election; that I have not already voted in this election; and I further declare that I marked my ballot in selection; and I further declare that I marked my ballot in selection. I am qualified to vote the enclosed ballot. I under postand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand place after I would be a polling poll place, voided, to the judge of elections at my polling place unless I surrender my balloting materials,

•	oter,
	, sign or
	or
	mark here
	(Required)

FOR COUNTY ELECTION USE ONLY		Today's Date (Required)
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ss or Physical Disability:

by declare that I am unable to sign claration for voting my ballot without Completed by Voter Unable their Declaration Because 약

nature. ed assistance in making my mark in lieu of llness or physical disability. I have made or ance because I am unable to write by reason

mark here

SS, address (street)

Date

address (city, zip code)

sign here

Appendix 27



GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES

Date: September 11, 2020

Version: 1.0

EXHIBIT

Joint 2 7/28/22

EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES

1 BACKGROUND:

The Pennsylvania Election Code describes processes that a qualified voter follows to apply for, receive, complete and timely return an absentee or mail-in ballot to their county board of election. These processes include multiple secure methods used by the voter's county board of election to verify that the qualified voter's absentee or mail-in application is complete and that the statutory requirements are satisfied. These include voter identification verification confirmed by either a valid driver's license number, the last four digits of the voter's social security number or other valid photo identification, and unique information on the application including the voter's residence and date of birth. Before sending the ballot to the applicant, the county board of elections confirms the qualifications of the applicant by verifying the proof of identification and comparing the information provided on the application with the information contained in the voter record. If the county is satisfied that the applicant is qualified, the application must be approved. This approval shall be final and binding, except that challenges may be made only on the grounds that the applicant was not a qualified voter, and those challenges must be made to the county prior to five o'clock p.m. on the Friday prior to the election.

Once the qualified voter's absentee or mail-in application is approved, the voter is mailed a ballot with instructions and two envelopes. The outer envelope includes both a unique correspondence ID barcode that links the envelope to the qualified voter's application and a pre-printed Voter's Declaration that the voter must sign representing that the voter is qualified to vote the enclosed ballot and has not already voted. This Guidance addresses the examination of the Voter's Declaration on the ballot return envelope. This Guidance assumes that the voter has satisfactorily completed the steps described above as to application for, receipt and return of an absentee or mail-in ballot.

2 RECORDING THE DATE, RETURN METHOD AND BALLOT STATUS FOR RETURNED BALLOTS:

County boards of elections should have processes in place to record the date, return method, and ballot status for all voted ballots received. County boards of elections must store and maintain returned ballots in a secure location until the ballots may be pre-canvassed or canvassed.

The county board of elections should stamp the date of receipt on the ballot-return. County boards of elections should record the receipt of absentee and mail ballots daily in the SURE system. To record a ballot as returned, the staff should scan the correspondence ID barcode on the outside of the envelope. The correspondence ID on the envelope is unique to each absentee or mail-in voter and each issuance of a ballot to a voter. Once a correspondence ID has been returned in the SURE system, it cannot be returned again. Further, if a ballot issuance record is cancelled by the county board of elections (e.g. voided to reissue a replacement ballot) in the SURE system, the correspondence ID on the cancelled ballot will become invalid. If the same barcode is subsequently scanned, the SURE system will not allow the returned ballot to be marked as being approved for counting.

The county boards of elections should record the date the ballot is received (not the date that the returned ballot is processed). In the event a county board of elections is entering the ballot on a date other than the date the ballot was received, the county personnel should ensure that the SURE record reflects the date of receipt, rather than the date of entry, since by default, SURE will automatically populate both the 'Date Received' and 'Vote Recorded' fields with the current date and time unless users manually correct the date to reflect the date received.

3 EXAMINATION OF DECLARATION ON BALLOT RETURN ENVELOPES:

The county board of elections is responsible for approving ballots to be counted during pre-canvassing.

To promote consistency across the 67 counties, the county boards of elections should follow the following steps when processing returned absentee and mail-in ballots.

After setting aside ballots of elector's who died prior to the opening of the polls, the county board of elections shall examine the Voter's Declaration on the outer envelope of each returned ballot and compare the information on the outer envelope, i.e., the voter's name and address, with the information contained in the "Registered Absentee and Mail-in Voters File, the absentee voter's list and/or the Military Veterans' and Emergency Civilians Absentee Voters File."

If the Voter's Declaration on the return envelope is blank, that ballot return envelope must be set aside and not counted. If the board determines that a ballot should not be counted, the final ballot disposition should be noted in SURE. The ballot return status (Resp Type) should be noted using the appropriate drop-down selection.

If the Voter's Declaration on the return envelope is signed and the county board is satisfied that the declaration is sufficient, the mail-in or absentee ballot should be approved for canvassing unless challenged in accordance with the Pennsylvania Election Code.

The Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections.

Version	Date	Description	Author
1.0	9.11.2020	Initial document release	

Appendix 28

TLP: WHITE



GUIDANCE CONCERNING CIVILIAN ABSENTEE AND MAIL-IN BALLOT PROCEDURES

Date: September 28, 2020

Version: 1.0

EXHIBIT

Joint 3 7/28/22

GUIDANCE CONCERNING CIVILIAN ABSENTEE AND MAIL-IN BALLOT PROCEDURES

1 Mail-in and Civilian Absentee Balloting – General Provisions

Qualified voters may apply at any time on or before 5:00 p.m. on the Tuesday before any primary or election for a mail-in or civilian absentee ballot, and county boards of elections must begin processing applications at least fifty (50) days before the primary or election. County boards of elections may process applications earlier than fifty (50) days before the primary or election, if the county board of elections determines that it is better for its operational needs to do so.

1.1 Who May Request an Absentee or Mail-in Ballot?

All qualified voters in Pennsylvania are eligible to vote by mail-in ballot, and no excuse is required. For example, even if a voter will be present in their municipality on Election Day, but would simply prefer to vote from home, they may request a mail-in ballot.

Absentee ballots may be voted by domestic voters who will be absent from their municipality on Election Day due to work or vacation, voters who are celebrating a religious holiday, and voters such as college students who also may be away from the municipality on Election Day, if they don't choose to vote where they go to school. Absentee ballots are also for those who are unable to attend their polling place due to illness or physical disability.

A voter may only qualify for and vote one ballot.

2.2 Permanent Voter Lists

Any qualified voter can request to be placed on the permanent mail-in voter list at any time.

For the permanent annual **absentee** ballot list, only voters with a permanent illness or disability are eligible; this section does not apply to voters expecting to be absent from the municipality. Absentee voters who request to be placed on the permanent absentee list do not have to renew their physician's certification of continued disability every four (4) years or list it on each application.

If voters wish to request to become an annual permanent voter:

- For annual permanent **mail-in** list requests: these requests may be submitted when completing their online mail-in ballot request application.
- For annual permanent **absentee** list requests: this may be submitted by paper application only due to the physician's certification requirement.

Each year the county must send an application to any voter on the permanent absentee and mail-in voter lists by the first (1st) Monday in February. The yearly application, once approved, serves as a standing request for a mail-in or absentee ballot to be mailed to that voter for every election that calendar year and for any special election until the third (3rd) Monday in February the next year.

If a permanent mail-in or permanent absentee voter no longer wishes to receive a ballot for the upcoming election or wishes to cancel her permanent status, the voter can submit a cancellation form to the county board of elections. The cancellation form can be found at VotesPA.com.

2 Requesting an Absentee or Mail-in Ballot

There are three (3) ways by which voters can apply for mail-in or absentee ballots:

- 1. By Mail
- 2. In Person
- 3. Online

2.1 MAIL REQUESTS

A voter may submit a paper application via mail to the county board of elections for absentee and mailin ballot applications.

2.2 In-person (Over the Counter) Requests

Act 77 of 2019 allows voters to request and cast an absentee or mail-in ballot over the counter in advance of Election Day. After ballots are finalized by a county, voters may apply at a County Election Office (CEO) during established business hours to receive and cast a mail-in or absentee ballot in person while the voter is in the office.

Once the voter is determined to be qualified and the application for an absentee or mail-in ballot is approved, the county board of elections **must promptly present** the voter with the voter's mail-in or absentee ballot. Under Section 1305 of the Election Code, 25 P.S. § 3146.5, a county board of elections may not deny the eligible voter's request to have the ballot presented to the voter while the voter is at the office unless there is a bona fide objection to the absentee or mail-in ballot application. Voters still need to provide proof of identification (as defined in the Election Code) to be verified by county boards of elections to vote an absentee or mail-in ballot. Proof of identification for civilian absentee and mail-in voting include a valid driver's license number, the last four digits of the voter's social security number or other valid photo identification.

Voters who receive a mail-in or absentee ballot in person must be provided an opportunity to privately and secretly mark their ballot. *Note:* The marking of the ballot in secret does not have to take place in the election offices. It can be provided in a nearby location.

2.2.1 Satellite County Election Offices

County election boards may provide for mail-in and absentee application processing and balloting at more than one location within county borders.

Counties may establish additional business hours for CEOs; hours do not have to be limited to weekdays or to typical business hours. Counties are encouraged to offer business hours outside of these time frames, including weeknights or weekend hours to enable maximum flexibility and convenience for voters.

When a county decides to provide additional mail-in and absentee balloting by establishing additional CEOs, the county must account for all of the following:

- Each CEO must be staffed by appointed elections personnel in municipal or county-owned or leased locations selected by the county board of elections for processing applications and in-person voting of both mail-in and absentee ballots.
- Each CEO must have a secure county network connection that is capable of connecting to the Statewide Uniform Registry of Electors (SURE), and staff trained and approved to access SURE. NOTE: The Department will work with counties to establish secure connections; the county network extension must be approved by the Department.
- Each CEO must either have copies of all ballot styles available to be voted in the county, or an on-demand ballot printer capable of printing all ballot styles available to be voted in the county.
- Each CEO must have a secure ballot collection receptacle to store voted mail-in or absentee ballots submitted at the location. County boards of election are required to keep voted ballots in a sealed or locked container until the time of pre-canvassing.
- Please see the Department of State's August 19, 2020 Absentee and Mail-In Ballot Return Guidance for more information and guidance on choosing a location for a CEO.

2.3 ONLINE REQUESTS

A voter may submit either an absentee or mail-in ballot request online via the Department's online portal at PA Voter Services.

Online applications must be processed according to the same statutory requirements as an application submitted by-mail or in person, including the proof of identification requirements defined in the Election Code.

3 Delivery of Mail-in and Absentee Balloting Materials

Counties must begin delivering mail-in or absentee ballots as soon they are certified and available. Counties may await the outcome of pending litigation that affects the contents of the ballots, but in any event the county must begin delivering mail-in or absentee ballots no later than the 2nd Tuesday prior to Election Day.

Once the counties begin delivering their ballots, as additional applications are received and approved, the county must deliver or mail ballots to such additional voters within forty-eight (48) hours of receipt of approved applications.

3.1 BALLOTING MATERIALS

The absentee and mail-in balloting materials must include the following:

- 1. The voter's proper ballot style based on the voter's registration address.
- 2. A white, inner (or "secrecy") envelope that indicates official ballot.

3. A pre-addressed outer ballot-return envelope that contains a declaration which the voter must sign and date.

The ballot must be returned within the inner envelope, which must be placed in the pre-addressed outer envelope.

With regard to the inner envelope:

- The Pennsylvania Supreme Court held on September 17, 2020, that any ballot that is not returned in the official ballot envelope (secrecy envelope) must be set aside and declared void. These ballots have been referred to as "naked ballots." In accordance with that ruling, all ballots that are not returned within the inner envelope must be set aside and may not be counted. Counties are strongly encouraged to include an instructional insert which describes how the voter should mark and return their ballot and to clearly warn that ballots must be returned in the secrecy envelopes or they will not be counted. The Department encourages county boards of election to publicize the requirement that ballots must be returned within the inner envelope, including on the county's website, in their offices, at ballot collection sites, and in other locations that may assist and educate voters.
- If any voted ballot's inner (or "secrecy") envelope contains any text, mark, or symbol which reveals the identity of the voter, the voter's political affiliation (party), or the voter's candidate preference, the envelopes and the ballots inside them must be set aside, declared void and may not be counted.

With regard to the outer ballot-return envelope:

- 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.
- A ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted. Ballot-return envelopes must be opened in such a manner as not to destroy the declarations executed thereon.
- All ballot-return envelopes containing executed declarations must be retained for a period of two years in accordance with the Election Code.

3.2 BALLOT DESIGN REQUIREMENTS

Act 12 of 2020 changed the law with respect to the surrender process for voters who request mail-in or absentee ballots.

Pursuant to Act 12 of 2020, a warning notice is required to be listed on both the absentee and mail-in ballots, which states:

WARNING: If you receive an absentee or mail-in ballot and return your voted ballot by the deadline, you may not vote at your polling place on election day. If you are unable to return your voted absentee or mail-in ballot by the deadline, you may only vote a provisional ballot at your polling place on election day, unless you surrender your absentee or mail-in ballot and envelope to the judge of elections to be voided to vote by regular ballot.

4.1 VOTER MUST RETURN OWN BALLOT

A voter must return his or her own completed absentee or mail-in ballot by 8:00 pm on Election Day to the county board of elections or other county-designated drop-off location. Third-person delivery of absentee or mail-in ballots is not permitted, and any ballots delivered by someone other than the voter are required to be set aside. The only exceptions are voters with a disability who have designated in writing an agent to deliver their ballot for them. Agency forms may be found at VotesPA.com. Emergency absentee ballots also may be delivered by a designated agent.

4.2 COLLECTION OF MAIL-IN AND ABSENTEE BALLOTS

In addition to the main CEO and satellite CEOs, counties may provide for other secure ballot collection locations that the county deems appropriate to accommodate in-person return of voted mail-in and absentee ballots. Please refer to the Department's August 19, 2020 Absentee and Mail-In Ballot Return Guidance for more information and guidance regarding ballot collection locations and procedures.

County boards of election are required to keep absentee and mail-in ballots in a sealed or locked container(s) until the time of pre-canvassing.

4.3 Surrender Process for Voters Who Request Mail-In or Absentee Ballots

Once a voter requests a civilian absentee or mail-in ballot, they should vote and return that mail-in or absentee ballot by mail, or deliver it in person to a county elections office (CEO) or other designated drop-off location prior to 8:00 P.M. on Election Day.

However, if a voter has not voted their mail-in or absentee ballot, they may take it to their polling place on election day to surrender it. (NOTE: This is a different procedure than was in place for the June 2020 primary. Act 12 of 2020 changed the procedures for voters who request mail-in or absentee ballots, but later appear at their polling place. These changes take effect for the first time in the November 2020 General Election.)

Specifically, a voter who requests a mail-in or absentee ballot and who is not shown on the district register as having voted the ballot may vote at their polling place on Election Day if (1) the voter surrenders the original mail-in or absentee ballot and its outer envelope to the judge of elections to be spoiled, and (2) the voter signs a statement subject to the penalties under 18 Pa. C.S. § 4904 in substantially the following form:

I hereby declare that I am a qualified registered elector who has obtained an absentee ballot or mail-in ballot. I further declare that I have not cast my absentee ballot or mail-in ballot, and that instead I remitted my absentee ballot or mail-in ballot and the envelope containing the declaration of the elector to the judge of elections at my polling place to be spoiled and therefore request that my absentee ballot or mail-in ballot be voided.

If the voter turns in (surrenders) his or her ballot and outer envelope and signs the statement, the voter is permitted to vote by regular ballot at the polling place.

If a voter whose record in the district poll book indicates that the voter requested a mail-in or absentee ballot but the voter does not surrender their ballot and declaration envelope and sign the required statement, the voter should be provided a provisional ballot. Even if the voter asserts that they did not cast a mail-in or absentee ballot and is eligible to vote, the voter should only be provided a provisional ballot.

5 ABSENTEE AND MAIL-IN VOTING PROCESSES FOR COUNTY ELECTION OFFICIALS

5.1 POLL BOOK PROCESSES

The poll books will be divided into two sections.

The main section will include a) voters who have not requested a mail-in or absentee ballot for this election and b) voters who requested an absentee or mail-in ballot but who did not return their ballot by the date the pollbooks were printed. There will be a special watermark in the poll book indicating that voters who did not return their ballot by the date the pollbooks were printed must either surrender their ballot as described in Section 4.3 above or vote provisionally if they appear at the polling place on Election Day.

The secondary section of the pollbook will contain a list of voters who have both requested and returned their ballot (cast their vote) by the time the poll book was printed.

Voters who requested but have not returned their absentee or mail-in ballot may vote in person at their polling place on election day ONLY if they surrender their ballot and the declaration envelope that accompanies it, as described in Section 4.3 above. The poll worker shall take the surrendered ballot and declaration envelope and mark them as "VOID." There is a location in the poll book where the poll worker must indicate that the items were surrendered. The voided ballot and declaration envelope, and the signed surrender declaration should be placed in a secure envelope or container and returned to the county election office with other polling place materials at the end of the voting day. The surrendered ballot materials must be preserved.

As noted above, the poll book record for voters whose cast absentee or mail-in ballot has already been received will indicate that the voter's ballot was cast and they are not eligible to vote at the polling place. This will aid poll workers when checking in voters to easily determine that these voters are not eligible to vote on the voting equipment but may vote provisionally if the voter believes they are eligible to vote.

The watermarks in the poll books as listed above also apply to voters with a permanent flag on their voter record. In either case, the poll worker will be able to determine the appropriate course of action when reviewing the poll book on election day.

5.2 Pre-Canvassing and Canvassing Absentee and Mail-in Ballots

The Act 12 of 2020 amendments provide for a pre-canvass period beginning on the morning of Election Day to canvass all ballots received prior to the pre-canvass meeting. The amendments further provide for a canvass meeting beginning no earlier than the close of polls to canvass all ballots not included in the pre-canvass meeting.

Pre-canvass Meeting

- The **pre-canvass** may begin no earlier than 7:00 AM on Election Day. County boards of election must provide notification of the time and location of a pre-canvass meeting at least 48 hours prior to the meeting by posting notice on its website.
- The county board of elections must provide a list of the names of the voters whose absentee or mail-in ballots are to be pre-canvassed.
- One authorized representative for each candidate and one authorized representative for each
 political party must be permitted to remain in the room where the pre-canvass meeting occurs.
- Persons observing, attending or participating in the pre-canvass meeting MAY NOT disclose the result of any portion of the pre-canvass prior to the close of polls on Election Day.
- The Department strongly urges all counties to begin pre-canvassing at the earliest time allowed to ensure that results can be tabulated promptly.

Canvass Meeting

- The canvass of mail-in and absentee ballots may begin no earlier than the close of polls and no
 later than the 3rd day following the election. County boards of election must provide
 notification of the time and location of the canvass meeting at least 48 hours prior to the
 meeting by posting notice on its website.
- The county board of elections must provide a list of the names of the voters whose absentee or mail-in ballots are to be canvassed.
- The canvass process must continue through the 8th day following the election to include valid military and overseas ballots received by 5:00 PM on the 7th day following the election.
- One authorized representative for each candidate and one authorized representative for each political party must be permitted to remain in the room where the canvass meeting occurs.
- The Department strongly urges all counties to begin canvassing at the earliest time allowed to ensure that results can be tabulated and reported promptly.

Pre-canvass and Canvass Procedures

At the pre-canvass or canvass, as the case may be, the county board of elections should:

- Segregate the unopened ballots of voters whose applications were challenged by the challenge deadline (5:00 PM on the Friday before the election).
 - These ballots must be placed in a secure, sealed container until the board of elections holds a formal hearing on the challenged ballots.
 - Ballot applications can only be challenged on the basis that the applicant is not qualified to vote.
- Set aside the ballot of any voter who was deceased before election day.

- Set aside any ballots without a filled out, dated and signed declaration envelope.
- Set aside any ballots without the secrecy envelope and any ballots in a secrecy envelope that include text, mark, or symbol which reveals the identity of the voter, the voter's political affiliation (party), or the voter's candidate preference.

The Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis.

No challenges may be made to mail-in or absentee ballot applications after 5:00 pm on the Friday before the election.

No challenges may be made to mail-in and absentee ballots at any time based on signature analysis.

NOTE: For more information about the examination of return envelopes, please refer to the Department's September 11, 2020 *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes*.

###

Version History:

Version	Date	Description
1.0	9.28.2020	Initial document
		release

Appendix 29

Voting by mail-in or absentee ballot is safe, secure, and easy.

How to return your mai...



EXHIBIT

Joint 4 7/28/22

In Pennsylvania, you have two options for mail ballots.

- Mail-in ballot Any qualified voter may apply for a mail-in ballot. You may simply request this ballot without a reason.
- Absentee ballot If you plan to be out of the municipality on election day or if you have a disability or illness that prevents you from going to your polling place on election day, you can request this ballot type, which still requires you to list a reason for your ballot. In order to request either ballot type, you must be registered to vote.

Check Your Registration Status

(https://www.pavoterservice s.pa.gov/Pages/voterregistrati onstatus.aspx)

to review your registration information.

Quick links

Deadlines for the November 8 Election

 November 1, 2022 at 5 p.m. - APPLICATIONS for a mail-in or absentee ballot must be received by your

 $(https://www.votespa.com/Resources/Pages/Contact-Your-Electi\\ \underline{\textbf{county election board}} \text{on-Officials.aspx})$

 November 8, 2022 at 8 p.m. – VOTED BALLOTS must be RECEIVED by your county election office - postmarks are not enough.

<u>emergency</u>

Missed the deadline? If you have an (such as an unexpected illness or disability or last-minute absence from your municipality) you may still be able to get a ballot after the deadline. Find information about how to emergency absentee ballot get an .

How do I request a mail-in or absentee ballot?

Any registered voter

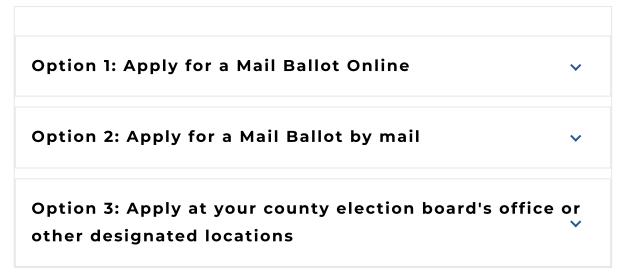
(https://www.pavoterservices.pa.gov/OnlineAbsenteeApplicatio may request a mail-in ballot n/#/OnlineAbsenteeBegin)

Absentee ballots can be requested

(https://www.pavoterservices.pa.gov/OnlineAbsenteeApplicatio n/#/OnlineAbsenteeBegin)

by voters with disabilities or an illness that prevents them from going to their polling place on election day, or those who will be absent from their municipality on Election Day. Request forms must be received by your county election board by 5 pm on November 1, 2022.

Expand All



What's the annual mail-in ballot request?

You now have the option to request to be added to the annual mail-in ballot request list where **you'll** receive an application to renew your mail-in ballot request each year. Once your request is approved, you will automatically receive ballots for the remainder of the year, and you **do not** need to submit an application for each election.

Learn more about the

annual mail-in ballot request

(https://www.vote.pa.gov/Voting-in-PA/Page s/Annual-Mail-in-Voter-List.aspx)

.

Third Party Ballot Delivery for Mail Voting

If you have a disability that prevents you from applying in person for your mail ballot or delivering your mail ballot, you may designate an agent to deliver your ballot materials for you. You must

designate the agent in writing using this form

(/Resources/Documents/Authorize-Designated-Agent-for-Mail-in-or-Absentee-Ballot.pdf)

or a form provided by your county.

Accessible Remote Ballot Marking Solution for Mail Voting

The Department of State is committed to increasing accessibility for voters with disabilities. Pennsylvania voters with disabilities now have the opportunity to mark their absentee or mail-in ballot electronically.

Learn more about the accessible remote ballot marking solution

(/Voting-in-PA/Pages/Accessible-Remote-Ballot-Marking-Solution-for-Mail-Voting.aspx)

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How do I vote and return my mail-in or absentee ballot?

Below are general steps on how to vote, prepare, and return your mail ballot. Be sure to follow the instructions included with your ballot. Contact your county election office if you have any questions.

Under Pennsylvania law, voters must return their own ballots. The only exceptions to this are for voters with a disability who have designated someone in writing to deliver their ballot.

Step 1:

Read the instructions carefully and mark your ballot. Be sure to complete the front and back of each page.

Step 2:

Seal your ballot in the inner secrecy envelope that indicates "official election ballot." Do not make any marks on the inner secrecy envelope.

Your ballot must be enclosed and sealed in the inner secrecy envelope that indicates "official election ballot" or it will not be counted.

Step 3:

Seal the inner secrecy envelope in the preaddressed outer return envelope. Complete, 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.

Step 4:

Return your voted ballot to the county election board. Absentee and Mail-in Ballots must be received by 8 pm on election day at your county election board. To ensure your ballot is received by the deadline, return the ballot as soon as possible.

1. You can mail your ballot.

- Using the return envelope supplied with your ballot, make sure you use the proper postage (if needed) and that it arrives to your county election board by 8 pm on election day. Postmarks do not count. If your ballot is not received by the county election board by 8 pm on election day, it will not be counted
- 2. **You can hand-deliver your ballot** before 8 pm on election day to your:

county election office

(/Resources/Pages/Contact-Your-Election-Of

ficials.aspx)

or

other officially designated site

- (/Voting-in-PA/Pages/Return-Ballot.aspx)
- Some counties are providing

(/Voting-in-PA/Pages/Return-Ball

<u>drop-boxes</u>ot.aspx)

for mail

ballots.

Where do I return my ballot?

Voters may return their voted mail-in or absentee ballot to their county election board of election office during that office's business hours, or another officially designated location. **Ballots must be received by your county election board before 8 pm on Election Day.**

Voting early in-person by mail-in or absentee ballot

If you are a registered Pennsylvania voter, you can use the early in-person voting option.

As soon as ballots are ready, you can request, receive, vote and cast your mail-in or absentee ballot all in one visit to your

(/Resources/Pages/Contact-Your-Election-Officials.as

county election board px)

or

other officially designated site

(/Voting-in-PA/Pages/Return-Ballot.aspx)

With this option, there is no need for mail at all, and you can cast your vote at your convenience. Learn more about

voting early in-person by mail-in or absentee ballot

(https://www.vote.pa.gov/Voting-in-PA/Pages/Early-Voting.aspx)

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Identification for Mail Voting

In order to apply for an absentee or mail-in ballot, you must supply proof of identification.

Uniformed and overseas citizens

(https://www.vote.pa.gov/Voting-in-PA/Pages/Military-and-Overs eas-Voters.aspx)

and voters who qualify under the

Voting Accessibility for the Elderly and Handicapped ACT

(https://www.vote.pa.gov/Your-Rights/Pages/Voting-Rights-and-the-law.aspx)

do not need to show ID. All other voters must use one of the following options.

Option 1

Include one of these ID numbers on your absentee or mail-in ballot form:

- Current and valid Pennsylvania driver's license
- PennDOT photo ID card

Option 2

If you don't have one of the documents listed under option 1, you can include the last 4 digits of your Social Security number on your absentee or mail-in ballot form.

Option 3

If you don't have one of the documents listed under option 1 or a Social Security number, you can provide a photocopy of one of the following IDs with your absentee or mail-in ballot application. The photocopy must show name, a photo, and an expiration date that is current.

- U.S. Passport
- U.S. Military ID (active duty and retired military ID may designate an expiration date that is indefinite). Military dependents' ID must contain a current expiration date.
- Employee photo identification issued by Federal, Pennsylvania,
 Pennsylvania county, or Pennsylvania municipal government.
- Photo identification issued by an accredited Pennsylvania public or private institution of higher learning.
- Photo identification issued by a Pennsylvania care facility, including longterm care facilities, assisted living residences and personal care homes.

Frequently Asked Questions

What if I requested a mail-in or absentee ballot but I didn't receive a

ballot, lost my ballot, or changed my mind and want to vote in-person?

- If you already submitted a mail-in or absentee ballot, you cannot vote at your polling place on Election Day.
- If you did not return your mail-in or absentee ballot and you want to vote in person, you have two options:
 - 1. Bring your ballot and the pre-addressed outer return envelope to your polling place to be voided. After you surrender your ballot and envelope and sign a declaration, you can then vote a regular ballot.
 - 2. If you don't surrender your ballot and return envelope, you can only vote by provisional ballot at your polling place. Your county election board will then verify that you did not vote by mail before counting your provisional ballot.

How do I know if my ballot was accepted and counted?

Under current Pennsylvania law, your mail-in ballot can't be opened until Election Day. Therefore, if there's a problem with your mail-in ballot, you won't have the opportunity to correct it before the election. Still, as long as you followed all the instructions and mailed your completed, signed, dated, and sealed in the inner secrecy envelope, ballot by Election Day, you don't have to worry.

Why are there two envelopes with my mail-in ballot?

The smaller secrecy envelope is intended to protect the anonymity of your vote. After you fill out your ballot, you must place it in the secrecy envelope and seal it.

Do not make any marks on this envelope. If you fail to place and seal your ballot in this envelope or if you make marks on this envelope, your ballot will not be counted.

The second, larger envelope is the mailing and declaration envelope. You must use it, even if you are dropping your ballot off at a drop box. Place your secrecy envelope (with your ballot inside) into the mailing and declaration envelope. You must seal it and sign and date the declaration before you can return your ballot.

Both of these envelopes must be used in order for your vote to count.

What if I miss the application deadline? Last Minute Emergencies

In emergency situations (such as an unexpected illness, disability or last-minute absence from your municipality), you can

<u>request an Emergency Absentee Ballot</u>

(https://www.vote.pa.gov/Resources/Documents/PADOS_EmergencyAbsenteeBallotApplication_English.pdf)

after 5 pm on the Tuesday before the election.

The deadline to submit your Emergency Absentee Ballot Application to the County Election Board is 8 pm on Election Day.

Emergency Application for Absentee Ballot (PDF)

(https://www.vote.pa.gov/Resources/Documents/PADOS_Emerg

encyAbsenteeBallotApplication_English.pdf)

<u>Authorized Representative for Emergency Absentee Ballot Form</u>

(https://www.vote.pa.gov/Resources/Documents/PADOS_Author

izeRepresentativeforEmergencyAbsenteeBallot.pdf)

Do not miss voting deadlines!

Sign up to receive emails about mail ballot deadlines, voting processes, new voting system, and more sent directly to your inbox.

Appendix 30



GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES

Date: May 24, 2022

Version: 2.0

Joint 5 7/28/22

Appendix p.0711
J. Ex. 5

May 24, 2022

Background

On May 19, 2022, the U.S. Court of Appeals for the Third Circuit issued a judgment and order in *Migliori, et al. v. Lehigh County Board of Elections, et al.*, No. 22-1499. Citing the "materiality" provision of the federal Civil Rights Act of 1964 (52 U.S.C. § 10101(a)(2)(B)), the Court of Appeals held that undated ballots cast in Lehigh County in the November 2021 election must be counted. It held that there is no basis to refuse to count the undated ballots because "inasmuch as there is no dispute that ballots that have the wrong date were counted in the [Lehigh] election, the dating provisions contained in the [Pennsylvania Election Code] are immaterial." Subsequent to that judgment, on May 19, the Department of State (Department) asked counties to segregate undated or incorrectly dated ballot return envelopes in anticipation of further guidance from the department.

Though the *Migliori* judgment was issued in the context of the November 2021 election in Lehigh County, it has been the Department's position that ballots that appear to have "incorrect" dates must be counted. Now, in light of the conclusion of the Third Circuit in *Migliori* it is the Department's position that ballots with an undated return envelope must also be counted for the May 17, 2022, Primary. However, out of an abundance of caution the Department advises, that those ballots should be segregated and remain segregated from all other voted ballots during the process of canvassing and tabulation. In other words, those ballots with undated ballot return envelopes or with incorrectly dated ballot return envelopes that have been set aside, should continue to be maintained, preserved, and appropriately logged pending litigation, which we anticipate will be undertaken on an expedited basis. A determination on whether the segregated tabulations will be used in certifying elections has not yet been made, given the ongoing litigation.

Counties should further segregate the ballots in question into two categories:

- 1. Undated.
- 2. Dated with an "incorrect" date.

Like the pre-canvass and canvass of absentee and mail-in ballots last week, the canvass of the undated ballot return envelopes and any incorrectly dated ballot return envelopes that were set aside must be conducted in an open meeting:

- One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the ballots are canvassed.
- No challenges by authorized representatives or any third party are permitted during canvass of the mail-in and absentee ballots.
- To facilitate transparency and ensure that all validly cast ballots are counted, it is critically
 important that county boards maintain accurate records of the disposition of ballots received
 during this period as directed below.

Canvass Procedures

The guidance concerning mail-in and absentee ballots previously provided by the Department on September 28, 2020, continues to apply unless otherwise specified herein.

The county board of elections shall canvass segregated absentee and mail-in ballots that were previously set aside due to being undated or incorrectly dated.

The canvass meeting shall continue until all segregated absentee and mail-in ballots have been canvassed.

The county board of elections shall examine the voter declaration on each envelope to ensure that it is signed and verify that the voter's name appears on the approved list of mail-in and absentee voters.

Please keep in mind that the county board of elections should continue to set aside and not open or count any of the following:

- Ballots cast by any voter who died prior to the opening of the polls on May 17, 2022.
- Ballots that were received after 8:00 p.m. on May 17, 2022.
- Ballots with a missing signature on the Declaration Envelope.
- Ballots that lack the inner secrecy envelope.
- Ballots where the inner secrecy envelope contains any text, mark, or symbol which reveals the identity of the voter or the voter's candidate preference.

Additionally, the county board of elections should not open or count any ballots pending ID verification as follows:

• If proof of identification for an absentee or mail-in voter was not received or could not be verified, the ballot should not be counted unless the elector provided proof of identification, that can be verified by the county board, by the sixth calendar day following the Primary or on or before Monday, May 23rd.

Other than ballots falling into one of the categories set forth above, mail-in and civilian absentee ballots that comply with the Election Code and the Department's prior guidance shall be canvassed as follows:

- Ballots on which the Declaration Envelopes are signed are valid and must be counted.
- Ballots that are signed and either undated or incorrectly dated are valid and must be counted.
- County boards of elections must maintain separate counts for undated and incorrectly dated ballots.

Appendix 31

From: Marks, Jonathan < imarks@pa.gov>
Sent: Friday, June 17, 2022 11:46 AM
To: Marks, Jonathan < imarks@pa.gov>

Subject: RE: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Good morning again everyone.

I apologize for the oversight. I forgot to copy summary of events into my earlier email. Please see the summary below.

SUMMARY

EXHIBIT

Joint 6 7/28/22 end ix p. 0715

J. Ex. 6

- 5/20/2022 U.S. Court of Appeals for the 3rd Circuit issues judgment in Migliori acknowledging that the handwritten dates on absentee and mail-in ballots are immaterial. Later that same day, the department instructed counties to segregate undated/wrongly dated ballots and secure them until we could provide further guidance.
- 5/23/2022 Dave McCormick for U.S. Senate files suit in Commonwealth Court seeking, among other things, an injunction that would require counties to count undated ballots.
- 5/24/2022 DOS sends guidance to counties on the segregation, canvassing and tabulation of undated and wrongly dated ballots asking counties to canvass and tabulate those ballots separately from all other ballots.
- 5/24/2022 DOS sends a supplemental statewide reporting form on which counties can report undated ballot vote totals for statewide offices
- 5/26/2022 Secretary of the Commonwealth issues order for the automatic statewide recount of the U.S. Senate contest in the Republican Primary.
- 5/31/2022 Justice Alito issues an administrative stay of the 3rd Circuit's judgment in Migliori.
- 6/2/2022 The Commonwealth Court of Pennsylvania issues an opinion and order in the McCormick matter directing counties to canvass and tabulate undated/wrongly dated ballots and to report two separate vote totals (vote totals with undated ballots and vote totals without undated ballots).
- 6/3/2022 To ensure counties comply with the Commonwealth Court's 6/2 order, DOS sends updated guidance instructing counties to canvass, tabulate and report vote totals from undated ballots and to keep those ballots and vote totals segregated from all other ballots.
- 6/9/2022 The U.S. Supreme Court denies the application for stay in the Migliori case and vacates Justice Alito's administrative stay.

Kind Regards,

Jonathan Marks Deputy Secretary for Elections & Commissions Pennsylvania Department of State 401 North Office Building Harrisburg, PA 17120

Email: jmarks@pa.gov / Phone: (717) 783-2035

From: Marks, Jonathan

Sent: Friday, June 17, 2022 9:08 AM **To:** Marks, Jonathan <<u>imarks@pa.gov</u>>

Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

Dear County Election Official,

This email is provided for clarification on which vote totals are to be submitted to the Department of State (DOS) for the May 17th Primary election and the due date for those submissions.

As you are aware, over the last several weeks federal and state courts have determined that a missing handwritten date on the declaration envelope is immaterial in determining whether the

ballot is *valid and timely returned*. (Please see below a summary of events since our last update on May 20th on the litigation.) As a result of that litigation, counties have been instructed that it will be necessary to certify vote totals that include the votes from undated/wrongly dated ballots. **Those certified vote totals for the May 17 Primary are due to DOS no later than Thursday**, **June 23rd**.

Attached is a certification page that you can use to certify your county's tabulation of the May 17th results.

If you have not already canvassed, tabulated, **and certified** the votes from undated/wrongly dated ballots in an open meeting during the official canvass, it is strongly recommending that you schedule such a meeting and provide at least 48 hours' notice as you would for the Board's regular canvassing meetings. It is also recommended that you share this email with your solicitors.

Given the unprecedented nature of these events, it is expected that there will be questions. Please direct any follow up questions to Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov). In other words, please direct your questions to all three of us.

Thank you as always for your patience and continued hard work, particularly in these unprecedented times.

Kind Regards,

Jonathan Marks Deputy Secretary for Elections & Commissions Pennsylvania Department of State 401 North Office Building Harrisburg, PA 17120

Email: <u>imarks@pa.gov</u> / Phone: (717) 783-2035

Click <u>here</u> to report this email as spam.

Appendix 32

From: Riegner, Paige <PRiegner@countyofberks.com>

Sent: Thursday, June 23, 2022 12:43 PM

To: Marks, Jonathan

Cc: Mathis, Jessica; Dauberman, Elissa

Subject: RE: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Hello,

Please see this article: Berks will cover mail ballots postage, add ballot drop box (pottsmerc.com)

Specifically, the section about the undated ballots.

Per the Commissioners, Berks County will not be submitting an additional certification at this time.

Thank you, Paige

Paige Riegner, MPA

Director of Election Services | County of Berks 633 Court Street, 1st Floor Reading, PA 19601 P: 610-478-6490 X5577 PRiegner@countyofberks.com

From: Marks, Jonathan <<u>imarks@pa.gov</u>> Sent: Friday, June 17, 2022 9:08 AM To: Marks, Jonathan <<u>imarks@pa.gov</u>>

Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

County of Berks Warning: This is an external email. Please exercise caution.

Dear County Election Official,

This email is provided for clarification on which vote totals are to be submitted to the Department of State (DOS) for the May 17th Primary election and the due date for those submissions.

As you are aware, over the last several weeks federal and state courts have determined that a missing handwritten date on the declaration envelope is immaterial in determining whether the ballot is *valid and timely returned*. (Please see below a summary of events since our last update on May 20th on the litigation.) As a result of that litigation, counties have been instructed that it will be necessary to certify vote totals that include the votes from undated/wrongly dated ballots. Those certified vote totals for the May 17 Primary are due to DOS no later than Thursday, June 23rd.

EXHIBIT

Joint 7 7/28/2020 end ix p. 071

Attached is a certification page that you can use to certify your county's tabulation of the May 17th results.

If you have not already canvassed, tabulated, **and certified** the votes from undated/wrongly dated ballots in an open meeting during the official canvass, it is strongly recommending that you schedule such a meeting and provide at least 48 hours' notice as you would for the Board's regular canvassing meetings. It is also recommended that you share this email with your solicitors.

Given the unprecedented nature of these events, it is expected that there will be questions. Please direct any follow up questions to Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov). In other words, please direct your questions to all three of us.

Thank you as always for your patience and continued hard work, particularly in these unprecedented times.

Kind Regards,

Jonathan Marks
Deputy Secretary for Elections & Commissions
Pennsylvania Department of State
401 North Office Building
Harrisburg, PA 17120
Email: jmarks@pa.gov / Phone: (717) 783-2035

FOR INFORMATION RE: COVID-19 AND WHAT YOU CAN DO... CLICK www.DoYourPartBerks.com

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Thank you.

Appendix 33

From: Marybeth Kuznik <mbkuznik@fayettepa.org>

Sent: Monday, June 27, 2022 12:58 PM

To: Marks, Jonathan; Mathis, Jessica; House, Kori

Cc: 'Jack Purcell'; sherylheidlaw@gmail.com; Dave Lohr; Scott Dunn; mark@zeblaw.com

Subject: [External] RE: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

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Dear Deputy Secretary Marks,

The Board of Elections of Fayette County has voted not to open or count the undated ballots from the May 17, 2022, General Primary. For this reason, I am unable to provide the information you request in your email below.

Dated ballots with the "wrong" date were counted and were already included in Fayette's original certification of the Primary and subsequent Recount.

Sincerely,

Marybeth Kuznik

Manuhoth Kuznik

Marybeth Kuznik Director Fayette County Election Bureau 2 West Main Street, Suite 111 Uniontown, PA 15401 724-430-1289, ext. 101, phone 724-430-4948, fax



EXHIBIT

Joint 8 7/28/22

From: Marks, Jonathan <jmarks@pa.gov> Sent: Monday, June 27, 2022 12:17 PM To: Marks, Jonathan <jmarks@pa.gov>

Subject: FW: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

CAUTION

This message originated from an external source. Verify the legitimacy before clicking links or opening attachments.

Dear County Election Official,

If you are receiving this email, you are among the group of counties who have either not yet certified vote totals from undated ballots or have not provided the Department with information about when you will be able to do so. I understand that this recent Primary has been unusual due to post-election litigation, but the recent rulings in the Commonwealth Court of Pennsylvania and the U.S. Court of Appeals for the 3rd Circuit makes it clear that we will have to certify vote totals that include the vote totals from undated ballots.

As a result, the Department needs you to send certified vote totals that include the votes from undated/wrongly dated ballots as soon as possible. If for some reason you are not able to do so by Wednesday, June 29, then please respond indicating the date on which you plan to do so.

In order to avoid any additional delays in finalizing our certification of the results of the General Primary, the Department may have no choice but to take action to compel certain counties to certify vote totals with undated/wrongly dated ballots in the event we do not receive those certifications before the end of this week.

As noted in my original email, please send copies of your certifications and any questions or responses to all three of the following DOS staff members: Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov).

Thank you for your urgent attention to this matter.

Kind Regards,

Jonathan Marks
Deputy Secretary for Elections & Commissions
Pennsylvania Department of State
401 North Office Building
Harrisburg, PA 17120

Email: jmarks@pa.gov / Phone: (717) 783-2035

From: Marks, Jonathan

Sent: Friday, June 17, 2022 9:08 AM
To: Marks, Jonathan < imarks@pa.gov>

Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

Dear County Election Official,

This email is provided for clarification on which vote totals are to be submitted to the Department of State (DOS) for the May 17th Primary election and the due date for those submissions.

As you are aware, over the last several weeks federal and state courts have determined that a missing handwritten date on the declaration envelope is immaterial in determining whether the ballot is valid and timely returned. (Please see below a summary of events since our last update on May 20th on the litigation.) As a result of that litigation, counties have been instructed that it will be necessary to certify vote totals that include the votes from undated/wrongly dated

ballots. Those certified vote totals for the May 17 Primary are due to DOS no later than Thursday, June 23rd.

Attached is a certification page that you can use to certify your county's tabulation of the May 17th results.

If you have not already canvassed, tabulated, **and certified** the votes from undated/wrongly dated ballots in an open meeting during the official canvass, it is strongly recommending that you schedule such a meeting and provide at least 48 hours' notice as you would for the Board's regular canvassing meetings. It is also recommended that you share this email with your solicitors.

Given the unprecedented nature of these events, it is expected that there will be questions. Please direct any follow up questions to Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov). In other words, please direct your questions to all three of us.

Thank you as always for your patience and continued hard work, particularly in these unprecedented times.

SUMMARY

- 5/20/2022 U.S. Court of Appeals for the 3rd Circuit issues judgment in Migliori acknowledging that the handwritten dates on absentee and mail-in ballots are immaterial. Later that same day, the department instructed counties to segregate undated/wrongly dated ballots and secure them until we could provide further quidance.
- 5/23/2022 Dave McCormick for U.S. Senate files suit in Commonwealth Court seeking, among other things, an injunction that would require counties to count undated ballots.
- 5/24/2022 DOS sends guidance to counties on the segregation, canvassing and tabulation of undated and wrongly dated ballots asking counties to canvass and tabulate those ballots separately from all other ballots.
- 5/24/2022 DOS sends a supplemental statewide reporting form on which counties can report undated ballot vote totals for statewide offices
- 5/26/2022 Secretary of the Commonwealth issues order for the automatic statewide recount of the U.S. Senate contest in the Republican Primary.
- 5/31/2022 Justice Alito issues an administrative stay of the 3rd Circuit's judgment in Migliori.
- 6/2/2022 The Commonwealth Court of Pennsylvania issues an opinion and order in the McCormick matter directing counties to canvass and tabulate undated/wrongly dated ballots and to report two separate vote totals (vote totals with undated ballots and vote totals without undated ballots).
- 6/3/2022 To ensure counties comply with the Commonwealth Court's 6/2 order, DOS sends updated guidance instructing counties to canvass, tabulate and report vote totals from undated ballots and to keep those ballots and vote totals segregated from all other ballots.
- 6/9/2022 The U.S. Supreme Court denies the application for stay in the Migliori case and vacates Justice Alito's administrative stay.

Kind Regards,

Jonathan Marks
Deputy Secretary for Elections & Commissions
Pennsylvania Department of State
401 North Office Building
Harrisburg, PA 17120

Harrisburg, PA 17120 Email: jmarks@pa.gov / Phone: (717) 783-2035

Appendix 34

From: Pfursich, Jacquelyn E < JEPfursich@co.lancaster.pa.us>

Sent: Monday, June 27, 2022 2:08 PM **To:** Marks, Jonathan < imarks@pa.gov>

Cc: Miller, Christa < MChrista@co.lancaster.pa.us >

Subject: [External] FW: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the <u>Report Phishing button in Outlook.</u>

Mr. Marks,

Your email dated June 27, 2022 was forwarded to me from the Lancaster County Board of Elections and Registration Commission Chief Clerk for response. On June 6, 2022 the Lancaster County Board of Elections submitted its certified vote tallies for the 2022 Primary Election. At the same time, Lancaster County also provided to the Department of State a second set of vote tallies that included 82 undated mail in ballots per the Commonwealth Court Order in the McCormick case, Docket No. 286 M.D. 2022. The Commonwealth Court Order specifically indicates that the County provide the vote tallies to the Department of State in that manner so that when a "final decision on the merits of whether the ballots that lack a dated exterior envelop must be counted or not" the Department of State will have the necessary reports. To date, there is no such decision on the merits of this question that would apply to Lancaster County or the 2022 Primary Election. Therefore, the Lancaster County Board of Elections has complied with the Pennsylvania Elections Code as well as the Commonwealth Court Order.

Please continue to use the certified vote tallies previously provided by the Lancaster County Board of Elections and reference the second set of vote tallies as needed.



Regards

Jacquelyn E. Pfursich Lancaster County Solicitor 150 N. Queen Street Suite #714 Lancaster, PA 17603 717-209-3208 Fax 717-293-7208 jepfursich@co.lancaster.pa.us



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From: Marks, Jonathan < imarks@pa.gov > Sent: Monday, June 27, 2022 12:17 PM
To: Marks, Jonathan < imarks@pa.gov >

Subject: [EXTERNAL] FW: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

Dear County Election Official,

If you are receiving this email, you are among the group of counties who have either not yet certified vote totals from undated ballots or have not provided the Department with information about when you will be able to do so. I understand that this recent Primary has been unusual due to post-election litigation, but the recent rulings in the Commonwealth Court of Pennsylvania and the U.S. Court of Appeals for the 3rd Circuit makes it clear that we will have to certify vote totals that include the vote totals from undated ballots.

As a result, the Department needs you to send certified vote totals that include the votes from undated/wrongly dated ballots as soon as possible. If for some reason you are not able to do so by Wednesday, June 29, then please respond indicating the date on which you plan to do so.

In order to avoid any additional delays in finalizing our certification of the results of the General Primary, the Department may have no choice but to take action to compel certain counties to certify vote totals with undated/wrongly dated ballots in the event we do not receive those certifications before the end of this week.

As noted in my original email, please send copies of your certifications and any questions or responses to all three of the following DOS staff members: Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov).

Thank you for your urgent attention to this matter.

Kind Regards,

Jonathan Marks Deputy Secretary for Elections & Commissions Pennsylvania Department of State 401 North Office Building Harrisburg, PA 17120

Email: <u>jmarks@pa.gov</u> / Phone: (717) 783-2035

From: Marks, Jonathan

Sent: Friday, June 17, 2022 9:08 AM
To: Marks, Jonathan < imarks@pa.gov>

Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

Dear County Election Official,

This email is provided for clarification on which vote totals are to be submitted to the Department of State (DOS) for the May 17th Primary election and the due date for those submissions.

As you are aware, over the last several weeks federal and state courts have determined that a missing handwritten date on the declaration envelope is immaterial in determining whether the ballot is *valid and timely returned*. (Please see below a summary of events since our last update on May 20th on the litigation.) As a result of that litigation, counties have been instructed that it will be necessary to certify vote totals that include the votes from undated/wrongly dated ballots. **Those certified vote totals for the May 17 Primary are due to DOS no later than Thursday, June 23rd**.

Attached is a certification page that you can use to certify your county's tabulation of the May 17th results.

If you have not already canvassed, tabulated, **and certified** the votes from undated/wrongly dated ballots in an open meeting during the official canvass, it is strongly recommending that you schedule such a meeting and provide at least 48 hours' notice as you would for the Board's regular canvassing meetings. It is also recommended that you share this email with your solicitors.

Given the unprecedented nature of these events, it is expected that there will be questions. Please direct any follow up questions to Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov). In other words, please direct your questions to all three of us.

Thank you as always for your patience and continued hard work, particularly in these unprecedented times.

SUMMARY

• 5/20/2022 – U.S. Court of Appeals for the 3rd Circuit issues judgment in Migliori acknowledging that the handwritten dates on absentee and mail-in ballots are immaterial. Later that same day, the department instructed counties to segregate undated/wrongly dated ballots and secure them until we could provide further guidance.

- 5/23/2022 Dave McCormick for U.S. Senate files suit in Commonwealth Court seeking, among other things, an injunction that would require counties to count undated ballots.
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Kind Regards,

Jonathan Marks Deputy Secretary for Elections & Commissions Pennsylvania Department of State 401 North Office Building Harrisburg, PA 17120

Email: jmarks@pa.gov / Phone: (717) 783-2035

Click here to report this email as spam.

Appendix 35

From: Leinbach, Christian Y < CLeinbach@countyofberks.com>

Sent: Tuesday, June 28, 2022 12:32 PM **To:** Marks, Jonathan <jmarks@pa.gov>

Cc: Riegner, Paige <PRiegner@countyofberks.com>; Kauffman, Cody <CKauffman@countyofberks.com>; Yocom-Grill, Anne-Marie <AGrill@countyofberks.com>; Ischaefer <Ischaefer@pacounties.org>; awhite <awhite@pacounties.org>;

Daryl Miller (millerd@mail.bradfordco.org) <millerd@mail.bradfordco.org>

Subject: Certification of undated ballots

Importance: High

Jonathan

Please help me understand where the clear court guidance is regarding certification on undated ballots. I do not see it. "rulings in the Commonwealth Court of Pennsylvania and the U.S. Court of Appeals for the 3rd Circuit makes it clear that we will have to certify vote totals that include the vote totals from undated ballots." I believe the rulings are anything but clear. At best the issue is not settled.

I look forward to your response.

Sincerely,

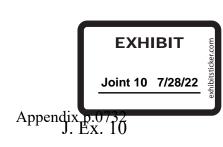
Christian Y. Leinbach
Chairman - Berks County Commissioners

633 Court Street Reading, PA 19601-4310

Phone: 610-478-6136 Ext. 3 / Ext. 6127

Fax: 610-478-6139

Email: <u>CLeinbach@CountyofBerks.com</u>
Website: www.CountyofBerks.com





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From: Marks, Jonathan < imarks@pa.gov>
Sent: Monday, June 27, 2022 12:17 PM
To: Marks, Jonathan < imarks@pa.gov>

Subject: FW: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals

Importance: High

County of Berks Warning: This is an external email. Please exercise caution.

Dear County Election Official,

If you are receiving this email, you are among the group of counties who have either not yet certified vote totals from undated ballots or have not provided the Department with information about when you will be able to do so. I understand that this recent Primary has been unusual due to post-election litigation, but the recent rulings in the Commonwealth Court of Pennsylvania and the U.S. Court of Appeals for the 3rd Circuit makes it clear that we will have to certify vote totals that include the vote totals from undated ballots.

As a result, the Department needs you to send certified vote totals that include the votes from undated/wrongly dated ballots as soon as possible. If for some reason you are not able to do so by Wednesday, June 29, then please respond indicating the date on which you plan to do so.

In order to avoid any additional delays in finalizing our certification of the results of the General Primary, the Department may have no choice but to take action to compel certain counties to certify vote totals with undated/wrongly dated ballots in the event we do not receive those certifications before the end of this week.

As noted in my original email, please send copies of your certifications and any questions or responses to all three of the following DOS staff members: Jessica Mathis (jesmathis@pa.gov), Kori House (korhouse@pa.gov), AND me (jmarks@pa.gov).

Thank you for your urgent attention to this matter.

Kind Regards,

Jonathan Marks Deputy Secretary for Elections & Commissions Pennsylvania Department of State 401 North Office Building Harrisburg, PA 17120

Email: <u>imarks@pa.gov</u> / Phone: (717) 783-2035

FOR INFORMATION RE: COVID-19 AND WHAT YOU CAN DO... CLICK www.DoYourPartBerks.com

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Thank you.

Appendix 36



COUNTY OF BERKS, PENNSYLVANIA

Office of the Solicitor

Services Center, 13th Floor 633 Court Street Reading, PA 19601

Christine M. Sadler - Solicitor

Christian Y. Leinbach, Chair Kevin S. Barnhardt, Vice Chair Michael S. Rivera, Commissioner Cody L. Kauffman, Esquire Direct Dial 610.478.6105, Ext. 6111 Email: ckauffman@countyofberks.com

Via Electronic Mail Only

Mr. Timothy E. Gates Chief Counsel, Pennsylvania Department of State 306 North Office Building Harrisburg, PA 17120 tgates@pa.gov

July 1, 2022

Dear Mr. Gates,

Thank you for your June 29th, 2022, correspondence sent to Ms. Paige Riegner, Director of the Berks County Office of Election Services. Pursuant to a majority vote of the Berks County Board of Elections, the County of Berks will not be recertifying the results of the May 17th, 2022, Primary Election as requested in your correspondence.

Sincerely,

Cody L. Kauffman, Esq.

First Assistant County Solicitor

For The Berks County Board of Elections

EXHIBIT

Joint 12 7/28/22

Appendix 37

From: Gates, Timothy <tgates@pa.gov>
Sent: Tuesday, July 5, 2022 4:30 PM

To: Pfursich, Jacquelyn E

Subject: RE: [External] RE: Certification of Undated Ballots

Good afternoon Jacquelyn -

We believe that the county can certify the election results for the undated ballots separately without having to decertify the results that have already been certified. That being said, I appreciate your response explaining that Lancaster County's position has not changed.

Many thanks,

--Tim

Timothy E. Gates | Chief Counsel Office of Chief Counsel | Department of State 306 North Office Building | Harrisburg, PA 17120 Phone: 717.783.0736 | Fax: 717.214.9899 tgates@pa.gov | www.dos.state.pa.us

PRIVILEGED AND CONFIDENTIAL COMMUNICATION

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From: Pfursich, Jacquelyn E < JEPfursich@co.lancaster.pa.us>

Sent: Tuesday, July 5, 2022 4:17 PM **To:** Gates, Timothy <tgates@pa.gov>

Subject: [External] RE: Certification of Undated Ballots

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the <u>Report Phishing button in Outlook.</u>

Good afternoon Tim,

The Lancaster County Board of Elections is in receipt of your letter dated June 29, 2022 as well as your email dated July 5, 2022. On June 27, 2022, I provided to Mr. Marks the County's position regarding the unsigned mail in-ballots and the status of the litigation regarding this issue. The County's position has not changed. Furthermore, the County believes that certifying an election twice without decertifying the first certification is not consistent with the Pennsylvania Election Code.

EXHIBIT

Joint 13 7/28/22 Appendix p.0738

J. EX. 13

The County has provided you the vote tallies in accordance with the Commonwealth Court Order and hopes that you reconsider your position regarding litigating this matter.

Regards,

Jacquelyn E. Pfursich
Lancaster County Solicitor
150 N. Queen Street Suite #714
Lancaster, PA 17603
717-209-3208
Fax 717-293-7208
jepfursich@co.lancaster.pa.us



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From: Gates, Timothy < tgates@pa.gov > Sent: Tuesday, July 5, 2022 2:25 PM

To: Pfursich, Jacquelyn E < <u>JEPfursich@co.lancaster.pa.us</u>> **Subject:** [EXTERNAL] RE: Certification of Undated Ballots

Jaquelyn -

Following up on my email/letter from last week.

If you do not provide the requested information by 5pm today the Acting Secretary intends to pursue all necessary and appropriate legal action.

--Tim

From: Gates, Timothy

Sent: Wednesday, June 29, 2022 12:56 PM

To: jepfursich@co.lancaster.pa.us

Subject: Certification of Undated Ballots

Importance: High

Dear Jacquelyn Pfursich -

Please see the attached letter regarding certification of undated ballots by your county board of elections.

Note that I have requested a response from you by this Friday, July 1, 2022.

--Tim

Timothy E. Gates | Chief Counsel Office of Chief Counsel | Department of State 306 North Office Building | Harrisburg, PA 17120 Phone: 717.783.0736 | Fax: 717.214.9899 tgates@pa.gov | www.dos.state.pa.us

PRIVILEGED AND CONFIDENTIAL COMMUNICATION

The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any use of this information other than by the intended recipient is prohibited. If you receive this message in error, please send a reply e-mail to the sender and delete the material from any and all computers. Unintended transmissions shall not constitute waiver of the attorney-client or any other privilege.

Appendix 38

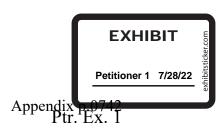
IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dave McCormick for U.S. Senate, and David H. McCormick,

Petitioners

v. : No. 286 M.D. 2022 : Heard: May 31, 2022

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 Board 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 Board 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

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge

FILED: June 2, 2022

OPINION NOT REPORTED

MEMORANDUM OPINION BY PRESIDENT JUDGE COHN JUBELIRER

On May 23, 2022, Dave McCormick for U.S. Senate and David H. McCormick (together, Petitioners) filed a Petition for Review in the Nature of a Complaint in Equity (Petition) in this Court's original jurisdiction against named Respondents Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth (Acting Secretary), and 60 county boards of elections¹ (County Boards). In their Petition, Petitioners allege that the above-listed County Boards refuse to count absentee and mail-in ballots for the Republican Nomination for the Office of United States Senator in the May 17, 2022 General Primary Election,² where the voters failed to handwrite a date on the exterior mailing envelope but the ballots were otherwise timely received based upon the date stamped by the County Boards upon receipt and complied with all applicable requirements. On May 24, 2022, Petitioners filed a Motion for Immediate Special Injunction and Supporting Memorandum of Law, which this Court treats as a motion for a preliminary

¹ Petitioners did not name the remaining seven county boards of elections based on their belief that those boards are already providing the relief sought by Petitioners in this matter. To the extent that it is asserted that these seven counties are indispensable parties and that their absence precludes this Court from acting, the Court is unconvinced at this time that the failure to name parties who are not engaging in the alleged unlawful behavior is a barrier to the Court considering this action.

² Because the unofficial returns submitted to the Department of State by the 67 county boards of elections pursuant to Section 1404(f) of the Pennsylvania Election Code (Election Code), Act of June 3, 1937, P.L. 1333, as amended, 25 P.S. § 3154(f), for the May 17, 2022 General Primary Election indicated that a candidate in the Republican Primary for the Office of United States Senator was defeated by one-half of a percent or less of the votes cast for that office, and the defeated candidate did not request in writing that a recount not be made under Section 1404(h) of the Election Code, 25 P.S. § 3154(h), on May 26, 2022, the Acting Secretary ordered a statewide recount of the entire vote cast in the Republican Primary for the Office of United States Senator pursuant to Section 1404(g)(1) of the Election Code, 25 P.S. § 3154(g)(1). See Order of Recount for the Republican Primary for United States Senator, dated May 26, 2022. The recount was ordered to be completed by the county boards no later than noon on Tuesday, June 7, 2022, and the results of the recount submitted no later than noon on Wednesday, June 8, 2022. *Id.*

injunction (Motion for Special Injunction). For the following reasons, the Court grants the Motion for Special Injunction.

Background & Procedural History

Sections 1306(a) and 1306-D(a) of the Pennsylvania Election Code³ provide, respectively, that, after an elector marks their ballot and secures it in the secrecy envelope, the elector is to place that envelope into a second envelope (outer or exterior envelope) on which, among other things, is printed a "declaration of the elector" which "[t]he elector shall then fill out, date and sign" (dating provisions). 25 P.S. §§ 3146.6(a) (absentee), 3150.16(a) (mail-in). Whether ballots can be counted that do not contain a handwritten date on the outer envelope as described in these sections is the issue. In Count I of the Petition, Petitioners allege that the County Boards' refusal to count timely received ballots lacking a handwritten date on the exterior envelope violates Section 10101(a)(2)(B) of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B),⁴ (commonly referred to as the "materiality provision"),

. . .

³ See Section 1306(a) of the Election Code, added by the Act of March 6, 1951, P.L. 3, 25 P.S. § 3146.6(a) (relating to voting by absentee electors); see also Section 1306-D(a) of the Election Code, added by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77), 25 P.S. § 3150.16(a) (relating to voting by mail-in electors). To complete an absentee or mail-in ballot, an elector is required to "fill out, date and sign the declaration printed on [the second, outer] envelope" and either send the envelope by mail, postage prepaid, or deliver it in person to the elector's respective county board of elections no later than 8:00 p.m. on the day of the primary election. Sections 1306(a), (c), and 1306-D(a), (c) of the Election Code, 25 P.S. §§ 3146.6(a), (c), 3150.16(a), (c).

⁴ Section 10101(a)(2)(B) of the Voting Rights Act provides, as follows:

⁽a) Race, color, or previous condition not to affect right to vote; uniform standards for voting qualifications; errors or omissions from papers; literacy tests; agreements between Attorney General and State or local authorities; definitions

because the dating provisions under the Election Code are immaterial to whether a voter is qualified to vote under state law. (Petition for Review (Pet. for Rev.) ¶¶ 18-20.) In Count II, Petitioners further allege that the County Boards' refusal to count ballots lacking a handwritten date on the exterior envelope, which is a mere technical requirement, disenfranchises both absentee and mail-in voters and thus violates the Free and Equal Elections Clause under article I, section 5 of the Pennsylvania Constitution, PA. CONST. art. I, § 5.5 (Pet. for Rev. ¶¶ 21-23.)

As relief, Petitioners seek a judicial declaration that "timely returned absentee and mail-in ballots may not be rejected due solely to the lack of a date in the declaration on the exterior envelope"; and an order directing the County Boards "to canvass any timely returned absentee or mail-in ballot that lacks a date on its exterior envelope and no other deficiencies or irregularities[,]" "to report to the [] Department of State [(Department)] the unofficial results of the canvass . . . of any timely returned absentee or mail-in ballot that lacks a date on its exterior envelope absent any other irregularities"; and an order enjoining County Boards "to take all other steps necessary to effectuate this Court's declaration[.]" (Pet. for Rev., Prayer for Relief ¶¶ 1-4.)

(2) No person acting under color of law shall--

. .

(B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election[.]

52 U.S.C. § 10101(a)(2)(B).

⁵ The Free and Equal Elections Clause provides: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." PA. CONST. art. I, § 5.

On May 24, 2022,6 immediately prior to the deadline by which the unofficial returns were due to be submitted to the Acting Secretary, Petitioners filed the Motion for Special Injunction seeking an order from this Court directing the County Boards to count the ballots in question. In so requesting, Petitioners assert that Pennsylvania's dating provisions for absentee and mail-in ballots are unenforceable under both state and federal law. Petitioners rely on our Supreme Court's plurality decision in In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, 241 A.3d 1058 (Pa. 2020) (In re 2020 Canvass), and the United States Court of Appeals for the Third Circuit's (Third Circuit) recent decision in Migliori v. Lehigh County Board of Elections (3d Cir., No. 22-1499, filed May 20, 2022; Amended Judgment May 23, 2022) (opinion issued May 27, 2022).8 In Migliori, the Third Circuit held that "inasmuch as there is no dispute that ballots that have the wrong date [on the exterior envelopes] were counted in the" November 2021 General Election for the Office of Judge of the Court of Common Pleas of Lehigh County, the dating provisions under Sections 1306(a) and 1306-D(a) of the Election Code are immaterial under Section 10101(a)(2)(B) of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B). See Migliori v. Lehigh County Board of Elections, No.

⁶ Also on May 24, 2022, Petitioners filed an Application for the Supreme Court to Exercise Jurisdiction Pursuant to its King's Bench Powers and/or Powers to Grant Extraordinary Relief. By per curiam order dated May 31, 2022, the Supreme Court, *inter alia*, denied the Application and declined to exercise its King's Bench powers and/or extraordinary jurisdiction over this matter. *See Dave McCormick for U.S. Senate v. Chapman* (Pa., No. 46 MM 2022, filed May 31, 2022).

⁷ Under Section 1404(f) of the Election Code, 25 P.S. § 3154(f), county boards were required to submit the unofficial returns to the Acting Secretary by 5:00 p.m. on the Tuesday following the election, i.e., May 24, 2022.

⁸ An emergency application for a stay of the Third Circuit's *Migliori*'s mandate, which was to go into effect on June 3, 2022, pending certiorari was granted on May 31, 2022, by the United States Supreme Court, through Associate Justice Samuel Alito. *Ritter v. Migliori* (U.S., No. 21A772, filed May 31, 2022). ("[T]he mandate of the . . . Third Circuit, case No. 22-1499, is hereby stayed pending further order of the undersigned or of the Court.").

22-1499 (3d Cir. Amended Judgment May 23, 2022). Moreover, the Third Circuit held that, because it was undisputed that all of the ballots that had been set aside due to the lack of a date on the exterior envelope in the November 2021 election for the Office of Judge of the Court of Common Pleas of Lehigh County were received by the deadline, there was no basis on the record to refuse to count those ballots. *Id*.

In response to the Third Circuit's judgment in *Migliori*, the Department issued Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes (Guidance) on May 24, 2022,⁹ advising the County Boards to count ballots cast with undated exterior envelopes in the May 17, 2022 General Primary Election and segregate them from all other voted ballots pending ongoing litigation of the issue. The Guidance advised the same with respect to ballots containing incorrect dates.

Two applications to intervene were filed in this matter by: (1) Doctor Oz for Senate & Dr. Mehmet Oz (Oz Intervenors); and (2) the Republican National Committee and Republican Party of Pennsylvania (Republican Intervenors) (together, Intervenors). As no objections to these applications were made, the applications to intervene were granted at the hearing and confirmed by subsequent order.

By order dated May 25, 2022, this Court scheduled a hearing on the Motion for Special Injunction and directed the parties to file, *inter alia*, responses in opposition to the Motion for Special Injunction, if any, and a joint stipulation of facts indicating which County Boards are not following the Department's Guidance.

⁹ See https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-05-24-Guidance-Segregated-Undated-Ballots.pdf (last visited June 2, 2022).

Petitioners have also filed on May 26, 2022, an Amended Application for Voluntary Discontinuance¹⁰ seeking to dismiss 12 County Boards from this action - Adams, Bedford, Cameron, Clinton, Crawford, Elk, Potter, Sullivan, Union, Warren, Washington, and Wyoming -- on the basis that they either (1) did not receive any non-overseas/non-military absentee or mail-in ballots without a voter-supplied date on the exterior envelope; (2) already counted those ballots; or (3) are complying with the Department's Guidance to County Boards directing them to count, but segregate, the challenged ballots.¹¹

Pursuant to the Court's May 25, 2022 directive, responses in opposition to the Motion for Special Injunction were received from the following County Boards: Blair County; Westmoreland County; and Berks County. The general tenor of the first two responses is that this litigation is premature and should be resolved after *Migliori* is final and/or it is determined that *Migliori* applies to this election, and the last response contends that it is unclear that *Migliori* changed the status of Pennsylvania law. In addition, Blair County indicates that it is "act[ing] appropriately" by segregating its 17 ballots that lack a date on the exterior envelope and not including them in its unofficial totals, (Blair Cnty. Response at 3), and Berks County indicates that it is following the Department's Guidance. The Union County Board seeks to be removed as a respondent in this matter because the outcome of these proceedings will not implicate its official or unofficial results for the May 17,

¹⁰ Initially, Petitioners filed an Application for Voluntary Nonsuit, seeking to have five County Boards (Cameron, Clinton, Potter, Sullivan, and Wyoming) dismissed from this action on the basis that Petitioners' requested relief is not applicable to those County Boards, as they either did not receive any non-overseas/non-military absentee or mail-in ballots without a voter-supplied date on the exterior envelope or already counted those ballots.

¹¹ At this time and given that County Boards are alleged to be handling the ballots that lack a date on the exterior envelope differently, the Amended Application for Voluntary Discontinuance is denied without prejudice to reassert.

2022 Primary Election. Finally, the following County Boards filed responses indicating they take no position on the Motion for Special Injunction: Butler County; Chester County; Clearfield County; Franklin County; Lehigh County; Luzerne County; McKean County; and Northampton County. Clearfield and Luzerne County also indicated in their responses that they were following the Guidance.

Also in accordance with the Court's May 25, 2022 directive, the parties have filed a Joint Stipulation of Facts (filed on May 27, 2022 (Jt. Stip.)), and two Supplemental Joint Stipulations of Facts (filed on May 27, 2022 (First Suppl. Jt. Stip.), and May 31, 2022 (Second Suppl. Jt. Stip.), respectively), which are signed by some, but not all, of the parties regarding the status of the count. In the Joint Stipulation and as supplemented by the Second Supplemental Joint Stipulation, the parties stipulated that a number of county boards of elections:

- (1) were not named because they have already counted the absentee/mail-in ballots lacking dates on their exterior envelopes (Armstrong, Erie, Greene, Philadelphia, Schuylkill, Sullivan, Susquehanna, York (Jt. Stip. ¶¶ 12-13));
- (2) should be dismissed from the litigation, as they either did not receive any ballots lacking dates on the exterior envelopes or are doing as Petitioners ask (Adams, Bedford, Cameron, Clinton, Crawford, Elk, Potter, Union, Warren, Washington, Wyoming (Jt. Stip. ¶ 14));
- (3) should be dismissed from the litigation, as they did not receive any Republican absentee/mail-in ballots lacking dates on their exterior envelopes (Clarion, Columbia, Jefferson, Lackawanna, Perry, Venango, Juniata, Northumberland (Jt. Stip. ¶¶ 15; Second Suppl. Jt. Stip. ¶ 3));
- (4) should be dismissed from the litigation because they are complying with the Guidance by segregating and providing separate vote tallies to the Department (Buck, Centre, Chester, Delaware, Franklin, Indiana,

Luzerne, Montgomery, Tioga, Northampton (Jt. Stip. ¶¶ 17-18; Second Suppl. Jt. Stip. ¶ 4));

- (5) it is not clear whether the board is complying with the Guidance (Somerset (Jt. Stip. ¶ 19));
- (6) are complying with the Guidance but not reporting the results to the Department (Allegheny, Cambria, McKean (Jt. Stip. ¶ 20; Second Suppl. Jt. Stip. ¶ 5));
- (7) should be removed because the board has already counted absentee/mail-in ballots lacking dates on their exterior envelopes in a single count with the rest of absentee/mail-in ballots that lack any other deficiency (Lehigh (Jt. Stip. ¶¶ 21-22));
- (8) should be removed as parties because they have complied with the Guidance (Huntingdon, Mifflin (Jt. Stip. ¶¶ 23-24));
- (9) are not following the Guidance (Bradford, Blair, Butler, Dauphin, Fayette, Lancaster, Lycoming, Westmoreland (Jt. Stip. ¶ 25));
- (10) are following the Guidance but do not intend to count the absentee/mail-in ballots lacking dates on their exterior envelopes absent further clarity or finality from the Courts (Berks (Jt. Stip. ¶ 26));
- (11) did not receive any absentee/mail-in ballots without dates on their exterior envelopes (Columbia, Union (Jt. Stip. ¶ 27)); or
- (12) did not respond to Petitioners' questionnaire (Beaver, Carbon, Clearfield, Cumberland, Forest, Fulton, Lawrence, Lebanon, Mercer, Monroe, Montour, Pike, Snyder, Wayne (Jt. Stip. ¶ 28; Second Suppl. Jt. Stip. ¶ 6)).

The first Supplemental Joint Stipulation, filed on May 27, 2022, by Oz Intervenors and signed by several county boards of elections, purports to set forth then-current counts of the numbers of undated absentee/mail-in ballots lacking dates on the exterior envelopes timely received by various counties (Adams, Allegheny, Bucks, Cameron, Chester, Clinton, Crawford, Delaware, Franklin, Perry, Somerset, Union, Venango) for the Republican Primary Election for United States Senator,

totaling 143 absentee/mail-in ballots (38 for Oz and 52 for McCormick). (*See generally* First Suppl. Jt. Stip.)

The Acting Secretary filed an Answer to the Motion for Special Injunction, asserting that Petitioners are likely to succeed on the merits of their case based on *Migliori*, and, alternatively, under Pennsylvania law, which "does not allow rejecting timely received absentee or mail-in ballots just because the voter did not date the return envelope." (*See* Secretary's Answer to the Motion for Special Injunction at 10.)

Republican Intervenors filed an Answer and New Matter to the Motion for Special Injunction and a Motion to Strike the Joint Stipulation, asserting that it opposes the Motion for Special Injunction, does not agree to the Joint Stipulation, and further does not agree that **any** County Boards should be dismissed from this action. Republican Intervenors also claim that the seven county boards not named as Respondents in the Motion for Special Injunction should be joined, as all county boards are indispensable parties to this action. Oz Intervenors filed a Brief in Opposition to Petitioners' Motion for Special injunction, which Republican Intervenors adopt.¹²

Hearing and Arguments

This Court held a hearing on the Motion for Special Injunction on May 31, 2022. At the start of the hearing, Petitioners; the Acting Secretary; various County Boards including Montgomery, Bucks, Franklin, Luzerne, Berks, Delaware, Westmoreland, and Chester; and Intervenors indicated they would not be presenting any witnesses or other evidence, and further agreed that the issue in this case is

 $^{^{\}rm 12}$ Oz Intervenors also filed Preliminary Objections to the Petition, which Republican Intervenors also adopt.

purely a legal one that may be resolved on the stipulated facts submitted by the parties. While some of the County Boards stated their position with respect to the Motion for Special Injunction, only Luzerne County subsequently offered argument in which it requested that the Court provide clear direction and guidance as to what to do with these ballots. The parties also agreed that it is undisputed that all absentee and mail-in ballots that lack dates on the exterior envelopes at issue in this case were timely received and contained no other irregularities as to the qualifications of the voters. Further, the parties generally acknowledged that County Boards were, in fact, counting ballots with incorrect dates on the exterior envelopes, such as a birth date.

Petitioners argue in support of the Motion for Special Injunction, ¹³ relying first on the Third Circuit's decision in *Migliori* and Section 10101(a)(2)(B) of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), and, second, that the dating provisions under Sections 1306(a) and 1306-D(a) of the Election Code do not advance a "weighty interest" under state law given these facts, and violates the Free and Equal Elections Clause of the Pennsylvania Constitution, PA. CONST. art. I, § 5. Petitioners stress that the timeliness of receipt of the ballots in question that lack handwritten dates on the exterior envelopes is established both by "receipt stamps" placed on them by the County Boards , and separately through the unique barcode on the return envelope associated with the voter and the specific ballot, which allows for ballots to be tracked through the Statewide Uniform Registry of Electors (SURE) System.

Petitioners further argue that currently the County Boards are taking different positions with some counting the ballots that lack a date on the exterior envelopes,

¹³ Given the exigency of this matter and the fact that an automatic recount is currently ongoing, the Court dispenses with a lengthy summary of the parties' arguments contained in their filings and focus on the main points of their positions as argued at the hearing.

and others not counting them; thus, the Election Code's dating provisions, which are ambiguous and should be read liberally so as to avoid the unreasonable result of disenfranchising voters, are not being uniformly applied to all Pennsylvania voters raising a question of whether the Pennsylvania Constitution is being violated. Petitioners further contend that the date that matters for eligibility purposes is Election Day. Because these ballots were all timely received by 8:00 p.m. on Primary Election Day, and could not have been cast prior to the ballot having been received by them, there is no question that the ballots have been timely completed regardless of whether there is a date on the exterior envelope. That there are no "weighty interests" which the dates on these exterior envelopes address is evident, according to Petitioners, because ballots on which their exterior envelopes contain obviously incorrect dates, such as birth dates or past or future years, are accepted and counted. Petitioners question how it would be possible to know whether a date was written on an exterior envelope contemporaneously with signing the envelope. Thus, Petitioners argue, under the facts of this case, there is no compelling reason to disenfranchise eligible voters because they inadvertently did not handwrite a date on the exterior envelope.

With regard to Section 10101(a)(2)(B) of the Civil Rights Act, Petitioners contend that this Court should find the Third Circuit's interpretation of federal law persuasive authority and that its holding in *Migliori* is "clearly correct." Petitioners note that at least four Pennsylvania Supreme Court justices recognized the potential violation of the materiality provision by the dating provisions in *In re 2020 Canvass*, a decision that did not resolve the question presently before the Court. Regarding Section 10101(a)(2)(B) of the Civil Rights Act, Petitioners contend that there are two questions before the Court: (1) whether the exterior mailing envelope is a record

or paper requisite to voting; and (2) whether voters' omission of a handwritten date on that envelope is material in determining whether voters are qualified to vote in this election. Petitioners assert that the exterior envelope is in fact a record or paper requisite to voting, under the definitions of "vote" and "voting" in Section 10101(e) of the Civil Rights Act, and that a voter's omission of a handwritten date is not material to determining anything about the qualifications to vote under Pennsylvania law. This is particularly true, Petitioners argue, where, as is undisputed here, ballots that had exterior envelopes with patently wrong dates were counted.

Petitioners request that the Court rule in their favor and grant their requested relief because they have a likelihood of success on the merits and meet the other requirements for obtaining a preliminary injunction. Petitioners clarify that the relief they seek is an order directing the County Boards to (1) segregate and count the absentee and mail-in ballots that lacked a date on the exterior envelope and include those ballots in the County Boards' final tally submitted to the Department; or, alternatively, (2) segregate, count and separately report the votes cast by the absentee and mail-in ballots that lacked a date on the exterior envelope.

The Acting Secretary agrees with Petitioners' position that ballots without a handwritten date on the outer envelope received by 8:00 p.m. on Election Day with no other irregularities should be counted in accordance with both federal and state law on the subject. The Acting Secretary notes that incorrect dates, including birth dates and those dates using the wrong year, have been counted. The Acting Secretary explains that counties are directed to track when an absentee or mail-in ballot is received by stamping its return envelope with the "received" date, in addition to scanning the unique barcode on the return envelope, which is associated with both the voter and the specific ballot allowing the ballot to be tracked through

the SURE system. The Acting Secretary further points out that no good reasons were provided to the Third Circuit as to why the dating provisions are important and submits that the date on the outer envelope does not prevent fraud, the backdating of votes, or determining voter eligibility. The Acting Secretary also states that it is fair to read the Election Code's dating provisions as a suggestion to voters, which some do not follow. The Acting Secretary distinguishes our Supreme Court's decision in In re 2020 Canvass from this case, noting that the Supreme Court did not consider the issue under federal law, as there was no thorough advocacy of the issue in that case, and did not have the benefit of *Migliori*. Additionally, according to the Acting Secretary, federal and state law on this issue may be harmonized because the Election Code does not expressly impose a consequence when there is no date on the exterior envelope. The statutory ambiguity should be resolved to avoid conflicting with both federal and state law. The Acting Secretary admits that, should an envelope not be signed, the ballot would not be counted despite that there is also no consequence provided for omission of a signature in the Election Code because a signature goes to establishing the identity of the voter.

Oz Intervenors assert that the record is insufficient to show that Petitioners have met the requirements for preliminary injunctive relief. Specifically, Oz Intervenors note that there is no irreparable harm here, as no one knows how many ballots that lack a date on the envelopes there actually are and, further, there are discrepancies with the number of those ballots that have been reported to the Department and the current vote margin. Oz Intervenors state they had no objection to the segregation of ballots, as they believe all counties are currently complying with the Guidance to segregate. With these ballots already being segregated, Oz Intervenors assert that if, after the automatic recount, the number of ballots with an

undated exterior envelope is not sufficient to change the outcome of the race, then those ballots should not be counted, and the Court would not need to address the issue. Oz Intervenors also argue that this Court's unreported decision in Ritter v. Lehigh County Board of Elections (Pa. Cmwlth., No. 1322 C.D. 2021, filed January 3, 2022), appeal denied, (Pa., No. 9 MAL 2022, January 27, 2022), remains good law despite the Third Circuit's decision in *Migliori*, which involved the same election and candidates. Oz Intervenors point out that Migliori is not final and contradicts *Ritter*. Further, Oz Intervenors assert that, under *Ritter*, the Civil Rights Act's materiality provision does not apply here because it has nothing to do with a voter's qualifications. Oz Intervenors clarify that the consequence for not including a date on the exterior envelope would be the ballot not being counted, as opposed to, for example, removing a voter from the voter rolls. According to Oz Intervenors, merely invalidating a ballot under the Election Code for failure to include a date on the exterior envelope does not result in the voter being denied the right to vote under federal law. Oz Intervenors further contend that the materiality provision was originally enacted under the Fifteenth Amendment to the United States Constitution¹⁴ to prohibit race discrimination with respect to qualifications to vote. As there is no evidence of discrimination here and no indication that the dating provisions relate to the registration or qualifications to vote, but rather are state law provisions regarding the manner of voting, Oz Intervenors argue that the materiality provision does not apply. Finally, Oz Intervenors observe that the question of whether to count ballots with undated exterior envelopes may not even need to be

¹⁴ The Fifteenth Amendment provides, in relevant part, that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV.

decided here because there may be insufficient ballots that lack a dated exterior envelope to make a difference.

Republican Intervenors contend that Pennsylvania law is clear that ballots that lack a dated exterior envelope should not be counted. They claim that this is merely an attempt by Petitioners to change the rules after the game. Further, according to Republican Intervenors, this is a policy issue decided by the Legislature, which stated that the exterior envelopes in which the absentee and mail-in ballots are submitted shall be dated. Republican Intervenors point to Justice Dougherty's concurring and dissenting opinion in *In re 2020 Canvass* and argue that the date on the exterior envelope provides proof of both when the voter cast his or her ballot and whether the voter completed the ballot within the proper timeframe. Including a date also prevents fraudulent backdating. Republican Intervenors also point to Justice Donohue's statements in *In re 2020 Canvass* about barcodes on ballots to reflect that there is nothing factually different in this case because even in 2020 county boards were scanning the ballots when received. Republican Intervenors consistently take the position that any ballots that lack a date on the exterior envelope, regardless of party, should not be counted, and further, that the Department's Guidance is not binding on either the county boards or this Court. Republican Intervenors additionally assert that all 67 county boards of elections should have been named as Respondents in this action, as they are all indispensable parties and cannot be bound unless named. Further, Republican Intervenors argue that *Migliori* is clearly wrong, as the Pennsylvania Legislature has decided this policy issue and has the power to ensure integrity in elections. Republican Intervenors assert that the Court should not intervene so close to the election under Purcell v. Gonzalez, 549 U.S. 1 (2006), as it erodes the public's confidence in the election process.

Discussion

The Court now addresses Petitioners' Motion for Special Injunction, in which they seek an order from this Court directing the County Boards, to the extent that they are not doing so, to segregate the ballots that lack a dated exterior envelope, canvass (count) those ballots, and include those votes in the County Boards' vote totals reported to the Acting Secretary. In summary, the Acting Secretary, and some of the County Board Respondents, do not object to this relief and ask the Court to provide clarity to an issue that is being resolved differently in different counties. Intervenors, and some other of the County Board Respondents, object to the counting of the ballots that lack a dated exterior envelope and reporting of those totals to the Secretary. No one objects to the ballots that lack a dated exterior envelope being identified and segregated. As to counting the ballots that lack a dated exterior envelope, Oz Intervenors object to counting the ballots at this time, asserting that the Court should wait to see if doing so could change the outcome of the primary Republican Intervenors object to these ballots ever being counted, election. reasoning that they are invalid due to their being in violation of the Election Code based on the lack of a dated exterior envelope.

As the parties argue, the Motion for Special Injunction essentially seeks a preliminary injunction. "A preliminary injunction is an extraordinary remedy[.]" *Hart v. O'Malley*, 676 A.2d 222, 223 n.1 (Pa. 1996). There are six "essential prerequisites" that a party seeking a preliminary injunction must establish for a court to issue the injunction. *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003) (internal quotation marks omitted). As described by the Supreme Court, the party seeking the preliminary injunction bears a heavy burden of proof and is required to show that: (1) "an injunction is necessary

to prevent immediate and irreparable harm that cannot be adequately compensated by damages"; (2) "greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings"; (3) "a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct"; (4) "the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, [the petitioner] must show that it is likely to prevail on the merits"; (5) "the injunction it seeks is reasonably suited to abate the offending activity"; and (6) "a preliminary injunction will not adversely affect the public interest." *Id.* "Because the grant of a preliminary injunction is a harsh and extraordinary remedy, it is to be granted only when and if **each** [factor] has been fully and completely established." *Pa. AFL-CIO by George v. Commonwealth*, 683 A.2d 691, 694 (Pa. Cmwlth. 1996) (emphasis in original).

If the preliminary injunction is a mandatory one, meaning it directs "the performance of some positive act to preserve the status quo," rather than a prohibitory one, which seeks to "enjoin the doing of an action that will change the status quo[,]" the plaintiff must establish "a clear right to relief[.]" *Mazzie v. Commonwealth*, 432 A.2d 985, 988 (Pa. 1981). This is because mandatory preliminary injunctions are more extraordinary and should be granted more sparingly than prohibitory preliminary injunctions. *Id.* "To establish a clear right to relief, the party seeking an injunction need not prove the merits of the underlying claim, but need only demonstrate that substantial legal questions must be resolved to determine the rights of the parties." *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 506 (Pa. 2014). "For a right to be clear, it must be more than merely

viable or plausible" *Wolk v. Sch. Dist. of Lower Merion*, 228 A.3d 595, 611 (Pa. Cmwlth. 2020) (internal quotation marks and citation omitted). "If the party has met the other requirements for a preliminary injunction and the underlying cause of action raises important legal questions, the right to relief is clear." *Lieberman Org. v. Philadelphia*, 595 A.2d 638, 640 (Pa. Cmwlth. 1990).

Notably, "[a] preliminary injunction [does not] serve as a judgment on the merits since by definition it is a **temporary remedy** granted until that time when the party's dispute can be completely resolved." *Appeal of Little Britain Township from Decision of Zoning Hearing Bd.*, 651 A.2d 606, 611 (Pa. Cmwlth. 1994) (emphasis added). Thus, this "proceeding is distinct from the final hearing on the merits." *Lindeman v. Borough of Meyersdale*, 131 A.3d 145, 151 (Pa. Cmwlth. 2015).

With the above principles in mind, the Court turns to the Motion before it and the parties' arguments beginning with the fourth prong of the *Summit Towne Centre* standard on which the parties focused their arguments -- whether Petitioners have shown that they are likely to prevail on the merits of their Petition, i.e., that their right to relief is clear.

Petitioners contend that they have established that they are likely to succeed on the merits in this matter such that they have a clear right to relief because, under Pennsylvania law, the Election Code is to be liberally construed so as not to deprive voters of their right to elect a candidate of their choice. They further argue that the dating provisions set forth in Sections 1306(a) and 1306-D(a) of the Election Code are not material to determining the qualifications of that voter under federal and Pennsylvania law and, therefore, an omission of the date may not be used to deny that voter the right to vote in this election.

Upon this Court's review of the undisputed facts presented in this case, the parties' arguments, and the relevant case law, the Court concludes that Petitioners have established that they are likely to succeed on the merits because they have "demonstrate[d] that substantial legal questions must be resolved to determine the rights of the parties," *SEIU Healthcare Pa.*, 104 A.3d at 506, and their claim is "more than merely viable or plausible." *Wolk*, 228 A.3d at 611. This conclusion weighs heavily in favor of issuing the requested injunctive relief.

The Court notes that no party has asserted, or even hinted, that the issue before the Court involves allegations of fraud. The parties have agreed that this election was free and fair. Nor is it disputed that the ballots in question were timely received, were cast by qualified Pennsylvania voters, and that ballots which had exterior envelopes that contained inaccurate dates, such as birth dates or dates that were clearly erroneous, were nonetheless opened, counted, and their votes included in the vote count. Finally, it is not disputed that County Boards throughout the Commonwealth are not uniform in how they are treating ballots that lack a date on the exterior envelope – some will not consider them at all, some are segregating them but not counting them, some are segregating and counting them but not reporting the vote in their totals, and some are segregating them, counting them, and including the recorded votes in their totals. Thus, without Court action, there exists the very real possibility that voters within this Commonwealth will not be treated equally depending on the county in which they vote.

The Court begins with the overarching principle that the Election Code should be liberally construed so as not to deprive electors of their right to elect a candidate of their choice. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020). For almost 70 years, the Pennsylvania Supreme Court has recognized that

[t]he power to throw out a ballot for minor irregularities, like the power to throw out the entire poll of an election district for irregularities, must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election **except for compelling reasons**. . . . The purpose in holding elections is to register **the actual expression of the electorate's will** and that computing judges should endeavor to see **what was the true result**. There should be the same reluctance to throw out a single ballot as there is to throw out an entire district poll, for sometimes an election hinges on one vote.

Appeal of James, 105 A.3d 64, 67 (Pa. 1954) (emphasis added). These principles are reflected in Section 10101(a)(2)(B) of the Civil Rights Act, which is the basis of Petitioners' first claim for relief.

Federal Civil Rights Act

Section 10101(a)(2)(B) of the Civil Rights Act states:

No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is **not material in determining whether such individual is qualified under State law to vote** in such election.

52 U.S.C. § 10101(a)(2)(B) (emphasis added). The requirement that an error or omission must be "material in determining whether such individual is qualified under State law to vote," *id.*, is consistent with the state law requirement that only compelling reasons justify the disenfranchisement of a qualified voter, *Appeal of James*, 105 A.3d at 67. Under Section 10101(e) of the Civil Rights Act, "the word 'vote' includes **all action necessary to make a vote <u>effective</u>**, including, but not limited to, registration or other action required by State law prerequisite to voting, **casting a ballot**, and **having such ballot counted and included in the appropriate**

totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election." 52 U.S.C. § 10101(e) (emphasis added). Section 10101(e) further provides that the words "qualified under State law" means "qualified according to the laws, customs, or usages of the State." *Id*.

The law and customs of Pennsylvania provide that individuals are qualified to vote in Pennsylvania if they are 18 years old as of the election, a United States citizen for at least 1 month, a resident of the Commonwealth for at least 30 days, a resident of the relevant election district for at least 30 days immediately preceding the election, and are not an incarcerated felon. PA. CONST. art. VII, § 1; Section 701 of the Election Code, 25 P.S. § 2811; Section 1301(a) of the Voter Registration Act, 25 Pa.C.S. § 1301(a); *Mixon v. Commonwealth*, 759 A.2d 442, 451 (Pa. Cmwlth. 2000) (persons with felony convictions, but not currently incarcerated, may register to vote); 1972 Op. Att'y Gen. No. 121¹⁵ (concluding a durational requirement of longer than 30 days is unenforceable).

Petitioners contend that not counting timely received ballots due to the omission of the date on the exterior envelope is a denial of the right to vote in violation of Section 10101(a)(2)(B) of the Civil Rights Act because the dating provisions are not material to the four voters' qualification requirements under state law. They argue that the dating provisions do not speak to or add any insight into a voter's age, citizenship, residency, or incarceration status, and, therefore, cannot be used as a reason not to count an otherwise validly cast ballot. Petitioners cite the Third Circuit's opinion in *Migliori*, which found the dating provisions are immaterial to a voter's qualifications and eligibility under Section 10101(a)(2)(B), and ordered that such ballots were to be counted. Petitioners argue that *Migliori* answered the

¹⁵ See https://www.duq.edu/assets/Documents/law/pa-constitution/_pdf/attorney-general/1972-121.pdf (last visited June 2, 2022).

question directly posed here on almost the same factual predicate and, therefore, the Court should find the Third Circuit's reasoning persuasive and supportive of their likelihood of success on the merits.

Intervenors argue that Petitioners have not established a likelihood of success on their federal claim because Section 10101(a)(2)(B) only applies to determinations that affect a voter's actual qualification, and not to the signature requirement on an envelope in which the ballot is returned. They assert the Fifteenth Amendment to the United States Constitution, the authority under which the materiality provision was enacted, relates to racial discrimination in laws associated with the registration and qualification of voters and the materiality provision must be read in that context. As there is no allegation that the dating requirement constitutes discriminatory action in the registration or qualification of voters in Pennsylvania, this provision does not apply here. Thus, Intervenors contend, Petitioners do not have a clear right to relief as they are unlikely to be successful on the merits of the Petition. Intervenors further argue that there is no private right of action under Section 10101(a)(2)(B) that would allow Petitioners to bring this action, as the United States Attorney General has the right to enforce this provision.

Additionally, Intervenors argue that Petitioners cannot establish a likelihood of success on the merits of the federal claim based on *In re 2020 Canvass* and their belief that the majority of the Supreme Court justices determined that the dating provisions are justified by "weighty interests" precludes a finding that the dating provisions are not "material" under Section 10101(a)(2)(B). They further argue that this Court, in *Ritter*, applied those "weighty interests" in determining that Section 10101(a)(2)(B) was inapplicable in that case.

Upon our review of Section 10101(a)(2)(B), the facts here, and the Third Circuit's analysis in *Migliori*, the Court finds the analysis in *Migliori* persuasive in determining whether Petitioners have a likelihood of success on the question of federal law asserted. In doing so, the Court notes that neither the Pennsylvania Supreme Court in *In re 2020 Canvass* nor the Court in *Ritter* had the benefit of the thorough advocacy that has been presented to this Court in the case at bar, and to the Third Circuit in *Migliori*. They further did not have the benefit of the Third Circuit's interpretation of Section 10101(a)(2)(B) as it relates to the Election Code's dating provisions. While this Court is not bound by the decisions of the federal district and intermediate appellate courts on issues of federal law, "it is appropriate for a Pennsylvania appellate court to follow the Third Circuit's ruling on federal questions to which the U[nited] S[tates] Supreme Court has not yet provided a definitive answer." **In the Circuit of the

Migliori involved very similar factual circumstances as those alleged here – the refusal to count ballots of qualified Pennsylvania voters that were timely received but did not have a dated exterior envelope, notwithstanding that ballots with exterior envelopes that had incorrect or inaccurate dates were counted. In finding that Section 10101(a)(2)(B) was violated under those circumstances, the Third Circuit reasoned:

¹⁶ The Court recognizes that the United States Supreme Court, through Justice Alito, has issued a stay of the Third Circuit's mandate in *Migliori* requiring the counting and reporting of those ballots. Justice Alito's order did not include any discussion of the merits of the Third Circuit's decision. Issuance of the stay will maintain the status quo in which the office of Judge of the Court of Common Pleas is not yet filled by a candidate until there is a final determination as to who won the election. The issuance of the stay does not at this time affect the persuasive value of the *Migliori* Court's reasoning and analysis.

Th[is] requirement[, dating the exterior envelope,] is material if it goes to determining age, citizenship, residency, or current imprisonment for a felony.

Appellees cannot offer a persuasive reason for how this requirement helped determine any of these qualifications. And we can think of none. Appellees try to make several reaching arguments. None of which we find persuasive. For example, Appellees argue that the date confirms a person is qualified to vote from their residence since a person may only vote in an election district s/he has resided in for at least thirty days before the election and one's residency could change in a matter of days. It is unclear how this date would help . . . but even supposing it could, this argument assumes the date on the envelope is correct. . . .

Intervenor-Appellee Ritter also claims that the date requirement "serves a significant fraud-deterrent function" and "prevents the tabulation of potentially fraudulent back-dated votes." Even if this were true, [Section 10101(a)(2)(B)] is clear that an "error or omission is not material" unless it serves to "determin[e] whether such individual is qualified under State law to vote in such election." Fraud deterrence and prevention are at best tangentially related to determining whether someone is qualified to vote. But whatever sort of fraud deterrence or prevention this requirement may serve, it in no way helps the Commonwealth determine whether a voter's age, residence, citizenship, or felony status qualifies them to vote. It must be remembered that all agree that the disputed ballots were received before [the] 8:00 p.m. deadline on Election Day. It must also be remembered that ballots that were received with an erroneous date were counted. We are at a loss to understand how the date on the outside envelope could be material when incorrect dates – including future dates – are allowable but envelopes where the voter simply did not fill in a date are not. Surely, the right to vote is "made of sterner stuff" than that.

.... The nail in the coffin, as mentioned above, is that ballots were only to be set aside if the date was **missing** – not incorrect. If the substance of the string of numbers does not matter, then it is hard to understand how one could claim that this requirement has any use in determining a voter's qualifications.

[The date written on the exterior envelope] was not entered as the official date received in the SURE system, nor used for any other purpose. Appellees have offered no compelling reasons for how these

dates – even if correct, which we know they did not need to be – help determine one's age, citizenship, residence, or felony status. And we can think of none. Thus, we find the dating provisions under 25 [P.S.] § 3146.6(a) and 3150.16(a) are immaterial under [Section 10101(a)(2)(B)].

Migliori, slip op. at 14-16 (footnotes omitted) (emphasis in original). At this stage of these proceedings, and in the absence of a definitive answer on this question by either the Pennsylvania Supreme Court or the United States Supreme Court, the Court finds *Migliori*'s analysis on this federal question sufficiently persuasive to conclude that Petitioners have established a likelihood of success on the merits on the Petition.

As to the argument that Petitioners cannot establish a likelihood of success on the merits because Section 10101(a)(2)(B) does not authorize a private cause of action, this Court is persuaded by the Third Circuit's thorough and well-reasoned analysis of this issue in *Migliori*. Therein, the Third Circuit rejected this argument, finding that the standard set forth in *Gonzaga University v. Doe*, 536 U.S. 273, 384 (2002), was satisfied and that a private cause of action could be filed to enforce Section 10101(a)(2)(B)'s provisions. *Migliori*, slip op. at 9-13. Accordingly, this is not a basis to find that Petitioners will be unlikely to succeed on the merits of their claims.

The Court is also not persuaded that *In re 2020 Canvass* requires a different result. It is apparent from the opinions in that matter that the federal materiality question was not resolved in that case. The Opinion Announcing the Judgment of the Court (OAJC) found "persuasive" an argument that not counting ballots that lacked a dated exterior envelope could lead to a violation of Section 10101(a)(2)(B), 241 A.3d at 1074 n.5, but did not otherwise address the argument. Justice Wecht offered his own insight into that question, stating

The OAJC does not pursue this argument, except to acknowledge a handful of cases that might be read to suggest that the name and address, and perhaps even the dat[ing provisions] could qualify as "not material in determining whether such individual is qualified under State law to vote." Given the complexity of the question, I would not reach it without benefit of thorough advocacy. But I certainly would expect the General Assembly to bear that binding provision in mind when it reviews our Election Code. It is inconsistent with protecting the right to vote to insert more impediments to its exercise than considerations of fraud, election security, and voter qualifications require.

Id. at 1080 n.54 (Wecht, J., concurring) (emphasis added). Finally, although Justice Dougherty's concurring and dissenting opinion did discuss the "weighty interests" behind the dating provisions, there was no explicit or implicit reference to Section 10101(a)(2)(B). Thus, a careful reading of *In re 2020 Canvass* reflects that at least four justices of the Supreme Court recognized that the materiality provision of Section 10101(a)(2)(B) might be applicable, although not resolving the issue "without the benefit of thorough advocacy." 241 A.3d at 1080 n.54 (Wecht, J., concurring). Because in this case, the Court has the "benefit of thorough advocacy," *id.*, not present in *In re 2020 Canvass*, *In re 2020 Canvass* is not, on its face, incompatible with Petitioners' likelihood of success on the merits of their Section 10101(a)(2)(B) claim.

Further, the specific material facts described in this case were not described by the Supreme Court in *In re 2020 Canvass*, particularly the fact that ballots with exterior envelopes that contained incorrect dates are counted and included in the election totals and that some counties are also including the ballots that lack the date on the exterior envelope in their election totals. Examining the "weighty interests" identified in Justice Dougherty's concurring and dissenting opinion, and cited in Justice Wecht's concurring opinion, as supporting their respective positions that the

legislative intent in using the word "shall" in relation to the dating provisions was that they be mandatory, not directory provisions, reveals that those interests identified were, at least implicitly, based on the belief that the date written on the exterior envelope was the actual date the ballot was completed.

For example, Justice Dougherty opined that "the date on the ballot envelope provides proof of when the elector actually executed the ballot in full," "[t]he presence of the date establishes a point in time against which to measure the elector's eligibility to cast the ballot," or that the date could be used to "ensure[] the elector completed the ballot within the proper time frame." Id. at 1090-91 (Dougherty, J., concurring and dissenting) (emphasis added) (internal quotation marks omitted). Each of these interests presume that the voter wrote the date on which the voter completed the ballot, and not their birthday or some date other than the day they executed the exterior envelope. However, it is not disputed in this matter that exterior envelopes that **clearly** used dates other than the day of execution have not been invalidated. And it would be difficult to determine whether the date accurately reflects the day the ballot was signed. Moreover, here there is no dispute that all of the ballots were received by 8:00 p.m. on Primary Election Day, which was not necessarily true in *In re 2020 Canvass*, which involved a unique situation where absentee and mail-in ballots were to be counted, by order of the Supreme Court, if they arrived within three days of Election Day, making it more relevant to know when, theoretically, a voter filled out, dated, and signed the exterior envelope. These "weighty interests," and the interpretation of the legislative intent behind the use of "shall" in those provisions, are thus undermined by the facts in this case because a ballot with an exterior envelope containing an incorrect date, which can be counted, does not ensure or establish anything in relation to fraud prevention,

electoral security, ballot confidentiality, or voter eligibility. When there is no factual basis for concluding that the dating provisions serve to address the "weighty interests," interpreting the word "shall" as mandatory, upon pain of disenfranchising qualified voters whose ballots were timely received, raises questions as to whether that interpretation fulfills the legislative intent behind those provisions. Moreover, the date that matters for eligibility purposes is the date of Election Day, which is the day of "the election." See PA. CONST. art. VII, § 1 (speaking of voter eligibility in terms of being qualified as of "the election"); 25 Pa.C.S. § 1301 (speaking of voter eligibility in terms of "the day of the election" or "the election"). Thus, if the voter died, moved or otherwise became ineligible to vote prior to Election Day, even if the voter was eligible when signing and dating the exterior envelope, that ballot would not count, no matter what date was on the outer envelope. Because these ballots were all timely received by 8:00 p.m. on Primary Election Day, and could not have been cast prior to the ballot having been received, there is no question that the ballots have been timely completed whether or not there is a date on the outer envelope. Thus, the "weighty interests" identified in *In re 2020 Canvass* are not as heavy when viewed through the lens of the facts in this case, and particularly when weighed against disenfranchising a qualified voter. Accordingly, this part of *In re 2020* Canvass is not, on its face, incompatible with Petitioners' likelihood of success on the merits of their Section 10101(a)(2)(B).

As to *Ritter*, the Court notes that, as an unreported opinion, *Ritter* is not binding authority under Pennsylvania Rule of Appellate Procedure 126(b), Pa.R.A.P. 126(b), and Section 414(a) of this Court's Internal Operating Procedures, 210 Pa. Code § 69.414(a). More importantly, there are several distinguishing factors between *Ritter* and this case. First, there is no mention in the *Ritter* opinion of the

material facts that are presently before the Court in this case, on which this Court relies, such as the fact that ballots that had exterior envelopes with incorrect or inaccurate dates on them are counted. This is important because *Ritter* relied on the "weighty interests" as described in Justice Dougherty's concurring and dissenting opinion in In re 2020 Canvass and, as discussed, the material facts in this case do not support such a finding. Second, unlike here, Ritter involved a challenge to the actions of a single county board of elections, not a challenge to boards of election throughout the Commonwealth in a statewide election. This is important because Ritter did not have to consider the fact that different counties were treating the ballots without a dated exterior envelope differently, leading to a question of unequal treatment of Pennsylvania voters casting ballots for the same candidates for the same office. Finally, it is unclear that *Ritter* had the benefit of the level of advocacy on the Section 10101(a)(2)(B) issue that was presented in this matter. In this regard, Ritter noted that the trial court had raised Section 10101(a)(2)(B) sua sponte, and that it was addressing this issue "[t]o the extent the parties refer[red]" to Section 10101(a)(2)(B) in their presentations. *Ritter*, slip op. at 18. Thus, it is not clear that Ritter fully addressed the arguments that are now raised to the Court and under the same factual predicate. Accordingly, the Court declines to find that *Ritter* precludes Petitioners from establishing that they will be successful on the merits of their Petition.

State Law

In addition to the above federal law claim, Petitioners also assert a state law claim as a basis for relief. The Pennsylvania Constitution declares that "[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." PA. CONST. art. I, § 5. For over

100 years the Pennsylvania Supreme Court has held that elections are "free and equal" when "the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial." *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). Moreover, efforts must be made to avoid disenfranchisement even when it happens "by inadvertence." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 812 (Pa. 2018) (citing *In re New Britain Borough Sch. Dist.*, 145 A. 597, 599 (Pa. 1929)).

To summarize, 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. The purpose in holding an election is to register the actual expression of the electorate's will and to see the true result.

Intervenors argue that this Court should conclude that Petitioners cannot establish a likelihood of success on the merits based on *In re 2020 Canvass* in which, they argue, a majority of the Supreme Court justices determined that the dating provisions are justified by "weighty interests." These interests as expressed in *In re 2020 Canvass*, are the date on the exterior envelope "provides proof of when the elector actually executed the ballot in full," "[t]he presence of the date establishes a point in time against which to measure the elector's eligibility to cast the ballot," or the date could be used to "ensure[] the elector completed the ballot within the proper time frame." 241 A.3d at 1090-91 (Dougherty, J., concurring and dissenting) (internal quotations omitted).

As discussed in the Court's consideration of Petitioners' federal law claim, the material facts set forth in this case were **not** set forth in *In re 2020 Canvass*,

particularly the fact that ballots that had exterior envelopes with incorrect dates were counted and included in the election totals and that some counties did count and include those ballots in the election totals. The "weighty interests" identified in that case as supporting a mandatory reading of the term "shall" in the dating provisions, and relied upon by Intervenors, reveal that those interests, at least implicitly, are based on the belief that the date written on the exterior envelope was an accurate date. However, because it is not disputed in this matter that exterior envelopes that clearly used dates other than the day of execution have not been invalidated. Moreover, because there is no dispute that all of the ballots were received by 8:00 **p.m. on Election Day,** which was not necessarily true in *In re 2020 Canvass*, these "weighty interests," and the associated interpretation of the dating provisions as mandatory, are thus undermined by the facts in this case. Under the facts in this case, as thoroughly described earlier in this opinion, 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. Accordingly, these statements in *In re* 2020 Canvass are not, on their face, inconsistent with Petitioners' likelihood of success on the merits under their state law claim. Further, as Ritter lacked the same factual predicate as the matter currently before the Court and relied upon the "weighty interests" analysis in *In re 2020 Canvass* to support its decision, it too is not inconsistent with Petitioners' likelihood of success on the merits.

For these reasons, the Court concludes that Petitioners have established that they are likely to prevail on the merits of their Petition and have a clear right to relief. There is no question that Petitioners have raised substantial legal questions that must be resolved and that their right to this relief is "more than merely viable or plausible."

Wolk, 228 A.3d at 611 (Pa. Cmwlth. 2020). Therefore, this prong weighs heavily in favor of granting the preliminary injunction.

The Remaining Prongs

The Court now considers the remaining prongs of the Summit Towne Centre standard. In examining prongs 1, 2 and 6, which relate to the equities of granting relief as opposed to denying the relief, the Court agrees that Petitioners have met their burden of proving their entitlement to relief. Respectively, those prongs require Petitioners to show that "an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages"; "greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings"; and "a preliminary injunction will not adversely affect the public interest." Summit Towne Centre, Inc., 828 A.2d at 1001. Here, numerous qualified Pennsylvania voters whose timely filed ballots are being rejected and not counted on a basis that appears to be inconsistent with state law and that the Third Circuit has held violates the Civil Rights Act, effectively disenfranchising them and depriving Petitioners of votes that were cast for Mr. McCormick, is irreparable harm that cannot be compensated by damages, is a great injury, and, in this Court's view, contrary to the public's interest. While Oz Intervenors argue that there will be no irreparable harm unless and until it is determined that counting the ballots that lack a dated exterior envelope will make a difference in the outcome of the primary election and both Intervenors argue that the public's interest in ensuring the confidence in the election process will be harmed, the Court is not persuaded. Granting temporary relief that precludes the potential disenfranchisement of qualified Pennsylvania voters who timely cast ballots while a determination is made as to whether that alleged disenfranchisement violates state or federal law is not inconsistent with the public's interest in ensuring confidence that the election process will count votes cast by qualified voters absent compelling circumstances, which may not be present here. As this primary election moves through the recount stage, the ability to determine which votes will make a difference is an ever-changing number and the Court concludes that to wait and direct relief, beyond segregation, will only delay the election process further. In addition, to the extent Intervenors rely on *Purcell*, the Court is unconvinced, at this stage of the proceeding, that a prohibition against federal courts weighing in on state election rules and laws on the eve of an election, precludes an after-the-fact state court challenge to the actual implementation of those state laws. Accordingly, these prongs weigh in favor of granting the requested injunctive relief.

As to prongs 3 and 5, which respectively require Petitioners to establish that "a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct"; and "the injunction it seeks is reasonably suited to abate the offending activity," the Court concludes Petitioners have done so. Because the offending activity is the alleged violation of state law and the Civil Rights Act by not counting timely received ballots of qualified Pennsylvania voters due to an omission of a date on the exterior envelope that may not involve a "weighty interest" under state law under these facts and that is immaterial under Section 10101(a)(2)(B), directing that those ballots be counted is reasonably suited to abate that activity. However, cognizant that this is only a preliminary determination and a full decision on the merits of this issue is yet to be made, the Court agrees that segregating those ballots, such that the number of ballots lacking an undated envelope being counted is readily discernable in the event a

different conclusion is reached upon a merits-based review, is likewise suitable. As to the status quo, this case presents an interesting situation where the status quo is that every County Board is making its own determination on what to do with these ballots. This raises the specter of the unequal treatment of qualified voters in Pennsylvania in that some qualified voters who happened to not date their exterior envelopes are having their vote counted and others are not. Under these circumstances, and, given the undeniable importance of the right of citizens to engage in the elective process and have their votes counted in the absence of "compelling reasons" to disenfranchise them, *Appeal of James*, 105 A.3d at 67, the Court concludes that providing clarity and guidance, so that voters' ballots are treated the same, satisfies this requirement. Thus, these prongs support granting Petitioners requested injunctive relief.

Conclusion

The right to vote in a free and fair election is essential in a representative democracy. The Court recognizes the tireless and dedicated efforts of the County Boards in the critical work of counting valid ballots. The Court also commends the candidates for their dedication and efforts to ensure that the election process is undertaken in a manner consistent with state and federal law. Under the facts in this case, and where there has been no answer to how requiring a handwritten date on the outside envelope supports a weighty interest when ballots with incorrect dates on their exterior envelopes are counted, a substantial question is raised as to whether voters are being disenfranchised based on a requirement that is immaterial to a voter's qualification in violation of Section 10101(a)(2)(B) of the Civil Rights Act and/or without a compelling reason in violation of state law.

Having concluded that Petitioners have met the six essential prerequisites for obtaining a preliminary injunction, the Court will grant the Motion for Special Injunction as follows: the County Boards are directed, if they are not already doing so, to segregate the ballots that lack a dated exterior envelope, to canvass those ballots assuming there are no other deficiencies or irregularities that would require otherwise, and to provide two vote tallies to the Acting Secretary, one that includes the votes from those ballots without a dated exterior envelope and one that does not. Thus, 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.

RENÉE COHN JUBELIRER, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David H. McCormick,

Petitioners

v. : No. 286 M.D. 2022

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 Board 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 Board 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

ORDER

NOW, June 2, 2022, Petitioners' Motion for Immediate Special Injunction is **GRANTED**, and the County Boards are directed, if they are not already doing so, to segregate the ballots that lack a dated exterior envelope, to canvass those ballots assuming there are no other deficiencies or irregularities that would require

otherwise, report two vote tallies to Leigh M. Chapman, Acting Secretary of the Commonwealth (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. Additionally, the Amended Application for Voluntary Discontinuance filed by Dave McCormick for U.S. Senate, and David H. McCormick is **DENIED** without prejudice.

RENÉE COHN JUBELIRER, President Judge

Appendix 39

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David H. McCormick,

Petitioners

v. : No. 286 M.D. 2022

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 Board 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 Board 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

ORDER

NOW, June 10, 2022, upon consideration of the Application for Relief in the Nature of a Voluntary Discontinuance or, Alternatively, a Dismissal for Mootness (Application for Discontinuance), filed by Dave McCormick for U.S. Senate and David H. McCormick, and the answers thereto filed by the Leigh M. Chapman, as Acting Secretary of the Commonwealth (Secretary), and Intervenors Doctor Oz for



Senate and Dr. Mehmet Oz (Oz Intervenors), and Republican National Committee and Republican Party of Pennsylvania (Republican Intervenors), the Application for Discontinuance is **GRANTED**. The Prothonotary shall mark this matter closed. In addition, upon consideration of the Application to Vacate Memorandum Opinion and Order of June 2, 2022, (Application to Vacate) filed by Oz Intervenors, in which Republican Intervenors join, and the answer filed by the Secretary, the Application to Vacate is **DENIED**.

RENÉE COHN JUBELIRER, President Judge

Appendix 40

EXHIBIT

Berks-Lancaster 1 7/28/22

Docketed: 03/18/2022

Termed: 05/27/2022

General Docket Third Circuit Court of Appeals

Court of Appeals Docket #: 22-1499 Nature of Suit: 3441 Civil Rights Voting

Linda Migliori, et al v. Lehigh County Board of Elections

Appeal From: United States District Court for the Eastern District of Pennsylvania

Fee Status: Paid

Case Type Information:

1) civil

private
 civil rights

Originating Court Information:

District: 0313-2 : 5-22-cv-00397

Court Reporter: Mike Finney, Court Reporter Supervisor Trial Judge: Joseph F. Leeson, Junior, U.S. District Judge

Date Filed: 01/31/2022

Date Order/Judgment:

Date Order/Judgment EOD:

03/16/2022

Date NOA Filed:

03/18/2022

Prior Cases:

None

Current Cases:

03/16/2022

None

MS. LINDA MIGLIORI

Plaintiff - Appellant

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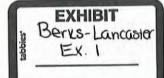
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22-1499 Docket 7/23/22, 6:13 PM

[NTC Retained]

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(see above)

MS. LINDA MIGLIORI; FRANCIS J. FOX; RICHARD E. RICHARDS; KENNETH RINGER; SERGIO RIVAS, Appellants V. ZACHARY COHEN, Intervenor - Plaintiff V. LEHIGH COUNTY BOARD OF ELECTIONS V. DAVID RITTER, Intervenor - Defendant

_			
	03/18/2022	1 37 pg, 2.5 MB	CIVIL CASE DOCKETED. Notice filed by Appellants Ms. Linda Miglori, Richard R. Richards and Sergio Rivas in District Court No. 5-22-cv-00397. (JK) [Entered: 03/18/2022 11:42 AM]
	03/18/2022	□ 2	RECORD available on District Court CM/ECF. (JK) [Entered: 03/18/2022 11:43 AM]
	03/18/2022	3 1 pg, 241.22 KB	ECF FILER: ENTRY OF APPEARANCE from Lucas J Repka on behalf of Appellee(s) Lehigh County Board of Elections. [22-1499] (LJR) [Entered: 03/18/2022 02:16 PM]
	03/18/2022	<u>4</u> 2 pg, 80.57 KB	ECF FILER: DISCLOSURE STATEMENT on behalf of Appellee Lehigh County Board of Elections. [22-1499] (LJR) [Entered: 03/18/2022 02:29 PM]
	03/19/2022	5 2 pg, 986 KB	ECF FILER: DISCLOSURE STATEMENT on behalf of Appellees Francis J. Fox, Kenneth Ringer and Appellants Ms. Linda Miglori, Richard E. Richards and Sergio Rivas. [22-1499] (SAL) [Entered: 03/19/2022 10:32 AM]
	03/19/2022	6 318 pg, 9.36 MB	ECF FILER: Motion filed by Appellees Francis J. Fox, Kenneth Ringer and Appellants Ms. Linda Miglori, Richard E. Richards and Sergio Rivas for injunction. Certificate of Service dated 03/19/2022. Service made by ECF, Email. [22-1499] (SAL) [Entered: 03/19/2022 10:51 AM]
	03/19/2022	□ 7	TEXT ONLY ORDER (Clerk) Appellee's response in opposition to the motion for injunction pending appeal must be filed by 11:00 a.m. on Sunday, March 20, 2022. (KAG) [Entered: 03/19/2022 11:39 AM]
	03/19/2022	8 1 pg, 197.65 KB	ECF FILER: ENTRY OF APPEARANCE from Adriel I. Cepeda Derieux on behalf of Appellant(s) Linda Migliori, Richard E. Richards, Sergio Rivas. [22-1499] (AIC) [Entered: 03/19/2022 03:47 PM]
	03/19/2022	9 28 pg, 357.67 KB	ECF FILER: RESPONSE in opposition filed by Appellee Lehigh County Board of Elections to Motion for Injunction. Certificate of Service dated 03/19/2022 by ECF. [22-1499][Edited 03/21/2022 by LML] (LJR) [Entered: 03/19/2022 04:29 PM]
	03/19/2022	10 1 pg, 311.2 KB	ECF FILER: ENTRY OF APPEARANCE from Joshua J. Voss on behalf of Appellee(s) David Ritter. [22-1499] (JJV) [Entered: 03/19/2022 04:58 PM]
	03/19/2022	177 pg, 4.08 MB	ECF FILER: Response filed by Appellee David Ritter to motion for Injunction. Certificate of Service dated 03/19/2022. [22-1499] (JJV) [Entered: 03/19/2022 11:04 PM]
	03/20/2022	12 2 pg, 131.95 KB	ORDER (CHAGARES, Circuit Judges) Appellants' motion for injunctive relief is hereby granted on a temporary basis in order to allow time for a full panel of this Court to consider the motion and responses in opposition. Appellee shall not certify the election results (scheduled to occur on March 21, 2022) pending further order of this Court. The Clerk will refer the matter to a three judge panel on an expedited basis. Panel No.: ECO-035-E. CHAGARES, Authoring Judge. (KAG) [Entered: 03/20/2022 05:27 PM]
	03/21/2022	1 pg, 184.57 KB	ECF FILER: ENTRY OF APPEARANCE from Ari Savitzky on behalf of Appellant(s) Linda Migliori, Richard E. Richards, Sergio Rivas. [22-1499] (AJS) [Entered: 03/21/2022 10:50 AM]
	03/21/2022	14 1 pg, 82.97 KB	ECF FILER: ENTRY OF APPEARANCE from Sophia Lin Lakin on behalf of Appellant(s) Linda Migliori, Richard E. Richards, Sergio Rivas. [22-1499] (SLL) [Entered: 03/21/2022 11:49 AM]
	03/21/2022	15 1 pg, 197.27 KB	ECF FILER: ENTRY OF APPEARANCE from Jacob B. Boyer on behalf of Amicus Curiae Commonwealth of Pennsylvania. [22-1499] (JBB) [Entered: 03/21/2022 04:27 PM]
	03/21/2022	16 10 pg, 48.96 KB	ECF FILER: AMICUS BRIEF on the merits on behalf of Commonwealth of Pennsylvania in support of Appellant/Petitioner's Emergency Motion for Injunction Pending Appeal. Certificate of Service dated 03/21/2022 by ECF. [22-1499][Edited 03/21/2022 by JK] (JBB) [Entered: 03/21/2022 04:33 PM]
	03/21/2022	1 pg, 244.71 KB	ECF FILER: ENTRY OF APPEARANCE from Michael J. Fischer on behalf of Amicus Curiae Commonwealth of Pennsylvania. [22-1499] (MJF) [Entered: 03/21/2022 04:39 PM]
	03/22/2022	18 1 pg, 106.37 KB	ORDER (Clerk) At the direction of the Court, the parties shall file their briefs as follows: Appellants' brief, Intervenor Cohen's brief (should he elect to participate), and the joint appendix must be filed on or before March 29, 2022, Appellee's and Intervenor Ritter's briefs must be filed on or before April 5, 2022 and Appellants' and Intervenor Cohen's reply briefs, if any, must be filed on or before April 8, 2022. The appeal will be calendared at the convenience of the Court. (JK) [Entered: 03/22/2022 12:21 PM]
	03/22/2022	1 pg, 297.15 KB	ECF FILER: ENTRY OF APPEARANCE from Stephen A. Loney, Jr. on behalf of Appellant(s) Linda Migliori, Richard E. Richards, Sergio Rivas, Francis J. Fox, Kenneth Ringer. [22-1499] (SAL) [Entered: 03/22/2022 01:43 PM]
	03/22/2022	20 3 pg, 111.27 KB	ECF FILER: CIVIL INFORMATION STATEMENT on behalf of Appellees Francis J. Fox, Kenneth Ringer and Appellants Ms. Linda Migliori, Richard E. Richards and Sergio Rivas. [22-1499] (SAL) [Entered: 03/22/2022 01:46 PM]
	03/22/2022	21 32 pg, 1.13 MB	ECF FILER: Concise Summary of the Case filed by Appellees Francis J. Fox, Kenneth Ringer and Appellants Ms. Linda Migliori, Richard E. Richards and Sergio Rivas. [22-1499] (SAL) [Entered: 03/22/2022 01:48 PM]
	03/22/2022	72	ECF FILER: Transcript Purchase Order Form (Part 1) filed by Appellees Francis J. Fox, Kenneth Ringer

20/22, 0.1011		EE 1100 D 00101
	1 pg, 60.41 KB	and Appellants Ms. Linda Migliori, Richard E. Richards and Sergio Rivas advising this court that no transcripts are available. [22-1499] (SAL) [Entered: 03/22/2022 01:49 PM]
03/22/2022	23 1 pg, 154,02 KB	ECF FILER: ENTRY OF APPEARANCE from Richard T. Ting on behalf of Appellant(s) Linda Migliori, Francis J. Fox, Richard E. Richards, Kenneth Ringer, Sergio Rivas. [22-1499] (RTT) [Entered: 03/22/2022 02:51 PM]
03/22/2022	24 1 pg, 89.5 KB	ECF FILER: ENTRY OF APPEARANCE from Connor P. Hayes on behalf of Appellant(s) Linda Migliori, Francis J. Fox, Richard E. Richards, Kenneth Ringer, Sergio Rivas. [22-1499] (CPH) [Entered: 03/22/2022 02:59 PM]
03/22/2022	25 1 pg, 128.85 KB	ECF FILER: ENTRY OF APPEARANCE from Marian K. Schneider on behalf of Appellant(s) Linda Migliori, Francis J. Fox, Richard E. Richards, Kenneth Ringer, Sergio Rivas. [22-1499] (MKS) [Entered: 03/22/2022 03:38 PM]
03/22/2022	26 1 pg, 89.08 KB	ECF FILER: ENTRY OF APPEARANCE from Witold J. Walczak on behalf of Appellant(s) Linda Migliori, Francis J. Fox, Richard E. Richards, Kenneth Ringer, Sergio Rivas. [22-1499] (WJW) [Entered: 03/22/2022 04:15 PM]
03/22/2022	27 33 pg, 2.32 MB	Copy of Amended Notice of Appeal filed 03/22/2022 received from Clerk of District Court[Edited 03/22/2022 by JK] (JK) [Entered: 03/22/2022 05:19 PM]
03/22/2022	28 1 pg, 42.35 KB	AMENDED CASE CAPTION SENT (JK) [Entered: 03/22/2022 05:24 PM]
03/23/2022	□ 29	TEXT ONLY ORDER (Clerk) The Clerk's Office has been notified that parties are considering filing amicus briefs in support of Appellants. At the direction of the Court, any party wishing to proceed as amicus on behalf of Appellants must file the brief and motion (if necessary) on or before April 1, 2022. (KAG) [Entered: 03/23/2022 11:06 AM]
03/24/2022	30 1 pg, 25.98 KB	ECF FILER: ENTRY OF APPEARANCE from Adam Bonin on behalf of Intervenor(s) Zac Cohen. [22-1499] (ACB) [Entered: 03/24/2022 11:02 AM]
03/28/2022	31 1 pg, 190.3 KB	ECF FILER: ENTRY OF APPEARANCE from Zachary Michael Wallen on behalf of Amicus Curiae Speaker of the Pa. House of Representatives, Bryan Cutler; Majority Leader of the Pa. House of Representatives, Kerry Benninghoff; President Pro Tempore of the Pa. Senate, Jake Corman; and Majority Leader of the Pa. Senate, Kim Ward. [22-1499] (ZMW) [Entered: 03/28/2022 04:16 PM]
03/29/2022	32 67 pg, 498.54 KB	ECF FILER: ELECTRONIC BRIEF on behalf of Appellants Francis J. Fox, Ms. Linda Migliori, Richard E. Richards, Kenneth Ringer and Sergio Rivas. Certificate of Service dated 03/29/2022 by ECF. [22-1499] (WJW) [Entered: 03/29/2022 11:45 PM]
03/29/2022	33 849 pg, 96 MB	ECF FILER: ELECTRONIC JOINT APPENDIX on behalf of Appellants Francis J. Fox, Ms. Linda Migliori, Richard E. Richards, Kenneth Ringer and Sergio Rivas. Certificate of service dated 03/29/2022 by ECF. [22-1499] (WJW) [Entered: 03/29/2022 11:52 PM]
03/29/2022	1 pg, 26.01 KB	ECF FILER: ELECTRONIC INTERVENOR JOINDER BRIEF on behalf of Appellee Zachary Cohen. Certificate of Service dated 03/29/2022 by ECF. [22-1499][Changed event and edited docket text][SEND TO MERITS PANEL]–[Edited 04/14/2022 by MCW] (ACB) [Entered: 03/29/2022 11:54 PM]
03/30/2022	□ 35	TEXT ONLY ORDER (Clerk) directing Witold J. Walczak, Esq.,counsel for Appellants, to file an Addendum to Brief containing the Certification of Virus Scan and Certification of Service in electronic format only. Due on or before 04/04/2022. (MCW) [Entered: 03/30/2022 11:11 AM]
03/31/2022	□ 36	HARD COPY RECEIVED from Appellants Francis J. Fox, Ms. Linda Migliori, Richard E. Richards, Kenneth Ringer and Sergio Rivas - Brief with Volume 1 of Joint Appendix attached. Copies: 7. (KEL) [Entered: 03/31/2022 09:56 AM]
03/31/2022	□ 37	HARD COPY RECEIVED from Appellants Francis J. Fox, Ms. Linda Migliori, Richard E. Richards, Kenneth Ringer and Sergio Rivas - Joint Appendix. Copies: 4. Volumes: 3 (Volume I attached to Brief). (EMA) [Entered: 03/31/2022 12:16 PM]
03/31/2022	38 2 pg, 13.61 KB	ECF FILER: ELECTRONIC ADDENDUM to BRIEF on behalf of Appellants Francis J. Fox, Ms. Linda Migliori, Richard E. Richards, Kenneth Ringer and Sergio Rivas containing Certification of Service and Virus Scan as directed by text order (Docket No. 35). Certificate of Service dated 03/31/2022 by ECF. [22-1499][Edited docket text][Edited 04/01/2022 by MCW] (WJW) [Entered: 03/31/2022 07:47 PM]
03/31/2022	□ 39	COMPLIANCE RECEIVED. Electronic Addendum to Brief received from Appellants Francis J. Fox, Ms. Linda Migliori, Richard E. Richards, Kenneth Ringer and Sergio Rivas. (MCW) [Entered: 04/01/2022 12:29 PM]
04/01/2022	40 4 pg, 231.49 KB	ECF FILER: Motion filed by Appellee David Ritter for Extension of Time to file Appellees' Brief and Appellants' Reply Brief until/for 4/8/2022 and 4/15/2022. Certificate of Service dated 04/01/2022. Service made by ECF. [22-1499] (JJV) [Entered: 04/01/2022 12:53 PM]
04/01/2022	□ <u>41</u>	ECF FILER: ENTRY OF APPEARANCE from Samantha G. Zimmer on behalf of Appellee(s) David Ritter.

23/22, 0.13 FW		EL 1100 EVANOT
	1 pg, 10.16 KB	[22-1499] (SGZ) [Entered: 04/01/2022 02:29 PM]
04/01/2022	42 33 pg, 119.14 KB	ECF FILER: ELECTRONIC AMICUS BRIEF on the merits on behalf of Amicus-Appellant Commonwealth of Pennsylvania in support of Appellant/Petitioner. Certificate of Service dated 04/01/2022 by ECF. F.R.A.P. 29(a) Permission: YES. [22-1499][Edited docket text][Edited 04/04/2022 by MCW] (JBB) [Entered: 04/01/2022 03:54 PM]
04/01/2022	1 pg, 147.02 KB	ECF FILER: ENTRY OF APPEARANCE from Tovah R. Calderon on behalf of Amicus Curiae United States. [22-1499] (TRC) [Entered: 04/01/2022 04:12 PM]
04/01/2022	1 pg, 147.18 KB	ECF FILER: ENTRY OF APPEARANCE from Noah B. Bokat-Lindell on behalf of Amicus Curiae United States. [22-1499] (NB) [Entered: 04/01/2022 04:15 PM]
04/01/2022	45 40 pg, 322.28 KB	ECF FILER: ELECTRONIC AMICUS BRIEF on the merits on behalf of United States. Certificate of Service dated 04/01/2022 by ECF. F.R.A.P. 29(a) Permission: YES. [22-1499] (NB) [Entered: 04/01/2022 04:20 PM]
04/04/2022	□ 46	HARD COPY RECEIVED from Amicus Appellant Commonwealth of Pennsylvania - Amicus Brief. Copies: 7. (SJB) [Entered: 04/04/2022 03:59 PM]
04/05/2022	☐ 47	TEXT ONLY ORDER (Clerk) granting the motion for extension of time at the direction of the Court. Appellees' briefs must be filed on or before April 8, 2022. Appellants' and Intervenor's reply briefs must be filed on or before April 15, 2022. (KAG) [Entered: 04/05/2022 11:18 AM]
04/05/2022	□ 48	HARD COPY RECEIVED from Amicus Appellant USA - Amicus Brief. Copies: 7. (KEL) [Entered: 04/05/2022 01:18 PM]
04/08/2022	49 76 pg, 686.73 KB	ECF FILER: ELECTRONIC BRIEF on behalf of Appellee David Ritter. Certificate of Service dated 04/08/2022 by ECF. [22-1499] (JJV) [Entered: 04/08/2022 12:07 PM]
04/08/2022	50 39 pg, 389.41 KB	ECF FILER: ELECTRONIC BRIEF on behalf of Appellee Lehigh County Board of Elections, Certificate of Service dated 04/08/2022 by ECF. [22-1499] (LJR) [Entered: 04/08/2022 12:23 PM]
04/08/2022	<u>51</u> 24 pg, 298.48 KB	ECF FILER: ELECTRONIC AMICUS BRIEF on the merits on behalf of The Honest Elections Project in support of Appellee/Respondent. Certificate of Service dated 04/08/2022 by ECF. F.R.A.P, 29(a) Permission: YES. [22-1499] (EMW) [Entered: 04/08/2022 08:35 PM]
04/08/2022	52 8 pg, 101.18 KB	ECF FILER: Motion filed by The Honest Elections Project to proceed as amicus on the merits in support of Appellee/Respondent. Certificate of Service dated 04/08/2022. [22-1499] (EMW) [Entered: 04/08/2022 08:37 PM]
04/11/2022	□ 53	HARD COPY RECEIVED from Appellee David Ritter - Brief. Copies: 7. (SJB) [Entered: 04/11/2022 10:32 AM]
04/11/2022	54 8 pg, 225.4 KB	ECF FILER: Motion filed by Proposed Amici Speaker Pennsylvania House of Representatives, Majority Leader of the House of Representatives, President Pro Tempore Pennsylvania Senate and Majority Leader of the Pennylvania Senate to proceed as amicus on the merits in support of Appellee/Respondent. Certificate of Service dated 04/11/2022. [22-1499] (ZMW) [Entered: 04/11/2022 01:03 PM]
04/11/2022	<u>55</u> 19 pg, 261.19 KB	ECF FILER: ELECTRONIC AMICUS BRIEF on the merits on behalf of Proposed Amici Speaker Pennsylvania House of Representatives, Majority Leader of the House of Representatives, President Pro Tempore Pennsylvania Senate and Majority Leader of the Pennylvania Senate in support of Appellee/Respondent. Certificate of Service dated 04/11/2022 by ECF. F.R.A.P. 29(a) Permission: NO. [22-1499] (ZMW) [Entered: 04/11/2022 01:19 PM]
04/13/2022	<u>56</u> 1 pg, 27.19 KB	TEXT ONLY ORDER (Clerk) directing Attorney Lucas J. Repka, Esq. for Appellee Lehigh County Board of Elections to submit 7 hard copies in red covers for the Appellee's Brief filed on 4/8/22. Due on or before 04/18/2022. (EAF) [Entered: 04/13/2022 11:23 AM]
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04/15/2022	59 38 pg, 206.96 KB	ECF FILER: ELECTRONIC REPLY BRIEF on behalf of Appellants Francis J. Fox, Ms. Linda Migliori, Richard E. Richards, Kenneth Ringer and Sergio Rivas. Certificate of Service dated 04/15/2022 by ECF. [22-1499] (WJW) [Entered: 04/15/2022 06:24 PM]
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04/20/2022	61 2 pg, 91.86 KB	Oral Argument Notification for 05/18/2022. Setting & Time: Maris Courtroom/11:00am. Location: Philadelphia, PA. (CMH) [Entered: 04/20/2022 09:30 AM]
04/20/2022	62 1 pg. 10.14 KB	ECF FILER: ENTRY OF APPEARANCE from Shohin H. Vance on behalf of Appellee(s) David Ritter. [22-1499] (SHV) [Entered: 04/20/2022 10:23 AM]

22-1499 Docket 7/23/22, 6:13 PM ECF FILER: SUMMARY OF ORAL ARGUMENT submitted by Attorney Joshua J. Voss, Esq. for Appellee 04/21/2022 63 David Ritter. Case Summary: Appellants lack standing to pursue an action under the Materiality Provision of the Civil Rights Act. Regardless, relief is foreclosed by several dispositive issues, including laches, lack of Art. III standing, waiver & a general failure to state a claim.. Post Video: YES. [22-1499] (JJV) [Entered: 04/21/2022 09:08 AM] ECF FILER: ARGUMENT ACKNOWLEDGMENT filed by Attorney Joshua J. Voss, Esq. for Appellee David 04/21/2022 64 Ritter. Certificate of Service dated 04/21/2022. Service made by ECF. [22-1499] (JJV) [Entered: 04/21/2022 1 pg, 158.16 KB 09:10 AM1 HARD COPY RECEIVED from Appellants Francis J. Fox, Ms. Linda Migliori, Richard E. Richards, Kenneth Ringer and Sergio Rivas - Reply Brief. Copies: 7. (IDR) [Entered: 04/22/2022 08:53 AM] ECF FILER: ENTRY OF APPEARANCE from Joshua S. Mazin on behalf of Appellee(s) Lehigh County 04/22/2022 ☐ 66 Board of Elections. [22-1499] (JM) [Entered: 04/22/2022 01:25 PM] 1 pg, 112.75 KB ECF FILER: ARGUMENT ACKNOWLEDGMENT filed by Attorney Joshua Mazin, Esq. for Appellee Lehigh 04/22/2022 67 County Board of Elections. Certificate of Service dated 04/22/2022. Service made by ECF. [22-1499] (JM) 1 pg, 20.94 KB [Entered: 04/22/2022 01:32 PM] ECF FILER: DIVISION OF TIME FORM filed by Attorney Joshua Mazin, Esq. for Appellee Lehigh County 04/22/2022 68 Board of Elections, Certificate of Service dated 04/22/2022. Service made by ECF. [22-1499] (JM) 1 pg, 28.14 KB [Entered: 04/22/2022 01:33 PM] ECF FILER: SUMMARY OF ORAL ARGUMENT submitted by Attorney Ari J. Savitzky, Esq. for Appellants Ms. Linda Migliori, Richard E. Richards and Sergio Rivas. Case Summary: The Civil Rights Act's Materiality Provision prohibits the County from disenfranchising Appellants for omitting an immaterial handwritten date on the outer envelope of their timely-received mail ballots. Appellants may sue enforce their federal rights... Post Video: YES. [22-1499] (AJS) [Entered: 04/22/2022 03:43 PM] ECF FILER: ARGUMENT ACKNOWLEDGMENT filed by Attorney Ari J. Savitzky, Esq. for Appellants Ms. 04/22/2022 0 70 Linda Migliori, Richard E. Richards and Sergio Rivas. Certificate of Service dated 04/22/2022. Service 1 pg, 26.14 KB made by ECF. [22-1499] (AJS) [Entered: 04/22/2022 03:45 PM] ECF FILER: SUMMARY OF ORAL ARGUMENT submitted by Attorney Joshua Mazin, Esq. for Appellee 04/26/2022 71 Lehigh County Board of Elections. Case Summary: The District Court correctly held the Materiality Provision of the Civil Rights Act does not provide a private cause of action. Appellants waived their attempt to invoked Section 1983. The date requirement is not a undue burden on Plaintiff's right tovote. Post Video: YES. [22-1499] (JM) [Entered: 04/26/2022 12:17 PM] ECF FILER: UNOPPOSED Motion filed by Appellants Francis J. Fox, Ms. Linda Migliori, Richard E. 04/26/2022 Richards, Kenneth Ringer and Sergio Rivas requesting additional time to argue. Certificate of Service 4 pg, 124.23 KB dated 04/26/2022. Service made by ECF. [22-1499] (SAL) [Entered: 04/26/2022 01:29 PM] ECF FILER: Motion filed by Amicus Appellant USA for Noah B. Bokat-Lindell to participate in oral 04/26/2022 73 argument. Certificate of Service dated 04/26/2022. Service made by ECF. [22-1499] (NB) [Entered: 5 pg, 104.5 KB 04/26/2022 01:43 PM1 04/26/2022 74 4 pg. 122.64 KB 04/28/2022 75 2 pg, 111.42 KB

В	ECF FILER: Motion filed by Amicus Appellant Commonwealth of Pennsylvania for Jacob B. Boyer to participate in oral argument. Certificate of Service dated 04/26/2022. Service made by ECF. [22-1499] (JBB) [Entered: 04/26/2022 03:01 PM]				
3	ORDER (MCKEE, GREENAWAY JR. and MATEY, Circuit Judges) granting Appellants' Uncontested Motion to Divide and Enlarge Oral Argument Time and to Cede Time to the United States and the Commonwealth of Pennsylvania. Motion by Amicus Curiae the United States to Participate in Oral Argument in Support of Appellants. Motion by Amicus Curiae the Commonwealth of Pennsylvania to Participate in Oral Argument in Support of Appellants. Motion by the Speaker of the Pennsylvania House of Representatives Bryan Cutler; Majority Leader of the Pennsylvania House of Representatives, Kerry Benninghoff; President Pro Tempore of the Pennsylvania Senate; Jake Corman, and Majority Leader of the Pennsylvania Senate, Kim Ward to File Brief as Amicus Curiae in Support of the Appellees. Motion filed by The Honest Elections Project to File Brief as Amicus Curiae in Support of the Appellees. Judge McKee, Authoring Judge. (PM) [Entered: 04/28/2022 03:01 PM]				
	ECF FILER: DIVISION OF TIME FORM filed by Attorney Ari J. Savitzky, Esq. for Appellants Ms. Linda Migliori, Richard E. Richards and Sergio Rivas. Certificate of Service dated 05/03/2022. Service made by ECF. [22-1499] (AJS) [Entered: 05/03/2022 10:48 AM]				
	ECF FILER: DIVISION OF TIME FORM filed by Attorney Joshua Mazin, Esq. for Appellee Lehigh County Board of Elections. Certificate of Service dated 05/05/2022. Service made by ECF. [22-1499] (JM) [Entered: 05/05/2022 12:22 PM]				
	ARGUED on Wednesday, May 18, 2022. Panel: MCKEE, GREENAWAY JR. and MATEY, Circuit Judges. Noah Bokat-Lindell arguing for Amicus Appellant United States of America; Jacob B. Boyer arguing for Amicus Appellant Commonwealth of Pennsylvania; Joshua Mazin arguing for Appellee Lehigh County				
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		Board of Elections; Ari J. Savitzky arguing for Appellant Linda Migliori; Joshua J. Voss arguing for Appellee David Ritter. (PM) [Entered: 05/18/2022 12:40 PM]	
05/18/2022	79 1 pg, 54.47 KB	COURT MINUTES OF ARGUED/SUBMITTED CASES. (PM) [Entered: 05/18/2022 12:41 PM]	
05/20/2022	80 3 pg, 111.71 KB	JUDGMENT, This matter is hereby remanded to the District Court and that court is hereby directed to forthwith enter an order that the undated ballots be counted. A formal opinion will follow. The mandate will issue immediately upon filing of the opinion. The time for filing a petition for rehearing will be 5 days from the date that the Court's opinion is entered on the docket. (JK) [Entered: 05/20/2022 04:12 PM]	
05/23/2022	81 12 pg, 232,49 KB	ECF FILER: Motion filed by Appellee David Ritter to Stay the Mandate. Certificate of Service dated 05/23/2022. Service made by ECF. [22-1499] (JJV) [Entered: 05/23/2022 02:30 PM]	
05/23/2022	3 pg, 98.68 KB	AMENDED JUDGMENT, the judgment of the District Court entered on March 16, 2022, is reversed insofar as it found Appellants lack the capacity to bring suit under 52 U.S.C. Section: 10101 as there exists a private right of action under 42 U.S.C. Section: 1983. See Gonzaga Univ. v. Doe, 536 U.S. 273, 28485 (2002). In addition, inasmuch as there is no dispute that ballots that have the wrong date were counted in the election, it is further ORDERED and ADJUDGED that, the dating provisions contained in 25 Pa. Cons. Stat. Section:Section: 3146.6(a) and 3150.16(a) are immaterial under Section: 10101(a)(2)(B). Accordingly, because it is undisputed that all the undated ballots that have been set aside in the November 2, 2021 election for Judge of the Common Pleas of Lehigh County were received by the deadline, there is no basis on this record to refuse to count them. This matter is hereby remanded to the District Court and that court is hereby directed to forthwith enter an order that the undated ballots be counted. A formal opinion will follow. The mandate will issue immediately upon filing of the opinion. The time for filing a petition for rehearing will be five (5) days from the date that the Court's opinion is entered on the docket. (JK) [Entered: 05/23/2022 04:28 PM]	
05/25/2022	83 16 pg, 166.14 KB	ECF FILER: Response filed by Appellants Ms. Linda Migliori, Richard E. Richards and Sergio Rivas to motion Mandate (recall, stay or issue). Certificate of Service dated 05/25/2022. [22-1499] (AJS) [Entered: 05/25/2022 09:29 AM]	
05/25/2022	84 2 pg, 84.34 KB	ECF FILER: JOINDER filed by Appellee Zachary Cohen in Opposition to Motion to Stay the Mandate. Certificate of Service dated 05/25/2022 by ECF. [22-1499][Edited 05/25/2022 by JK] (ACB) [Entered: 05/25/2022 10:27 AM]	
05/27/2022	85 2 pg, 75.37 KB	ORDER (MCKEE, GREENAWAY JR. and MATEY, Circuit Judges) The Court's judgment, entered May 2022 and amended on May 23, 2022, is hereby revised to the extent that it stated that the judgment will issue immediately upon filing of the opinion. Instead, the Clerk will issue the mandate 7 days after the of the Court's opinion on the docket. The motion to stay the mandate is dismissed as moot. MCKEE, Authoring Judge. (JK) [Entered: 05/27/2022 10:26 AM]	
05/27/2022	86 20 pg, 374.7 KB	PRECEDENTIAL OPINION. Coram: MCKEE, GREENAWAY, JR. and MATEY, Circuit Judges. Total Pages: 20. Judge: MCKEE Authoring, Judge: MATEY Concurring. (JK) [Entered: 05/27/2022 12:10 PM]	
05/31/2022	87 1 pg, 67,17 KB	COPY OF ORDER OF SUPREME COURT OF THE UNITED STATES at No. 21A772 dated 05/31/2022 signed by SAMUEL A. ALITO, JR, staying issuance of the mandate pending further order of the U.S. Supreme Court. (JK) [Entered: 06/01/2022 10:54 AM]	
06/13/2022	88 6 pg, 63.54 KB	COPY OF ORDER OF SUPREME COURT OF THE UNITED STATES dated 06/09/2022 signed by JUSTICE ALITO, denying application to stay and vacating previous order. (JK) [Entered: 06/13/2022 03:55 PM]	
06/13/2022	89 25 pg, 641.03 KB	MANDATE ISSUED. (JK) [Entered: 06/13/2022 04:09 PM]	
06/22/2022	90 5 pg, 283.73 KB	ECF FILER: Motion filed by Appellants Francis J. Fox, Ms. Linda Migliori, Richard E. Richards, Kenneth Ringer and Sergio Rivas for Extension of Time to file Application for Fees until/for 47 days. Certificate of Service dated 06/22/2022. Service made by ECF. [22-1499] (RTT) [Entered: 06/22/2022 08:00 PM]	
06/23/2022	□ 91	TEXT ONLY ORDER (Clerk) Appellants' motion an extension of time is granted at the direction of the Court. Appellants must file any application for fees and costs on or before August 8, 2022. (KAG) [Entered: 06/23/2022 03:46 PM]	
07/11/2022	□ 92	NOTICE from U.S. Supreme Court. Petition for Writ of Certiorari filed by David Ritter on 07/07/2022. Supreme Court Case No. 22-30. (TMK) [Entered: 07/12/2022 02:56 PM]	

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Appendix 41

Case: 22-1499 Document: 16 Page: 1 Date Filed: 03/21/2022

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 22-1499

LINDA MIGLIORI, et al.,

Appellants,

V.

LEHIGH COUNTY BOARD OF ELECTIONS, et al.,

Appellees.

Appeal from the United States District Court for the Eastern District of Pennsylvania No. 5:22-cv-00397 Honorable Joseph F. Leeson, Jr.

AMICUS BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA IN SUPPORT OF APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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March 21, 2022

EXHIBIT

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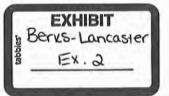


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STATEMENT OF INTEREST

This matter raises important questions concerning the interplay of federal voting rights law and the Commonwealth of Pennsylvania's election procedures. The parties have invoked the Commonwealth's position with respect to these matters in their briefing before this Court. *See* Appellants' Emergency Motion at 24, 27 (ECF No. 6-1); Intervenor-appellee Response in Opp'n ("Response") at 7 n.2 (ECF No. 11-1). The Commonwealth therefore respectfully submits this brief to address these issues and, in particular, to correct certain inaccurate statements in the brief submitted by Intervenor-appellee about the state of Pennsylvania law. *See* Response at 5-7 & n.2.

Further, the Commonwealth of Pennsylvania has an interest in properly resolving whether "undated ballots"—the sort of ballots at issue here—should be counted and included in a county's election results. This derives from the Commonwealth's further interest in all its political subdivisions' lawfully exercising their authority. Finally, the Commonwealth has an interest in ensuring all Pennsylvanians who lawfully cast a ballot have their voted counted.

ARGUMENT

This Court should grant appellants' emergency motion for an injunction so that it may address the critical and meritorious voting rights questions appellants

¹ No party authored this brief in any part or contributed money for the preparation of this brief.

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raise, and so that the Commonwealth of Pennsylvania's elections can proceed in accord with federal law and with needed certainty. The Commonwealth agrees with appellants that the district court incorrectly concluded that 52 U.S.C. § 10101(a)(2)(B) may not be enforced by private parties, and also agrees that ordering a county to void undated ballots violates that federal provision. This Court should enter an injunction pending appeal because the appellants are likely to succeed on the merits, and to allow the Court time to address these important questions.

In consecutive general elections, some Pennsylvania counties have included in their election results lawfully cast absentee and mail-in ballots even if the voter did not date the outer envelope used to return the ballot, while other counties have not. Although the respective decisions have generated multiple lawsuits, Pennsylvania courts have not yet definitively resolved whether Pennsylvania law requires counties to include so-called "undated ballots" in their election results. Litigation over that question remains on-going. See, e.g., Montgomery Cnty. Bd. of Elections v. Chapman, 339 MD 2021 (Oct. 1, 2021 Pa. Commw. Ct.).

Independent of what state law requires, final resolution of whether to count undated ballots also demands analyzing if, as a matter of federal law, the date a voter is asked to include on a ballot return envelope is "material in determining

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whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). To date, no court has squarely addressed that question.

The Commonwealth of Pennsylvania has participated in this litigation, as it did in related state-court litigation, to explain why the date a voter is asked to place on their ballot return envelope does not in any way aid in determining that voter's qualification to vote under Pennsylvania law. *See* App'x at 191-96. If the Court grants appellants' motion for an injunction, the Commonwealth would again participate as amicus to describe what Pennsylvania election law requires, why the date on a voter's return envelope is immaterial, and why no one, including the parties in this case, has plausibly argued otherwise.

Intervenor-appellee's assertion that "as a matter of [Pennsylvania] law, the date is material," *see* Response at 5-7 & n.2, is incorrect.² In fact, *no* Pennsylvania court has conclusively analyzed whether the date on a voter's return envelope is "material in determining whether such individual is qualified under State law to vote in such election," for purposes of § 10101(a)(2)(B). The analysis that has been done supports the immateriality of the date.

² Intervenor-appellee's arguments about proper interpretation of § 10101(a)(2)(B) are similarly mistaken, including patently incorrect claims about what federal courts have "uniformly" held, Response at 11; *see also id.* at 13, and arguments about § 10101(a)(2)(B)'s "plain language" that are based on statutory headings rather than statutory text, *id.* at 10-11.

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The *only* Pennsylvania Supreme Court case to consider whether Pennsylvania counties may count undated ballots resulted in no majority opinion, with the Court holding that, as a matter of Pennsylvania law, undated ballots would be counted for the 2020 election. In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058, 1079 (Pa. 2020) (opinion announcing judgment of the Court). Although application of § 10101(a)(2)(B) was not squarely before the Court, a majority of the Justices acknowledged that interpreting the Pennsylvania Election Code to require voiding undated ballots could offend § 10101(a)(2)(B). In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058, 1074 n.5 (Pa. 2020) (opinion announcing judgment of the Court); id. at 1089 n.54 (Wecht, J., concurring and dissenting). The Court's plurality opinion described one party as having argued with "persuasive force" that there would be a conflict, id. at 1074 n.5, further noting that "a signed but undated declaration . . . does not implicate any weighty interest," id. at 1078. A minority of the Court, in dissent, suggested that the date written on the outer envelope served important purposes, but the accompanying explanations made inaccurate assumptions about Pennsylvania elections, id. at 1090 (Dougherty, J., concurring and dissenting).3

³ While not specifically ruling on the merits, the district court here relied on the dissent to conclude that the date requirement "is an important guard against fraud." App'x at 29. This claim, too, reflects a misunderstanding of Pennsylvania

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And the *only* Pennsylvania Commonwealth Court decision to directly address § 10101(a)(2)(B) agreed that a ballot envelope's date "does not, in any way, relate to whether that elector has met the qualifications necessary to vote in the first place," despite incorrectly holding in a nonprecedential decision that the federal statute applies to only voter registration laws. *Ritter v. Lehigh Cnty. Bd. of Elections*, 1322 CD 2021, 2022 WL 16577 (Pa. Commw. Ct. Jan. 3, 2022). The dissenting judge in *Ritter* likewise described the date on the ballot envelope a "technicality" akin to the color ink a voter uses. *Id.* at *11 (Wojcik, J., dissenting).

The remaining Commonwealth Court case that intervenor-appellee cites, another nonprecedential decision, decided only that the Pennsylvania Supreme Court's fractured 2020 decision demanded that the Commonwealth Court void undated ballots as a matter of Pennsylvania law. *In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, No. 1381 CD 2021, 2022 WL 96156, at *3 (Pa. Commw. Ct. Jan. 10, 2022). The lone judge in that case to consider what purpose the date rule serves agreed that the date on a ballot envelope is an insignificant technicality. *Id.* at *7-10 (Covey, J., concurring and dissenting).

law. The requirement that a voter date the outer envelope could not, in any way, protect against fraud. Under Pennsylvania law, whether a ballot is timely depends on when it is *received*, not when it is filled out by the voter. 25 P.S. §§ 3146.6(c), 3150.16(c). Counties do not look to the date written on the outer envelope to determine whether a ballot is timely, so "back-dating" an envelope or otherwise writing an inaccurate date on it would accomplish nothing for purposes of determining a voter's eligibility. Indeed, as discussed below, *infra* at 6, Pennsylvania counts ballots with dates that are obviously incorrect.

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Similarly, the Pennsylvania Department of State has instructed counties to count ballots with dates that are obviously "wrong"—such as those in which the voter wrote the wrong year, or mistakenly wrote their date of birth—further underscoring that the date itself is not relevant. *See* Email from Jonathan Marks, Deputy Secretary for Elections & Commissions, Dep't of State, to County Election Officials (June 1, 2021), Exh. 6 to Plfs.' Compl. (ECF No. 1-8), *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 5:22-cv-00397-JFL (E.D. Pa. Jan. 31, 2022).

Thus, whether the date included on a ballot return envelope is "material" for purposes of § 10101(a)(2)(B), and whether that federal statute prohibits disenfranchising voters because of a trivial error, very much presents a meritorious question warranting the injunction needed for this Court's review. And while the district court described the predicate question—whether there is a private right of action to enforce §10101(a)(2)(B)—as not "particularly close," App'x at 34, the only two circuit courts to consider that issue reached opposing conclusions.

Compare Schwier v. Cox, 340 F.3d 1284, 1294-97 (11th Cir. 2003) with McKay v. Thompson, 226 F.3d 752, 756 (6th Cir. 2000). The Commonwealth respectfully submits that an injunction is appropriate to permit the Court to address the district court's errors.

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CONCLUSION

For the reasons above, appellants' emergency motion for an injunction pending appeal should be granted.

March 21, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this amicus brief has been served on all counsel of record using the Court's CM/ECF system.

/s/ Jacob B. Boyer

Appendix 42

Case: 22-1499 Document: 42 Page: 1 Date Filed: 04/01/2022

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 22-1499

LINDA MIGLIORI, et al.,

Plaintiffs-Appellants,

V.

LEHIGH COUNTY BOARD OF ELECTIONS, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Pennsylvania No. 5:22-cv-00397 Honorable Joseph F. Leeson, Jr.

AMICUS BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA IN SUPPORT OF APPELLANTS AND REVERSAL

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April 1, 2022

EXHIBIT

Berks-Lancaster 3 7/28/22

EXHIBIT
Berks-Lancaster
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STATEMENT OF INTEREST

The Commonwealth of Pennsylvania respectfully submits this amicus brief in support of appellants pursuant to Federal Rule of Appellate Procedure 29(a)(2).

The Commonwealth intends for this brief to aid the Court's understanding of Pennsylvania election law and voting processes. In particular, the Commonwealth addresses why, under Pennsylvania law, including a date on the envelope of a mailed ballot is immaterial to determining a voter's eligibility, and why contrary arguments misunderstand Pennsylvania law or rest on ill-informed speculation about the Commonwealth's election procedures.

Additionally, the Commonwealth has an interest in ensuring its political subdivisions exercise their authority in accordance with Pennsylvania and federal law. And resolution of this case may assist Pennsylvania courts as they conclusively interpret the relevant state law provision. *See* 1 Pa.C.S. § 1922(2) (directing that Pennsylvania statutes should be interpreted to be "effective").

Finally, the Commonwealth has an interest in ensuring that no eligible

Pennsylvania voter is unlawfully disenfranchised. Relatedly, the Commonwealth

¹ Mr. Ritter has leveled a bizarre criticism of the Commonwealth's involvement in this matter, suggesting that constitutional concerns about voiding undated ballots should be raised in a different forum. J.A. 808 (Ritter Reply in Supp. Summ. J.). But the Commonwealth has not raised such constitutional concerns, focusing instead on the rights created under federal statutory law. And the Commonwealth is not seeking to invalidate any provision of Pennsylvania law. Rather, the Commonwealth believes that Pennsylvania and federal law can and should be read harmoniously to require the counting of the ballots at issue.

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has an interest in ensuring that there are remedies for violations of its citizens' right to vote. The Commonwealth therefore discusses the misapplication of precedent that led the district court to conclude the voters here have no cause of action.

BACKGROUND

Pennsylvania citizens are qualified to vote if, as of Election Day, they:

(1) will be 18 years old; (2) will have been a citizen for at least one month; (3) will have lived in Pennsylvania and in their election district for at least thirty days; and (4) are not imprisoned for a felony conviction. Pa. Const. art. VII, § 1; 25 P.S. § 2811; 25 Pa.C.S. § 1301(a).² Counties initially assess compliance with these conditions when an individual submits a voter registration application. 25 Pa.C.S. § 1328.

Registered voters that satisfy any of several conditions may vote absentee.

Pa. Const. art. VII, § 14; 25 P.S. § 3146.1. Any qualified, registered voter can vote as a "mail-in elector." 25 P.S. § 3150.11. Voters submit absentee and mail-in ballot applications to their county board of elections. *Id.* §§ 3146.2, 3150.12. County boards must confirm that applicants are eligible to vote before approving their

² See also Mixon v. Commonwealth, 759 A.2d 442, 451 (Pa. Commw. Ct. 2000) (holding that individuals with felony convictions, other than those currently incarcerated, may register to vote); 1972 Op. Atty. Gen. No. 121 (concluding durational residency requirements longer than 30 days are unenforceable); U.S. Const. amend. XXVI (prohibiting denial of right to vote to citizens 18 years of age or older because of age).

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absentee or mail-in ballot application. *Id.* §§ 3146.2b, 3150.12b. Those approvals are final except that challenges based on ineligibility to vote can be made through 5 p.m. on the Friday before Election Day. *Id.* §§ 3146.2b(c), 3150.12b.

Election district registers (*i.e.*, poll books) identify which registered voters have requested absentee or mail-in ballots. *Id.* §§ 3146.6(b)(1), 3150.16(b)(1). Those voters may not vote in-person unless they surrender their blank absentee or mail-in ballot and its return envelope. *Id.* §§ 3146.6(b)(3), 3150.16(b)(3). Otherwise, a voter who attempts to vote in-person having already requested an absentee or mail-in ballot may vote only provisionally. *Id.* §§ 3146.6(b)(2), 3150.16 (b)(2). If a voter returns an absentee or mail-in ballot before the deadline and also casts a provisional ballot at a polling place, only the absentee or mail-in ballot is counted, regardless of the date written on its return envelope. *Id.* § 3050(a.4)(5)(ii)(F).

Functionally identical procedures govern how voters complete and return an absentee or mail-in ballot. Anytime between receiving the official ballot and 8 p.m. on Election Day, the voter secretly marks their ballot, places the ballot in a secrecy envelope, and then places the secrecy envelope in an outer return envelope. *Id.* §§ 3146.6(a), 3150.16(a). The return envelope has a printed declaration that the voter "shall then fill out, date and sign." *Ibid.* Return envelopes have unique barcodes associated with the voter, allowing ballots to be tracked through the

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Statewide Uniform Registry of Electors (SURE). Pa. Dep't of State, *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes* ("Sept. 2020 Guidance") at 2 (Sept. 11, 2020). After sealing the return envelope, the voter delivers the entire package by mail or by hand to their county board of elections. 25 P.S. §§ 3146.6(a), 3150.16(a).

Absentee and mail-in ballots are timely if received by the voter's county board of elections by 8 p.m. on Election Day. *Id.* §§ 3146.6(c), 3150.16(c). To track when a mailed ballot has been received, Department of State Guidance directs counties to "scan the correspondence ID barcode on the outside of the envelope." *See* Sept. 2020 Guidance at 2. Scanning the barcode automatically generates a date stamp that is recorded in the "Date Received" field in the SURE System. *Id.* Voters can use the Department's website to track when their ballot was received. *See* Pa. Dep't of State, *Election Ballot Status*. Timely absentee and mail-in ballots that county boards of elections have verified, that have not been challenged, and for which there is not due proof that the voter has died prior to Election Day, are counted and included with the election results. 25 P.S. § 3146.8(d), (f)-(g).

³ Available at: https://www.dos.pa.gov/VotingElections/OtherServices Events/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf.

⁴ Available at: https://www.pavoterservices.pa.gov/pages/ballottracking.aspx.

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In the last two general elections, absentee and mail-in ballots returned without a date on outer envelope has been a pervasive problem. See In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058, 1068-69 (Pa. 2020) (identifying thousands of such ballots having been cast in Allegheny or Philadelphia County during the 2020 election).

After the 2020 election, the Pennsylvania Supreme Court issued its only decision about so-called "undated ballots," ruling that, under Pennsylvania law, the ballots could be counted for the 2020 general election. Id. at 1079 (opinion announcing judgment). The Court, however, did not produce a majority opinion. Three Justices concluded that Pennsylvania law forbids disqualifying undated ballots because "a signed but undated declaration is sufficient and does not implicate any weighty interest." Id. at 1078 (opinion announcing judgment). A concurring Justice wrote that Pennsylvania law mandates a date on the outer envelope no matter what interest it serves, but agreed that undated ballots should be counted in 2020 because even diligent voters would not have known the consequence of omitting the date. Id. at 1089 (Wecht, J., concurring). Three other Justices would have voided undated ballots because they considered the date to serve important purposes. Id. at 1090-91 (Dougherty, J., concurring and dissenting).

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In the same case, four Justices identified that voiding ballots for minor errors may conflict with 52 U.S.C. § 10101(a)(2)(B). *Id.* at 1074 n.5 (opinion announcing judgment); *id.* at 1089 n.54 (Wecht, J., concurring). The opinion announcing the judgment described one party as having argued with "persuasive force" that there would be a conflict, *id.* at 1074 n.5, and later explained that, under Pennsylvania law, "any handwritten date [is] unnecessary and, indeed, superfluous," *id.* at 1077 (opinion announcing judgment).

Questions about what Pennsylvania law requires as to undated ballots have persisted since the Pennsylvania Supreme Court's fractured 2020 decision. Three cases filed in Pennsylvania courts in 2021 raised this issue. One case remains pending. *Montgomery Cnty. Bd. of Elections v. Chapman*, No. 339 MD 2021 (Oct. 1, 2021 Pa. Commw. Ct.). Split panels of the Commonwealth Court issued nonprecedential decisions in the other two, each concluding that the court was bound by the concurring Justice's opinion from *In re Absentee & Mail-in Ballots*. *In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, No. 1381 CD 2021, 2022 WL 96156 (Pa. Commw. Ct. Jan. 10, 2022), *appeal denied* 2022 WL 536196 (Pa. Feb. 23, 2022); *Ritter v. Lehigh Cnty. Bd. of Elections*, No. 1322 CD 2021, 2022 WL 16577, at *8 (Pa. Commw. Ct. Jan. 3, 2022), *appeal denied* 2022 WL 244122 (Pa. Jan. 27, 2022).

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SUMMARY OF ARGUMENT

Disenfranchising the 257 qualified voters who failed to date the declaration on their absentee or mail-in ballot's return envelope violates those voters' rights under federal law. That is so because omitting a date is "an error or omission" on a "record or paper relating to . . . [an] act requisite to voting" that is not "material in determining whether such individual is qualified under State law." 52 U.S.C. § 10101(a)(2)(B).

Pennsylvanians are qualified to vote if they meet the state's age, citizenship, and residency requirements as of Election Day. *See* 25 P.S. § 2811(2), (3); *id.* § 3146.8(d); 25 Pa. C.S. § 1301. And mailed ballots are timely if they are received by 8 p.m. on Election Day. 25 P.S. §§ 3146.6(c), 3150.16(c). For each reason, including a date on a ballot return envelope is not "material" to determining a voter's eligibility. Indeed, counties count ballots returned in envelopes with "wrong" dates. Nor does the date serve any purpose in preventing fraud. "Backdating" a ballot envelope after the fact would not allow a voter to avoid Pennsylvania's received-by deadline.

For this election, ballot return envelopes have been made a "record or paper relating to . . . [an] act requisite to voting." Because § 10101 defines "vote" to mean "all action necessary to make a vote effective," a ballot return envelope is a "record or paper relating to . . . [an] act requisite to voting" when, as here,

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completing it in a particular way has been made a precondition for counting a ballot.

Under *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the right that §10101(a)(2)(B) guarantees is presumptively enforceable through 42 U.S.C. § 1983. Nothing overcomes that presumption; rather, both the language of § 10101 and its legislative history establish that the U.S. Attorney General's enforcement authority is a complement to the private suits that have occurred since the 19th century. *See* 52 U.S.C. § 10101(d), (e), (g). Because the district court failed to recognize that this suit was brought under § 1983, it inverted the applicable burden and asked if the voters had established that Congress meant for § 10101 to provide its own remedy. Because § 1983 plainly provides a cause of action here, this Court need not engage in that analysis. Still, the same statutory text and legislative history that confirm § 1983 provides a remedy also establish that § 10101 creates its own cause of action, thus satisfying the standard announced in *Alexander v. Sandoval*, 532 U.S. 275 (2001).

ARGUMENT

I. Disqualifying Undated Ballots Infringes Voters' Rights Under § 10101(a)(2)(B)

Federal law provides:

No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other

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act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

52 U.S.C. § 10101(a)(2)(B).⁵ That statute was enacted to end trivial requirements that "served no purpose other than as a means of inducing voter-generated errors that could be used to justify" denying the right to vote. *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008). Denying eligible Pennsylvania voters' right to vote for merely failing to date the envelope used to return an absentee or mail-in ballot violates § 10101(a)(2)(B).⁶

A. The Date on a Ballot Return Envelope Is Not Material to Determining Voters' Qualifications under Pennsylvania Law

Dating the declaration on an absentee or mail-in ballot return envelope does not assist in determining if the ballot was cast by someone eligible to vote under Pennsylvania law. Therefore, a date is not "material" and omission of a date cannot be used to disenfranchise any Pennsylvania voter.

⁵ When initially passed, the statute read "No person acting under color of law shall . . . deny the right of any individual to vote in any Federal election" Civil Rights Act of 1964, Pub. L. No. 88-352, § 101. Congress later amended the statute to delete "Federal." Voting Rights Act of 1965, Pub. L. No. 89-110, § 15.

⁶ The district court did not reach this question because it incorrectly concluded the voters do not have a cause of action. *Infra* at 19-25. Notwithstanding that, this Court should because the voters' right to relief on this purely legal question is clear.

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To determine whether a denial of the right to vote violates § 10101(a)(2)(B), courts compare the erroneous or omitted information against state law voter qualifications. *See, e.g., Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308-09 (N.D. Ga. 2018); *Wash. Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1270 (W.D. Wash. 2006); *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005). If the error or omission, accepted as true, does not preclude (or at least interfere with) determining a voter's eligibility, the error or omission is not "material." *NAACP*, 522 F.3d at 1175.

In Pennsylvania, a person may vote if, by Election Day, they are 18 years old, have been a citizen for at least one month, have lived in Pennsylvania and in their election district for at least thirty days, and are not imprisoned for a felony conviction. *Supra* at 2. A dated declaration on a return envelope is not relevant to determining compliance with any of these criteria—Election Day is the material date for determining eligibility. In its recent, nonprecedential decision addressing the undated ballots at issue here, the Commonwealth Court, despite ordering that the ballots be excluded, explained that the date "does not, in any way, relate to whether that elector has met the qualifications necessary to vote in the first place." *Ritter*, 2022 WL 16577, at *9.

Nor does a date on the envelope assist in separating timely cast absentee or mail-in ballots from untimely ones. A ballot is timely if it is *received* by 8 p.m. on

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Election Day. Supra at 4. Any ballot received by that time necessarily will have been completed by that time. Further, counties track when a ballot is received. See Sept. 2020 Guidance at 2; In re Absentee & Mail-in Ballots, 241 A.3d at 1077 (opinion announcing judgment) ("[T]he county board stamps the date of receipt on the ballot-return and records the date the ballot is received in the SURE system.").

Three Justices of the Pennsylvania Supreme Court correctly observed that this law and procedure provides "a clear and objective indicator of [a ballot's] timeliness, making any handwritten date unnecessary and, indeed, superfluous." *In re Absentee & Mail-in Ballots*, 241 A.3d at 1077 (opinion announcing judgment). Recent Pennsylvania Commonwealth Court judges who have considered the importance of a dated declaration likewise have concluded that it is a meaningless "technicality." *In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, No. 1381 CD 2021, 2022 WL 96156, at *7-10 (Pa. Commw. Ct. Jan. 10, 2022) (Covey, J., concurring and dissenting); *Ritter*, 2022 WL 16577, at *11 (Wojcik, J., dissenting).

What is more, nothing in Pennsylvania law allows invalidating ballots that include the "wrong" date. As a matter of practice, counties do not invalidate such ballots. *See*, *e.g.*, J.A. 79 (Department of State guidance advising counties that "there is no basis to reject a ballot for putting the 'wrong' date on the envelope"); J.A. 254-55 (testimony from Lehigh Board of Elections' Chief Clerk that Lehigh

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counted ballots with "wrong" dates for 2021 election). Treating errors—such as the "wrong" date—differently from omissions underscores that the underlying information is unimportant and thus immaterial.

Much of the confusion about whether the date is material originates from the dissenting opinion in *In re Absentee & Mail-in Ballots*, which expressed a view that the absence of a date is not "a mere technical insufficiency we may overlook," 241 A.3d at 1090 (Dougherty, J., concurring and dissenting). Respectfully, the dissenting opinion's assertions do not hold up.

First, the date on a mailed ballot does not confirm a voter's "desire to cast it in lieu of appearing in person at a polling place." *Contra id.* A date on the return envelope is no more confirmation of a voter's intent to vote absentee or by mail-in ballot than is completing, signing, and returning the ballot. More critically, whether someone who has cast an absentee or mail-in ballot has misgivings about having done so is irrelevant. Election district registers identify which voters have requested an absentee or mail-in ballot. *Supra* at 3. Those voters may not vote in person unless they surrender their blank absentee or mail-in ballot, and its envelope, to their polling place; otherwise, they may vote only provisionally. *Id.* If a voter returns a completed absentee or mail-in ballot before the deadline and casts a provisional ballot at a polling place, only the absentee or mail-in ballot is counted, regardless of the date written on it. *Id.*

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Second, the date does not "establish[] a point in time against which to measure the elector's eligibility to cast the ballot." *Contra In re Absentee & Mailin Ballots*, 241 A.3d at 1090 (Dougherty, J., concurring and dissenting). Eligibility is assessed as of Election Day. *See, e.g.*, 25 P.S. § 2811(2), (3) (imposing residency requirements for the time period "immediately preceding the election"); *id.* § 3146.8(d) (directing counties to discard absentee and mail-ballots cast by individuals who died before Election Day); 25 Pa. C.S. § 1301 (allowing anyone "who will be at least 18 years of age on the day of the next election" to register).

Third, as already explained, the written date does not "ensure[] the elector completed the ballot within the proper time frame." *Contra In re Absentee & Mailin Ballots* 241 A.3d at 1090 (Dougherty, J., concurring and dissenting). Nor does it "prevent[] the tabulation of potentially fraudulent back-dated votes." *Contra id.*⁷ Relying on Justice Dougherty, the district court repeated that excluding undated ballots is "an important guard against fraud." J.A. 32. The district court hypothesized that "individuals who come in contact with that [undated] outer

⁷ Justice Dougherty made these points after the Pennsylvania Supreme Court had ordered, for the 2020 election only, that ballots postmarked by Election Day could be counted if they were received up to three days later, and that ballots received during this three-day window lacking postmarks would "be presumed to have been mailed by Election Day unless a preponderance of the evidence demonstrates that it was mailed after Election Day." *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 386 (Pa. 2020).

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envelope may, post hoc, fill in a date that is not representative of the date on which the ballot was executed." *Id*.

But because Pennsylvania employs only a "received-by" deadline, *supra* at 4, back-dating is not a way to fraudulently convert an ineligible ballot into a seemingly eligible one. A ballot is received by the deadline (and logged) or it is not. Filling in an incorrect date cannot convert an invalid ballot into a valid one, or vice versa. Pennsylvania law and procedure thus makes the date a voter writes "superfluous." *In re Absentee & Mail-in Ballots*, 241 A.3d at 1077 (opinion announcing judgment). Vague gestures at unidentifiable fraud prevention that are inconsistent with Pennsylvania law do not suggest differently.

Hypothetical scenarios conjured by the parties in this matter only confirm that the date is immaterial to "determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). A voter who may have unexpectedly moved out of state, *see* J.A. 508 (Lehigh Mot. Summ. J.); J.A. 681 (Ritter Opp'n to Summ. J.), or been convicted of a felony, *see* J.A. 682 (Ritter Opp'n to Summ. J.), between completing their ballot and Election Day is ineligible to vote regardless of when they completed their ballot, *supra* at 13 (voter must be eligible as of Election Day). These hypothetical voters are just like a voter

⁸ People who move within Pennsylvania during the 30 days preceding Election Day remain eligible to vote where they already were registered. 25 P.S. § 2811(3); 25 Pa.C.S. §§ 1501(b), 1902.

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who dies between completing a mailed ballot and Election Day. And a person who might try to vote in person after having already requested a mail-in ballot, J.A. 508 (Lehigh Mot. Summ. J.); J.A. 682 (Ritter Opp'n to Summ. J.), would not be permitted to do so unless they surrendered their absentee or mail-in ballot and its return envelope. *Supra* at 3.

Before the district court, Mr. Ritter tried to avoid the irrelevance of his hypotheticals by arguing that the date is needed as evidence of whether a voter whom everyone agrees is ineligible for reasons not having to do with the envelope date also signed a false declaration. See J.A. 681-84 (Ritter Opp'n to Summ. J.)⁹ Under this argument, the written date (assumed to be true) can be used to ferret out false declarations submitted by voters who unexpectedly move or are convicted of a felony prior to the election. The logic of this claim aside, the fact remains that ballots cast by these voters should not be counted no matter what. Whether an ineligible voter may also have falsely completed the return envelope's declaration has no bearing on this conclusion.

⁹ Mr. Ritter has gone so far as to suggest that the date is material because a voter who wrote a false date and was subsequently prosecuted and convicted for doing so would be ineligible to vote in *future* elections. *See* J.A. 684 (Ritter Opp'n to Summ. J.). But the materiality inquiry is "whether such individual is qualified under State law to vote in *such* election," 52 U.S.C. § 10101(a)(2)(B) (emphasis added), not in all current and future elections. Plus, it is still not the date that is material to eligibility, but the conviction.

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Pennsylvania has now conducted four elections with no-excuse mail-in voting, and questions relating to undated ballots have been litigated on multiple occasions. Yet the arguments for disenfranchising voters who omit the date on their return envelope continue to rely on assertions that are unsupported by Pennsylvania law.

B. Section 10101(a)(2)(B) Applies to Errors on Ballot Envelopes

Section 10101(a)(2)(B) forbids denying the right to vote "because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). Without dispute, a mailing envelope is a "record or paper." And in this case dating a return envelope has been made an "act requisite to voting." Section 10101(a)(2)(B) thus forbids disqualifying ballots because the return envelope omits an immaterial date.

Limiting § 10101(a)(2)(B) to errors or omissions made during voter registration would be irreconcilable with the statute's text. The statute applies to errors made on "any record or paper relating to any application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). If the statute covers just records or papers related to an application or registration then "other act requisite to voting" has no meaning, and no party has suggested one. Narrowing § 10101(a)(2)(B) to records or papers related to registration would therefore violate

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the basic rule that statutes should not be interpreted to make language superfluous. See, e.g., Duncan v. Walker, 533 U.S. 167, 174 (2001).

So the phrase "other act requisite to voting" must capture a category of actions distinct from applying and registering to vote. As it is, § 10101 defines that category of action. Congress specifically defined "vote" for purposes of § 10101 to include "all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted " 52 U.S.C. § 10101(e) (emphasis added); see also id. § 10101(a)(3)(A) ("For purposes of this subsection . . . the term 'vote' shall have the same meaning as in subsection (e) of this section."). That means the "other act[s] requisite to voting" encompasses acts "necessary to make a vote effective." There is nothing remotely confusing about following the statute's plain text such that § 10101(a)(2)(B) applies to an "error or omission on any record or paper relating to any application, registration, or other act [necessary to make a vote effective]." Contra J.A. 679 (Ritter Opp'n to Summ. J.).

Consistent with what § 10101 says, one court recently reached the straightforward conclusion that § 10101(a)(2)(B) "isn't limited to . . . voter registration." *Common Cause v. Thomsen*, -- F. Supp. 3d --, No. 19-323, 2021 WL 5833971, at *3 (W.D. Wis. Dec. 9, 2021). Other courts have likewise applied § 10101(a)(2)(B) beyond voter registration, including to denials of the right to vote

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because of errors or omissions made on an absentee ballot envelope. *League of Women Voters of Arkansas v. Thurston*, No. 20-5174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021); *Martin*, 347 F. Supp. 3d at 1308–09.

Lehigh's mistaken argument that § 10101(a)(2)(B) governs only voter registration borrows heavily from Friedman v. Snipes, 345 F. Supp. 2d 1356 (S.D. Fla. 2004), which denied a motion for a temporary restraining order seeking relief under that statute, J.A. 503-05 (Lehigh Mot. Summ. J.). Comparisons to Friedman fail to grasp that the relevant error was that the ballot at issue arrived after Florida's receipt deadline. 345 F. Supp. 2d at 1371. That, the district court reasoned, was not an error made on a "record or paper." Id. at 1371-72. So, the court concluded, even if Congress was "concerned about denials of the right to vote at all stages and components of the voting process—from application to registration to casting to counting," the statute "provides specifically for protections against denials based on errors or omissions on 'records or papers' that are immaterial to the determination of an individual's qualification to vote." Id. (emphasis added). Here, unlike in *Friedman*, the envelopes used to return a ballot are indisputably "records or papers."

Given the statute's own definition of "vote," there is no basis for limiting the meaning of "other act requisite to voting" based on the canon of *ejusdem generis*.

Contra J.A. 677-78 (Ritter Opp'n to Summ. J.). The Supreme Court has rejected

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resorting to such interpretative canons when the statute itself provides an operative definition. *See Bilski v. Kappos*, 561 U.S. 593, 604 (2010). It also has directed that courts should not "woodenly apply [*ejusdem generis*]" just because the disputed phrase appears in a list. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008). The unmodified inclusion of "other act requisite to voting" and the statute's unambiguously broad definition of "vote" should be "read to mean what they literally say," *Ali*, 552 U.S. at 227 (cleaned up), rather than artificially circumscribed.

II. Voters Can Bring Suit to Enforce § 10101(a)(2)(B)'s Protections
The district court erred in holding that voters cannot sue for violations of § 10101(a)(2)(B).

Most fundamentally, the district court neglected to consider if 42 U.S.C. § 1983 expressly authorizes the voters' suit, as the voters pleaded and argued. J.A. 52 (Complaint); J.A. 752 (Voters' Opp'n to Summ. J.). While there is overlap between the analysis the district court performed under *Alexander v. Sandoval*, 532 U.S. 275 (2001), to determine if § 10101 implies a right of action, and that it should have performed under *Gonzaga University v. Doe*, 536 U.S. 273 (2002), to determine if § 10101(a)(2)(B) is enforceable through § 1983, the analyses diverge such that § 1983 allows this suit regardless of whether there also is an implied action.

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Both *Sandoval* and *Gonzaga* direct courts to conduct a two-part inquiry in determining whether a statute creates a private right of action (*Sandoval*) or a private right enforceable under §1983 (*Gonzaga*). The first part of the inquiry is the same: a court must ask "whether Congress intended to create a federal right." *Gonzaga*, 536 U.S. at 283. That inquiry incorporates whether "Congress intended that the statutory provision in question benefits the plaintiff"; "whether the right asserted is so 'vague and amorphous' that its enforcement would strain judicial competence"; and "whether the statute unambiguously imposes a binding obligation on the states." *Grammer v. John J. Kane Reg'l Centers-Glen Hazel*, 570 F.3d 520, 525 (3d Cir. 2009).

The only circuit court to consider if § 10101(a)(2)(B) creates a federal right concluded it does. *Schwier v. Cox*, 340 F.3d 1284, 1296-97 (11th Cir. 2003). The district court concluded the same. J.A. 24, 29. Those conclusions are correct. Section 10101(a)(2)(B)'s focus on the benefitted class—voters—unavoidably follows from its assurance of "the right of any individual to vote in any election." The right it affords is neither vague nor amorphous—it is the right to have your vote counted notwithstanding trivial mistakes. And the statute imposes an indisputable obligation, forbidding denials of the right for those trivial mistakes.

The Sandoval and Gonzaga inquiries diverge at the second step, which is where the district court went astray. Federal rights are enforceable through an Case: 22-1499 Document: 42 Page: 26 Date Filed: 04/01/2022

implied cause of action only if Congress also created a private remedy. *Alexander*, 532 at 286. But federal rights are "presumptively enforceable" in an action under § 1983. *Gonzaga*, 536 U.S. at 283. That presumption is rebutted only if "Congress shut the door to private enforcement either expressly, through specific evidence from the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* at 284 n.4. Because these standards differ, § 1983 may be available where an implied cause of action is not (and vice versa if, for example, the defendant is not a state actor). ¹⁰

By applying the wrong test, the district court flipped the burden and looked for evidence of congressional intent to create a private right of action through § 10101(a)(2)(B), rather than evidence of congressional intent to preclude enforcement by way of § 1983. It faulted the Eleventh Circuit for not applying a similar presumption, J.A. 28-29, but that court got it right, *Schwier*, 340 F.3d at 1294-97. In *Schwier*, the Eleventh Circuit recognized that plaintiffs brought their suit under § 1983; below, the district court did not mention it.

¹⁰ As the dissenting justice in *Sandoval* observed, the Court would not have needed to consider the existence of an implied cause of action had the plaintiff used § 1983 instead. 532 U.S. at 299–300 (Stevens, J., dissenting); *see also McGovern v. City of Philadelphia*, 554 F.3d 114, 120–21 (3d Cir. 2009) (noting § 1983 may be available even when there is no implied cause of action).

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What is more, the district court's analysis of congressional intent was flawed. It concluded that the U.S. Attorney General's enforcement power under § 10101(c) is meant to be exclusive. Yet the Supreme Court already has ruled that federal enforcement of voting rights can coexist with private actions. *Allen v. State Bd. of Elections*, 393 U.S. 544, 556–57 (1969). And here, § 10101's text and the relevant legislative history explicitly presuppose that the Attorney General's authority is complementary.

First, paragraph (d) gives district courts jurisdiction for actions under § 10101 "without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law." 52 U.S.C. § 10101(d). As the voters have explained, this paragraph contemplates actions by voters—the "party aggrieved." Appellants' Br. at 26-27 (Doc. No. 32). Title 52 regularly distinguishes between the "aggrieved" party in a proceeding to enforce voting rights and the U.S. Attorney General. 52 U.S.C. §§ 10302(a), 20105(a), 20510. Plus, the U.S. Attorney General would not need to exhaust administrative remedies. *Schwier*, 340 F.3d at 1296.

Second, paragraphs (e) and (g) contemplate actions brought by a party other than the Attorney General. The former sets out specific procedures that apply to "any proceeding instituted [by the Attorney General]," 52 U.S.C § 10101(e), a preface that would be unnecessary if there was no alternative. Paragraph (g)

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reinforces the same point, again describing procedures specific to "any proceeding brought [by the Attorney General] to enforce subsection (b) of this section." *Id.* § 10101(g). That, too, would be needless prefatory language if the Attorney General's powers were exclusive.

Third, § 121 of the Civil Rights Act of 1957, the same act that invested the U.S. Attorney General with enforcement authority, amended 28 U.S.C. § 1343 to specifically grant district courts jurisdiction over actions to recover damages for violations of the right to vote. Civil Rights Act of 1957, Pub. L. No. 85-315, § 121. The U.S. Attorney General, however, may seek only "preventive relief." 52 U.S.C § 10101(c). Adding the jurisdictional provision while simultaneously eliminating the cause of action needed to invoke that jurisdiction would be inexplicably bizarre.

Because this text unequivocally confirms that § 1983 provides the voters a cause of action, using the *Sandoval* framework to determine if § 10101 independently supplies a cause of action is gratuitous. Still, the same text that confirms that the presumption of § 1983's availability cannot be overcome also signals that § 10101 itself creates a right of action. None of paragraphs (d), (e), and (g), or the specific grant of jurisdiction over actions for damages, makes sense if Congress did not intend for a private remedy to exist.

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While legislative history could not supplant what the statute emphatically communicates, the relevant history substantiates that § 10101 is privately enforceable through § 1983 at a minimum. The voters' brief in this court capably describes the relevant legislative history. Appellants' Br. at 34-37(Doc. No. 32). But it is worth emphasizing how insistent the architect of § 10101(c) was that it would not replace private suits.

Before Congress gave the U.S. Attorney General power to enforce what is now § 10101, private citizens enforced violations of that section's guarantees through § 1983 actions. H.R. Rep. No. 85-291, at 12 (1957) (stating "Section 1983 of Title 42 U.S.C. has been used to enforce the rights . . . contained in Section 1971"); Civil Rights-1957: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary ("Brownell Testimony"), 85th Cong. at 3 (Feb. 14, 1957) (statement and testimony of the Hon. Herbert Brownell, Jr., Attorney General of the United States) (stating private citizens have long used § 1983 actions for violations of the right to vote); Schwier, 340 F.3d at 1295 (collecting cases). Former U.S. Attorney General Herbert Brownell, Jr., had initially proposed the legislation that ultimately gave his office supplementary enforcement authority, and oversaw drafting of the legislation. See Brownell Testimony, 85th Cong. at 1, 203. In his testimony to Congress about the proposal, he was explicit that, "[u]nder the laws amended if this program passes, private

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people will retain the right they have now to sue in their own name and the Attorney General will have the additional right which he does not now have to bring on behalf of the United States for the protection of its citizens the new remedy remedial [sic] actions." *Id.* at 73; *see also id.* at 72 ("Private individuals . . . could still bring their own actions.").¹¹

The House certainly appreciated the complementary nature of the U.S.

Attorney General's enforcement power. Its report introduced the proposed provision as "To Provide Means for Further Securing and Protecting the Right to Vote." H.R. Rep. No. 85-291, at 11.

Therefore, legislative history, just like statutory text, confirms what intuitively must be true: "It is highly unlikely that in enacting civil rights legislation for the first time since the Reconstruction era [Congress] would simultaneously withdraw existing protection from § 10101." *Schwier*, 340 F.3d at 1295 (cleaned up). What is more, it is utterly implausible that Congress silently intended to take such counterintuitive action.

¹¹ The district court used statements from Attorney General Brownell as evidence that civil remedies did not exist before 1957, J.A. 27, but the Attorney General was quite clearly lamenting only the Department of Justice's historic lack of civil enforcement power, *see* Brownell Testimony, 85th Cong. at 3.

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CONCLUSION

For the reasons above, the district court should be reversed and, further, should be directed to enter judgment for the voters on Count I.

April 1, 2022

Respectfully submitted,

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CERTIFICATES

- I, Jacob B. Boyer, hereby certify that:
 - 1. I am a member of the bar of this Court;
 - 2. The text of the electronic version of this brief is identical to the text of the paper copies;
 - A virus detection program was run on the file and no virus was detected; and
 - 4. This brief contains 6,084 words and therefore complies with Federal Rules of Appellate Procedure 29(2)(5) and 32(a)(7)(B). In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

/s/ Jacob B. Boyer

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CERTIFICATE OF SERVICE

I, Jacob B. Boyer, hereby certify that a copy of this amicus brief has been served on all counsel of record using the Court's CM/ECF system.

I further certify that seven hard copies of this brief will be sent by first class mail to the Clerk of the United States Court of Appeals for the Third Circuit in Philadelphia, Pennsylvania.

/s/ Jacob B. Boyer

Appendix 43

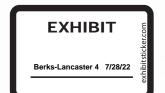
Why are there two envelopes with my mail-in ballot?

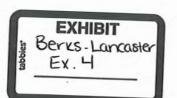
The smaller secrecy envelope is intended to protect the anonymity of your vote. After you fill out your ballot, you must place it in the secrecy envelope and seal it.

Do not make any marks on this envelope. If you fail to place and seal your ballot in this envelope or if you make marks on this envelope, your ballot will not be counted.

The second, larger envelope is the mailing and declaration envelope. You must use it, even if you are dropping your ballot off at a drop box. Place your secrecy envelope (with your ballot inside) into the mailing and declaration envelope. You must seal it and sign and date the declaration before you can return your ballot.

Both of these envelopes must be used in order for your vote to count.





Step 3:



Seal the inner secrecy envelope in the preaddressed outer return envelope. Complete, 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.

Step 4:



Return your voted ballot to the county election board. Absentee and Mail-in Ballots must be received by 8 pm on election day at your county election board. To ensure your ballot is received by the deadline, return the ballot as soon as possible.

What must be included when I return my mail-in or absentee ballot by mail or in person? Do I need a postage stamp?

- 1. When you receive your mail-in or absentee ballot, make sure you read all the instructions, and make sure you vote both sides of the ballot, if applicable.
- Put your voted ballot in the inner secrecy envelope that indicates "Official Election Ballot." Do NOT make any marks on the secrecy envelope.
- 3. Then put the secrecy envelope inside the pre-addressed outer return envelope where the voter signs.
- 4. Complete the voter's declaration by signing and writing the current date. Be sure to seal the outer envelope.
- Return your mail ballot to your county board of elections by mail, in person at your county election office or by dropping it off at another location designated by your county board of elections.
- 6. If you return your ballot by mail, you need a postage stamp for the envelope.

Appendix 44

Ritter v. Miglioril, 142 S.Ct. 1824 (Mem) (2022)

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142 S.Ct. 1824 Supreme Court of the United States.

> David RITTER v. Linda MIGLIORII, et al.

> > No. 21A772 | June 9, 2022

Opinion

The application for stay presented to Justice <u>ALITO</u> and by him referred to the Court is denied. The order heretofore entered by Justice <u>ALITO</u> is vacated.

Justice <u>ALITO</u>, with whom Justice <u>THOMAS</u> and Justice <u>GORSUCH</u> join, dissenting from the denial of the application for stay.

This application for a stay pending certiorari involves the counting of undated mail-in ballots in one state-court judicial election. A stay pending certiorari is appropriate only if the Court is likely to grant review; certiorari is discretionary; and the Court now denies the stay. I would agree with that decision were it not for concern about the effect that the Third Circuit's interpretation of 52 U.S.C. § 10101(a)(2)(B) may have in the federal and state elections that will be held in Pennsylvania in November.

The Third Circuit's interpretation broke new ground, and at this juncture, it appears to me that that interpretation is very likely wrong. If left undisturbed, it could well affect the outcome of the fall elections, and it would be far better for us to address that interpretation before, rather than after, it has that effect. I would therefore enter a stay pending certiorari and advise that any petition for certiorari and brief in opposition should be filed expeditiously. If that is done, the Court will be in a position to grant review, set an expedited briefing schedule, and if necessary, set the case for argument in October.

To illustrate why the Third Circuit's interpretation is sufficiently questionable and important to merit review, I offer the following thoughts on the interpretation of the statute in question. As I will explain, 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. It seems plainly contrary to the statutory language, but as is almost always the case when we decide whether to grant emergency relief, I do not rule out the possibility that further briefing and argument might convince me that my current view is unfounded. But with that caveat, I will proceed to discuss the statutory language.

The statutory provision in question reads as follows:

"No person acting under color of law shall ... deny the right of any individual to vote in any election because of an error or omission on any record or paper related to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." § 10101(a)(2)(B).

*1825 This provision has five elements: (1) the proscribed conduct must be engaged in by a person who is "acting under color of law"; (2) it must have the effect of "deny[ing]" an individual "the right to vote"; (3) this denial must be attributable to "an error or omission on [a] record or paper"; (4) the "record or paper" must be "related to [an] application, registration, or other act requisite to voting"; and (5) the error or omission must not be "material in determining whether such individual is qualified under State law to vote in such election." *Ibid.*

The Third Circuit held that the failure to count mail-in ballots that did not include the date on which they were filled out constituted a violation of this provision, but the Third Circuit made little effort to explain how its interpretation can be reconciled with the language of the statute. In my view, however, it appears that elements 2 and 5 are clearly not met.

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I will start with element 2. When 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. "Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules." Brnovich v. Democratic National Committee, 594 U.S. ---, ----, 141 S.Ct. 2321, 2338, 210 L.Ed.2d 753 (2021). A registered voter who does not follow the rules may be unable to cast a vote for any number of reasons. A voter may go to the polling place on the wrong day or after the polls have closed. A voter may go to the wrong polling place and may not have time to reach the right place before it is too late. A voter who casts a mail-in ballot may send it to the wrong address. A State's refusal to count the votes of these voters does not constitute a denial of "the right to vote." Even the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right.

Element 5 weighs even more heavily against the Third Circuit's interpretation. This element requires that the error or omission be "material in determining whether such individual is qualified under State law to vote in such election." There is no reason why the requirements that must be met in order to register (and thus be "qualified") to vote should be the same as the requirements that must be met in order to cast a ballot that will be counted. Indeed, it would be silly to think otherwise. Think of the previously mentioned hypothetical voters whose votes were not counted because they did not follow the rules for casting a vote. None of the rules they violated-rules setting the date of an election, the location of the voter's assigned polling place, the address to which a mail-in ballot must be sent-has anything to do with the requirements that must be met in order to establish eligibility to vote, and it would be absurd to judge the validity of voting rules based on whether they are material to eligibility.

Under Pennsylvania law, a person is qualified to vote if he or she is at least 18 years old on the day of the election, has been a citizen of the State for at least one month, has lived in the relevant election district for at least 30 days, and is not imprisoned for a felony. See 25 Pa. Cons. Stat. § 1301 (2002). Other requirements must be met in order for a mail-in ballot to be counted. Among other things, a statute *1826 provides that a voter "shall ... fill out, date and sign" a declaration printed on the outer security envelope in which the actual ballot is sealed. S. 422, 2020 Gen. Assem., Reg. Sess. (Pa.), codified at Pa. Stat. Ann., Tit. 25, § 3150.16(a) (emphasis added); see also Migliori v. Lehigh County Bd. of Elections, No. 5:22ev-0397, 2022 WL 802159 (E.D. Pa., Mar. 16, 2022), App. to Application 23a-24a. The Pennsylvania Supreme Court has held that the inclusion of the date on which the ballot was filled out is mandatory and that undated ballots cannot be counted, see In re Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 General Election, - Pa. - , 241 A.3d 1058 (2020), but the Third Circuit held that this state-law rule is preempted by 52 U.S.C. § 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? One may argue that the inclusion of a date does not serve any strong purpose and that a voter's failure to date a ballot should not cause the ballot to be disqualified. But 10101(a)(2)(B) does not address that issue. It applies only to errors or omissions that are not material to the question whether a person is qualified to vote. It leaves it to the States to decide which voting rules should be mandatory.

The problem with the Third Circuit's interpretation can be illustrated by considering what would happen if it were applied to a mail-in voting rule that is indisputably important, namely, the requirement that a mail-in ballot be signed. Pa. Stat. Ann., Tit. 25, § 3150.16(a). Suppose a voter did not personally sign his or her ballot but instead instructed another person to complete the ballot and sign it using the standard notation employed when a letter is signed for someone

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else: "p. p. John or Jane Doe." Or suppose that a voter, for some reason, typed his or her name instead of signing it. Those violations would be material in determining whether a ballot should be counted, but they would not be "material in determining whether such individual is qualified under State law to vote in such election." Therefore, under the Third Circuit's interpretation, a ballot signed by a third party and a ballot with a typed name rather than a signature would have to be counted. It seems most unlikely that this is what 52 U.S.C. § 10101(a)(2)(B) means.²

For these reasons, it appears to me that the Third Circuit's interpretation is very likely incorrect, and I would grant a stay to preserve the opportunity to review that decision prior to the elections in November.

All Citations

142 S.Ct. 1824 (Mem), 2022 Daily Journal D.A.R. 5881

Footnotes

- Elements 1 and 3 are satisfied, but for the reasons explained below, see n. 2, *infra*, the Third Circuit's interpretation is not consistent with the most natural reading of element 4.
- In light of what I have written about elements 2 and 5, it is unlikely that element 4 must be addressed, but for the sake of completeness, I will add that the language of that provision must be given a strained meaning in order to make it applicable to the validity of a rule about filling out a mail-in ballot. Element 4 demands that a "record or paper" must be "related to [an] application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). A mail-in ballot is a "record or paper," and it does not appear to be related in any direct sense to any "application" or "registration," so the question is whether it is "related to" some "other act requisite to voting." But the casting of a ballot constitutes the act of voting. Indeed, the statute specifies that "the word 'vote' includes all action necessary to make a vote effective including ... casting a ballot, and having such ballot counted." § 10101(e). It is therefore awkward to describe the act of voting as "requisite to the act of voting."

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Appendix 45

From: Marks, Jonathan < <u>imarks@pa.gov</u>>
Sent: Tuesday, June 1, 2021 9:21 AM
To: Marks, Jonathan < <u>imarks@pa.gov</u>>

Subject: DOS Email: Reminder Regarding Requirement to Sign AND Date Declaration Envelopes

County of Lehigh Warning: This is an external email. Please exercise caution.

Good morning everyone.

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.

Thank you for everything that you do.

Kind Regards,

Jonathan M. Marks

Deputy Secretary for Elections & Commissions

PA Department of State

302 North Office Building

Harrisburg, PA 17120

Phone: 717-783-2035

EXHIBIT

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Appendix 46

No.	

In the Supreme Court of the United States

DAVID RITTER,

Petitioner,

v.

LINDA MIGLIORI, FRANCIS J. FOX, RICHARD E.
RICHARDS, KENNETH RINGER, SERGIO RIVAS, ZAC
COHEN, and LEHIGH COUNTY BOARD OF ELECTIONS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Joshua J. Voss Kleinbard LLC Three Logan Square 1717 Arch St., 5th Fl. Philadelphia, PA 19103

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July 7, 2022

Attorneys for Petitioner

EXHIBIT

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QUESTION PRESENTED

Pennsylvania requires voters to sign and date a declaration when they vote by mail. In a private law-suit filed after a local election, the Third Circuit held that this dating requirement was preempted by the materiality provision of the Civil Rights Act of 1964, 52 U.S.C. §10101(a)(2)(B). That decision "is very likely incorrect," as three Justices have explained, and "could well affect the outcome of the fall elections." *Ritter v. Migliori*, 2022 WL 2070669 (U.S. June 9), at *3, *1 (Alito, J., dissental). Though petitioner planned to ask this Court to review it, he couldn't because the election ended and the results were certified. So the Third Circuit's decision will continue wreaking havoc, but this Court cannot review it on the merits.

The question presented is:

Should this Court vacate the Third Circuit's decision under *United States v. Munsingwear*, *Inc.*, 340 U.S. 36 (1950)?

RELATED PROCEEDINGS

Pennsylvania State Court:

Ritter v. Lehigh Cnty. Bd. of Elections, 2022 WL 16577 (Commw. Ct. Jan. 3)

United States District Court:

Migliori v. Lehigh County Board of Elections, 2022 WL 802159 (E.D. Pa. Mar. 16)

United States Court of Appeals:

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

United States Supreme Court:

Ritter v. Migliori, 142 S. Ct. 1824 (2022)

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JURISDICTION

The Third Circuit issued its decision on May 27, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The materiality provision of the Civil Rights Act of 1964 states:

No person acting under color of law shall ... deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

52 U.S.C. §10101(a)(2)(B).

INTRODUCTION

"Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules." *Brnovich v. DNC*, 141 S. Ct. 2321, 2338 (2021). The Constitution gives state legislatures ample authority to enact those rules. *See* Art. I, §4, cl. 1; Art. I, §1, cl. 2; amend. X. And those rules are particularly important

for mail-in voting, which takes place outside the presence of election officials and presents a heightened risk of fraud. *Brnovich*, 141 S. Ct. at 2348. Hence why laws requiring mail-in voters to follow certain rules—sign and date a declaration, use a sealed secrecy envelope, find a witness, follow deadlines, and more—are ubiquitous. *Republican Party of Penn. v. Degraffenreid*, 141 S. Ct. 732, 736 (2021) (Thomas, J., dissental). These workaday rules serve state interests that are "strong and entirely legitimate." *Brnovich*, 141 S. Ct. at 2340.

But these rules have their detractors—well-funded opponents who've been searching for a theory that would let federal courts invalidate regulations of mailin voting. During the pandemic, opponents tried to argue that the Constitution required federal courts to suspend these laws. This Court disagreed "numerous" times. *DNC v. Wis. State Leg.*, 141 S. Ct. 28, 32 (2020) (Kavanaugh, J., concurral). Then opponents, claiming racially disparate impacts, tried to invalidate these laws under §2 of the Voting Rights Act. This Court closed that door as well, explaining that Congress did not preempt "common" regulations that impose only the "usual burdens of voting." *Brnovich*, 141 S. Ct. at 2346-48.

The detractors' next big theory appears to be the materiality provision of the Civil Rights Act. Passed in 1964, that statute prevents States from denying someone "the right to vote" because they made an error or omission on a "record or paper" that is "requisite to voting," unless the error or omission is "material" to whether the voter is "qualified under State law." 52

U.S.C. §10101(a)(2)(B). This statute bans the practice—common in the Jim Crow South—of registrars denying black voters the right to register due to "minor misspelling errors or mistakes in age or length of residence." H.R. Rep. No. 88-914 (Nov. 20, 1963), 1964 U.S.C.C.A.N. 2391, 2491. But today, litigants are trying to stretch this language to cover laws that govern the mechanics of mail-in voting—rules that voters must follow to ensure their mail-in ballots are counted. These laws are preempted by the materiality statute, the theory goes, unless they prove a voter's qualifications, meaning their age, residency, citizenship, or non-felon status. And, of course, most ballot-validity rules do not do that.

This theory has major proponents. The ACLU, who represents the plaintiffs here, has adopted it. The national Democratic Party has adopted it too. The party is currently telling courts that the materiality statute preempts laws requiring voters to mail ballots to the right county, use a secrecy envelope, and meet the postmarking deadline. Worse, the United States has adopted this theory as well. It wrote amicus briefs for the plaintiffs in this case, and it is currently suing Texas and Arizona for their voter-ID laws. The United States' new position is important because the Civil Rights Act places *it* in charge of enforcing the materiality statute. *See* 52 U.S.C. §10101(c).

This expansive reading of the materiality statute was adopted below. With "little effort to explain how its interpretation can be reconciled with the language of the statute," *Ritter*, 2022 WL 2070669, at *1 (Alito,

J., dissental), the Third Circuit held that the materiality statute preempts Pennsylvania's laws requiring mail-in voters to date a declaration. It thus ordered Lehigh County to count 257 undated ballots in a judicial election where petitioner David Ritter led by only 71 votes. When Ritter moved for an emergency stay, this Court denied his application over the dissent of three Justices.

After this Court denied a stay, the case quickly became moot. The very next day, the district court ordered the board of elections to count the 257 undated ballots. The board did so and, less than a week after this Court denied a stay, Ritter learned that the Third Circuit's decision had flipped the result. Instead of winning the election by 71 votes, Ritter lost the election by 5 votes. The county then certified the results and declared his opponent the winner.

Because this case "has become 'moot while on its way here," this Court should follow its "established practice": it should "vacate the judgment below and remand with a direction to dismiss." Azar v. Garza, 138 S. Ct. 1790, 1792 (2018) (quoting Munsingwear, 340 U.S. at 39). The Court likely would have granted certiorari had the case not become moot. The Third Circuit's decision was important, wrong, and deepened a split among the lower courts. And the equities strongly favor vacatur, regardless of the odds of certiorari. The mootness here was caused by the election calendar, not Ritter, and leaving the Third Circuit's thinly reasoned decision in place would spawn unfortunate and unreviewable consequences. It jeopardizes a wide range of entirely legitimate state election laws.

And it will disrupt the November elections. Vacatur avoids these consequences, with no prejudice to the individual plaintiffs who brought this case. This Court should enter that relief to "clea[r] the path for future relitigation of the issues" and "eliminat[e] a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40.

STATEMENT OF THE CASE

Under Pennsylvania's election code, voters must date a declaration on the envelope of their mail-in ballot. Around 250 voters failed to do that in Lehigh County's 2021 election, and the Pennsylvania courts deemed those undated ballots invalid. Five voters then filed a follow-on suit in federal court, again arguing that the undated ballots must be counted. The voters lost in the district court, the Third Circuit reversed on appeal, and this Court denied an emergency stay. Then, in fast succession, the undated ballots were counted, the result was flipped, and the election was certified. So this controversy ended, but the Third Circuit's precedent remains untouched—inflicting consequences both immediate and far-reaching.

A. Pennsylvania requires mail-in voters to sign and date a declaration.

The Pennsylvania legislature authorized no-excuse mail-in voting for the first time in 2019. To vote this way, Pennsylvanians must place their ballot in an inner secrecy envelope and then place the inner secrecy envelope in an outer mailing envelope. The mailing envelope contains a declaration that the voter must "fill out, *date* and sign." 25 Pa. Stat. §3150.16(a)

(emphasis added); accord §3146.6(a). The declaration affirms that the voter, among other things, is qualified to vote in this election from this address and hasn't voted already. See Envelope Guide, Pa. Dep't of State, bit.ly/3LBsM4Q (last visited July 6, 2022).

According to Pennsylvania's courts, this dating requirement serves "weighty interests." Ritter v. Lehigh Cnty. Bd. of Elections, 2022 WL 16577, at *9 (Pa. Commw. Ct. Jan. 3). It helps prove "when the elector actually executed the ballot." In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058, 1090 (Pa. 2020) (op. of Dougherty, J.). It "establishes a point in time against which to measure the elector's eligibility." *Id.* It helps "ensur[e] the elector completed the ballot within the proper time frame." Id. at 1091. And it prevents third parties from collecting and "fraudulent[ly] back-dat[ing] votes." Id.; accord App.65 ("Where ... the outer envelope remains undated, the possibility for fraud is heightened."). As in other States, dating requirements like Pennsylvania's "deter fraud," "create mechanisms to detect it," and "preserv[e] the integrity of the election process." Republican Party of Penn., 141 S. Ct. at 736 (Thomas, J., dissental) (cleaned up).

B. Ritter runs for a judgeship in 2021 and initially wins the third and final seat.

Lehigh County's court of common pleas is a trial court with general jurisdiction. Its judges serve 10-year terms. They run in partisan elections for their first term and retention elections after that.

In November 2021, Lehigh County held an election for three new judges on the court of common pleas. Six candidates ran—three Republicans and three Democrats—so the top three vote-getters would win the seats. After the votes were tallied, the three Republicans finished in the top three. But the margin between the third-place candidate (David Ritter) and fourth-place candidate (Zac Cohen) was less than 75 votes:

Candidate	Vote Total
Tom Caffrey (REP)	35,301
Tom Capehart (REP)	33,017
David Ritter (REP)	32,602
Zachary Cohen (DEM)	32,528
Maraleen Shields (DEM)	32,041
Rashid Santiago (DEM)	29,453

Caffrey and Capehart were seated. But Ritter was not. His opponent, Cohen, filed a challenge with the county board of elections.

C. In the state contest, the Pennsylvania courts agree with Ritter that undated ballots cannot be counted.

Of the 22,000 absentee votes cast in Lehigh County's 2021 election, 257 had no date on the outer envelope. In other words, 1% of mail-in voters failed to comply with Pennsylvania's dating requirement. After Cohen's challenge, the board of elections decided to count those undated votes, but Ritter challenged that decision in court. The state trial court ruled for

Cohen, but the commonwealth court reversed on appeal.

A three-judge panel of the commonwealth court agreed with Ritter that the 257 undated ballots could not be counted. In addition to state-law claims, the court addressed whether the dating requirement violates the materiality provision of the Civil Rights Act. That statute was "inapplicable," according to the commonwealth court, because the dating requirement does not regulate whether a voter is *qualified* to vote, but whether a qualified voter's ballot is *valid*. 2022 WL 16577, at *9. The materiality statute does not invalidate the dating requirement, which is an election-integrity measure that serves "weighty interests." *Id*.

The commonwealth court instructed the trial court to "issue an order ... directing [Lehigh County] to exclude the 257 [undated] ballots from the certified returns." *Id.* at *10. The commonwealth court's decision became final on January 27, 2022, when the Pennsylvania supreme court denied Cohen's petition to appeal. 271 A.3d at 1286. The trial court promptly directed Lehigh County to "exclude the 257 ballots at issue in this case." CA3 Dkt. 33-2 at JA128.

D. Individual voters file a new federal lawsuit, lose, but win on appeal.

Four days after the state-court proceedings ended, five individual voters filed a new federal lawsuit. The voters claimed that they did not date their mail-in ballots and argued that Pennsylvania's dating requirement violated the materiality statute. Though they claimed to be vindicating their individual right to

vote, they did not ask for only their five ballots to be counted; they asked that Lehigh County be ordered to count all "257" undated ballots. D.Ct. Dkt. 1 at 20-21. Ritter intervened as a defendant, and Cohen intervened as a plaintiff.

The district court quickly entered summary judgment against the plaintiffs. It ruled that the plaintiffs lacked a private right of action to enforce the materiality statute. App.53-62. The court "did not find the question of the existence of a private right of action to be particularly close." *Migliori v. Lehigh Cnty. Bd. of Elections*, 2022 WL 827031, at *1 (E.D. Pa. Mar. 18).

The individual voters (but not Cohen) appealed. D.Ct. Dkt. 58. After expedited briefing and argument, the Third Circuit issued a judgment on May 20. The judgment warned that the court would soon issue an opinion for the plaintiffs, that the opinion would direct the district court to "order that the undated ballots be counted," and that the Third Circuit would "immediately" issue its mandate with the opinion. CA3 Dkt. 82 at 2-3. Ritter asked the Third Circuit to either stay its mandate pending certiorari or delay the issuance of its mandate seven days so that Ritter could seek a stay from this Court. CA3 Dkt. 81. The Third Circuit agreed to delay its mandate seven days. CA3 Dkt. 85.

The Third Circuit issued its decision at the end of May. It held that Congress intended for the materiality statute to be enforced through §1983's private right of action. It discounted the fact that the materiality provision "refers to the Attorney General's enforcement ability," and it supported its conclusion by

consulting legislative history. App.11-18. The Third Circuit then held that Pennsylvania's dating requirement did not comply with the materiality statute. It reasoned that any state election law that does not "g[o] to determining age, citizenship, residency, or current imprisonment for a felony" violates the statute. App.19. It did not explain how the text of the statute reaches ballot-validity requirements in the first place.

Importantly, throughout this litigation, Lehigh County was enjoined from certifying the election. *See* D.Ct. Dkt. 13; CA3 Dkt. 12. The plaintiffs sought that relief at every stage because, "[o]nce the Elections Board certifies the election ..., Plaintiffs lose any opportunity to obtain meaningful redress." D.Ct. Dkt. 3 at 20; *accord* D.Ct. Dkt. 52-1 at 17 (arguing that, if "the County ... certif[ies] the election," then "Plaintiffs will likely lose any opportunity for appellate review"). Certification, they argued, is a "bell" that "cannot be unrung." D.Ct. Dkt. 3 at 20. "[O]nce an election is certified, 'there can be no do-over [or] redress." CA3 Dkt. 6-1 at 24-25; *accord* D.Ct. Dkt. 3 at 19 ("once certified, an excluded vote cannot be restored"); CA3 Dkt. 6-1 at 3 ("irretrievably lost"); *id.* at 7-8 ("permanent loss").

E. The Third Circuit's decision goes into effect and flips the result.

Ritter sought an emergency stay from this Court to prevent the Third Circuit's decision from going into effect. Justice Alito entered an administrative stay, but the full Court later denied Ritter's application.

Justice Alito, joined by Justices Thomas and Gorsuch, dissented. They would have granted the stay,

noting their "concern" that the Third Circuit's decision would affect "the federal and state elections that will be held in Pennsylvania in November." *Ritter*, 2022 WL 2070669, at *1 (Alito, J., dissental). The Third Circuit's interpretation of the materiality statute, they explained, "broke new ground." *Id.* It is "very likely wrong" and "could well affect the outcome of the fall elections." *Id.* These Justices would have entered a stay and ordered expediting briefing so that "the Court will be in a position to grant review, set an expedited briefing schedule, and if necessary, set the case for argument in October." *Id.* at *2.

One day after this Court denied a stay—before the Third Circuit's mandate had even issued—the district court ordered Lehigh County to count the 257 undated ballots. App.31. The board of elections counted them six days later. Though the plaintiffs told this Court that Ritter could not "show that counting the additional votes will change the result," Stay-Opp.3, that's precisely what happened. Instead of winning the election by 71, Ritter lost the election by 5. Lehigh County certified the election for Cohen. See Pratt, Eight Months Later, Lehigh County Certifies 2021 General Election, WLVR (June 28, 2022), bit.ly/3bQwNWX.

The Third Circuit's decision literally changed the outcome of Ritter's election, but the fallout did not end there. Even though the Third Circuit's decision "was issued in the context of the November 2021 election in Lehigh County," the State has ordered all counties to count undated ballots in future elections (unless the Third Circuit's decision is overturned by this Court). Guidance Concerning Examination of Absentee and

Mail-In Ballot Return Envelopes 2-3, Pa. Dep't of State (May 24, 2022), bit.ly/3NLG8x0 (Guidance). And a Pennsylvania judge, relying heavily on the Third Circuit's decision, ordered all counties to count undated ballots in the May primaries. See Dave McCormick for U.S. Senate v. Chapman, Mem. Op., No. 286 M.D. 2022 (Pa. Commw. Ct. Jun. 2, 2022).

Though the plaintiffs told this Court that the Third Circuit's decision would not affect laws other than the dating requirement, see Stay-Opp. 26-27, that assurance quickly proved false. Less than a week after the Third Circuit's decision, a group of plaintiffs sued to invalidate Pennsylvania's law requiring mail-in ballots to be placed in secrecy envelopes. The plaintiffs argued that, under the Third Circuit's decision, this requirement is not "material in determining whether [voters are] qualified under [Pennsylvania] law to vote." Dondiego v. Lehigh Cnty. Bd. of Elections, Dkt. 1 ¶43, No. 5:22-cv-2111-JLS (E.D. Pa. May 31, 2022). The defendants quickly settled. Dondiego, Dkts. 43-44, No. 5:22-cv-2111-JLS (E.D. Pa. June 15, 2022). The settlements will continue, as Pennsylvania's attorney general agrees with the plaintiffs' reading of the materiality statute and has urged courts to invalidate the State's election law. E.g., CA3 Dkt. 42; D.Ct. Dkt. 40.

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision, "[i]f left undisturbed," will leave a dangerous interpretation of the materiality statute on the books, threaten to invalidate countless regulations of mail-in voting, and inject

chaos into the state and federal elections in November. *Ritter*, 2022 WL 2070669, at *1 (Alito, J., dissental). It should not be left undisturbed. Because the case became moot on its way here, this Court should do what it typically does when the election calendar prevents a litigant from obtaining review: *Munsingwear* vacate. *E.g.*, *Bognet v. DeGraffenreid*, 141 S. Ct. 2508 (2021).

This case became "moot while on its way here." *Munsingwear*, 340 U.S. at 39. The parties' dispute was about which ballots would be counted in Lehigh County's 2021 election for the court of common pleas. After the Third Circuit's decision but before this Court granted certiorari, the ballots were counted, the results were certified, and the election ended. As the plaintiffs have argued throughout this case, certification marks the end of the parties' controversy.

When a case becomes moot on its way here, the Court's "established practice" is to invoke *Munsingwear*—to grant certiorari, vacate the judgment, and remand with instructions to dismiss the case as moot. 340 U.S. at 39. That remedy promotes "fairness" by "expung[ing] an adverse decision" that the petitioner could not get this Court to review. *Camreta v. Greene*, 563 U.S. 692, 712 & n.10 (2011). Though the United States has argued that vacatur is inappropriate unless the underlying case would have been certworthy, it admits that vacatur can "still ... be appropriate" even when that's not true. Pet. 23 n.4, *Hargan v. Garza*, 2017 WL 5127296 (U.S. Nov. 3, 2017). Because *Munsingwear* is "rooted in equity," the fact that the case became moot "before certiorari does not

limit this Court's discretion." *Garza*, 138 S. Ct. at 1792-93. But under any standard, the Third Circuit's judgment should be vacated here.

If this case had not become moot, the Court likely would have granted certiorari. The Third Circuit's expansive interpretation of the materiality statute is the kind of disruptive usurpation of the States' authority over elections that this Court hasn't hesitated to review. And the Third Circuit's holding that plaintiffs have a private right of action creates a 2-1 circuit split. Three Justices said they would have granted certiorari at the stay stage. It's likely that at least one more would have joined them at the merits stage—where the facts, law, and stakes would have crystallized and the burdens of granting emergency relief would have dissipated. Compare Moore v. Harper, 142 S. Ct. 1089 (2022) (denying an emergency stay), with Moore v. Harper, 2022 WL 2347621, at *1 (U.S. June 30) (granting certiorari). Or the prospect of certiorari is at least close enough to justify wiping the slate clean under Munsingwear.

Certiorari aside, the equities alone warrant vacatur. The mootness here "occur[red] through happenstance," rather than Ritter's own conduct. *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71 (1997). The case became moot when the new election results were certified over Ritter's rigorous defense of the original results. But that certification left in place a decision that "could well affect the outcome of the fall elections" and is being invoked to attack state election laws across the country. *Ritter*, 2022 WL 2070669, at *2 (Alito, J., dissental). It was issued hastily and did not

address the statutory question at the core of this case. The state election laws that it will jeopardize include legitimate requirements necessary to the administration of the upcoming elections. And vacatur is far less burdensome than an emergency stay or expedited review, which three Justices already indicated they were willing to support. The equities, as they normally do, point to *Munsingwear*.

I. This case became moot on its way here.

Article III courts may decide "only ... ongoing cases or controversies." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). An "actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Alvarez v. Smith*, 558 U.S. 87, 92 (2009).

The controversy underlying this case has ended. The plaintiffs sued so that their undated ballots would be counted in Lehigh County's 2021 election. That election ended, the plaintiffs' ballots were counted, the results were certified, and the offices were filled. Even if Ritter convinced this Court to reverse the Third Circuit, none of that would change. Lehigh County would not (if it even could, legally) uncertify the election, uncount the plaintiff's votes, or remove Cohen from office. As is typical in election cases, this dispute over which votes will be counted became moot once the votes were counted and the election was certified. See, e.g., Bognet, 141 S. Ct. at 2508 (granting pre-certiorari vacatur in a dispute over the validity of certain ballots in Pennsylvania's 2020 election after the case became moot because the election was certified); Brockington v. Rhodes, 396 U.S. 41, 43 (1969) (granting vacatur because a case involving "a particular office in a particular election" becomes "moot" once the "election is over").

The plaintiffs agree. Throughout this case, they asked the lower courts to enjoin Lehigh County from certifying the election, precisely because of certification's case-mooting effect. As they put it, certification is a "bell" that "cannot be unrung." D.Ct. Dkt. 3 at 20. That final act eliminates "any opportunity for appellate review." D.Ct. Dkt. 52-1 at 16. It's the point after which "there can be no ... redress." CA3 Dkt. 6-1 at 24-25. Pennsylvania's chief elections official agrees. See Sec'y-BIO 1, Bognet, 2021 WL 1040374 (U.S. Mar. 15, 2021) ("This case is moot" because "Pennsylvania has officially certified all results" and "Petitioners do not suggest that this Court could, at this late date, change the outcome of a single race."). The plaintiffs cannot argue otherwise now.*

II. Absent mootness, the questions presented are certworthy.

As noted, the United States takes the position that "vacatur under *Munsingwear* is appropriate if, among other things, the case would have merited this Court's plenary review had it not become moot." Reply 2, *Yellen v. U.S. House of Representatives*, 2021

^{*} If the plaintiffs change positions and provide some convincing reason why this case is not moot, then this Court should grant certiorari on the merits. The questions presented should be (1) whether Pennsylvania's dating requirement violates the materiality statute and (2) whether plaintiffs have a private right of action to enforce the materiality statute.

WL 4219332 (U.S. Sept. 2021). Ritter satisfies that standard, as three Justices suggested already at the stay stage. *See Ritter*, 2022 WL 2070669, at *1 (Alito, J., dissental) ("the Third Circuit's interpretation is sufficiently questionable and important to merit review").

This case would have presented two issues that merit this Court's consideration. First, the question whether the materiality statute applies to laws governing the validity of mail-in ballots is important and has significant consequences for the fall elections. Second, the question whether private plaintiffs can enforce the materiality statute has split the circuits 2-1. Both questions would have been certworthy, and either question is a sufficient basis to vacate under *Munsingwear*.

A. The Third Circuit adopted a broad reading of the materiality statute that will disrupt many elections.

The materiality provision of the Civil Rights Act of 1964 bars election officials from deeming individuals unqualified to vote based on small mistakes on their applications:

No person acting under color of law shall ... deny *the right* of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act *requisite to* voting, if such error or omission is not material in determining whether such individual is *qualified* under State law to vote in such election.

52 U.S.C. §10101(a)(2)(B) (emphases added). The statute bars election officials from, for example, denying someone's voter-registration application because he misspelled his name or street address. *See* H.R. Rep. No. 88-914, 1964 U.S.C.C.A.N. at 2491.

The materiality statute does not preempt laws that govern the process of casting mail-in ballots. As Congress explained at the time, the statute is aimed not at "discriminatory laws," but at "the discriminatory application and administration of apparently nondiscriminatory laws." *Id.* At least three parts of the text illustrate why it does not invalidate ordinary laws governing mail-in voting:

- 1. Laws that regulate the casting of mail-in ballots do not deem a voter not "qualified under State law to vote." §10101(a)(2)(B). States determine whether voters are qualified through the process of registration, and the qualifications for voting are minimal: age, residency, citizenship, and non-felon status. See Ritter, 2022 WL 2070669, at *2 (Alito, J., dissental). But the rules governing the validity of mail-in ballots—the where, when, and how of casting these ballots—do not have "anything to do" with a voter's qualifications. *Id*. They serve different purposes, like improving election administration, confirming voters' identities, deterring fraud, and protecting voters' privacy. It would be "silly" and "absurd" to invalidate all these requirements unless they help confirm a voter's age, residency, citizenship, or non-felon status. *Id*.
- 2. Laws that require mail-in voters to follow certain rules also do not "deny the right of any individual

to vote." §10101(a)(2)(B). "When a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied 'the right to vote." *Ritter*, 2022 WL 2070669, at *2 (Alito, J., dissental). The voter's vote is not counted "because he or she did not follow the rules for casting a ballot." *Id.* The failure to follow basic ballot-casting rules "constitutes the forfeiture of the right to vote, not the denial of that right." *Id.*; see Rosario v. Rockefeller, 410 U.S. 752, 758 (1973) (explaining that voters who "chose not to" follow the State's election deadline were not "disenfranchise[d]" by the State).

3. Nor do laws governing how a mail-in ballot must be cast regulate an "act requisite to voting." §10101(a)(2)(B). The materiality statute defines "vote" to include "all action necessary to make a vote effective including ... casting a ballot, and having such ballot counted." §10101(e). So dating the declaration *is* "voting" because it is "necessary to make a vote effective." It would be "strained" and "awkward" to "describe the act of voting as 'requisite to the act of voting." *Ritter*, 2022 WL 2070669, at *2 n.2 (Alito, J., dissental).

Yet the Third Circuit concluded otherwise. It held that the materiality statute not only reaches laws that govern the validity of mail-in ballots, but also preempts Pennsylvania's law requiring voters to date the declaration on their mailing envelope. The Third Circuit did not grapple with the textual problems discussed above. It "made little effort to explain how its interpretation can be reconciled with the language of the statute." *Id.* at *1.

Unsurprisingly then, the court's analysis was deeply confused. The Third Circuit spent most of its time explaining why the dating requirement does not help Pennsylvania tell whether a ballot was cast on time, and it put near-dispositive stress on the fact that Pennsylvania already counts ballots that contain the wrong date (as opposed to no date). See App. 18-22. But none of that matters under the Third Circuit's reading of the materiality statute. If dating the declaration is a "requisite to voting" and disqualifying undated ballots deems an individual "[un]qualified" and "den[ied] the right ... to vote"—as the Third Circuit necessarily concluded—then the remaining analysis should have been simple. Timeliness is not a qualification for voting under Pennsylvania law, see 25 Pa. Cons. Stat. §1301, so of course the dating requirement would not be "material in determining whether [an] individual is qualified under State law to vote," 52 U.S.C. §10101(a)(2)(B). That the Third Circuit felt the need to say more proves that even it was uncomfortable with the implications of its interpretation.

And the Third Circuit should have been uncomfortable, as its interpretation of the materiality statute has no real limits. Many, if not most, regulations of mail-in voting do not "g[o] to determining age, citizenship, residency, or current imprisonment for a felony." App.19. They serve other purposes, like confirming voters' identities, deterring and detecting fraud, and protecting voters' privacy. The Third Circuit's decision implicates not just dating requirements, but also laws that require voters to provide certain identifying information, write with certain instruments, use certain envelopes, meet certain deadlines, find certain

witnesses, and the like. Even the requirement that mail-in voters sign a declaration would not be material under the Third Circuit's decision. *Ritter*, 2022 WL 2070669, at *2 (Alito, J., dissental).

Litigants have already seized on the Third Circuit's decision to challenge all sorts of regulations. Immediately on the heels of that decision, private plaintiffs filed a lawsuit challenging Pennsylvania's requirement that mail-in voters use an inner secrecy envelope. Their principal authority was the Third Circuit's decision in this case. See Dondiego, Dkt. 2-1 at 9-10, No. 5:22-cv-2111-JLS (E.D. Pa. May 31, 2022). The national Democratic Party has likewise used the materiality statute to challenge laws requiring mailin voters to include their name, send their ballot to the right place, get a postmark, meet the deadline, use the right envelope, and more. Its lead authority? The Third Circuit's decision in this case. See DCCC v. Kosinski, Dkt. 97 at 18-19, No. 1:22-cv-1029 (S.D.N.Y. June 17, 2022).

These nationwide challenges illustrate why the Third Circuit's decision, which "broke new ground," would have been "sufficiently ... important to merit review" by this Court. *Ritter*, 2022 WL 2070669, at *1 (Alito, J., dissental). As contemplated by this Court's Rule 10(c), certiorari is appropriate, even without a direct circuit split, when it raises an "important question of federal law that has not been, but should be, settled by this Court." The Third Circuit's reasoning is a "de facto green light to federal courts to rewrite dozens of state election laws around the country." Wis. State Leg., 141 S. Ct. at 35 (Kavanaugh, J., concurral).

When federal courts invalidate state election laws or threaten new inroads on States' authority to regulate elections, this Court has not hesitated to grant certiorari without waiting for a classic circuit split. *E.g.*, *Moore*, 2022 WL 2347621; *Brnovich*, 141 S. Ct. at 2336; *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1841 (2018); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 188 (2008) (op. of Stevens, J.).

That's not to say that the proper reading of the materiality statute hasn't divided the lower courts: It has. The Fifth Circuit—fully aware of the Third Circuit's decision here—just rejected the notion that the materiality statute covers "any requirement that may prohibit an individual from voting if the individual fails to comply." Vote.Org v. Callanen, 2022 WL 2389566, at *6 n.6 (5th Cir. July 2) (citing *Ritter*, 2022) WL 2070669, at *2 (Alito, J., dissental)). The Pennsylvania courts too, in this very case, reached a directly contrary result from the Third Circuit. See Ritter, 2022 WL 16577, at *9. And until recently, no case in any jurisdiction suggested that the materiality statute governs "the counting of ballots by individuals already deemed qualified to vote." Friedman v. Snipes, 345 F. Supp. 2d 1356, 1371 (S.D. Fla. 2004).

For all these reasons, this Court likely would have granted certiorari to review the Third Circuit's novel and sweeping interpretation of the materiality statute. Three Justices have already said as much. Especially given what's transpired since then, certiorari is likely enough to justify vacatur now.

B. The Third Circuit deepened a circuit split on whether private plaintiffs can enforce the materiality statute.

Independently, the Third Circuit's decision would have been certworthy because it created a 2-1 circuit split. The Third Circuit joined the Eleventh Circuit in concluding that §1983 gives plaintiffs a private right of action to enforce the materiality statute. See App.11-18; Schwier v. Cox, 340 F.3d 1284, 1293 (11th Cir. 2003). The Sixth Circuit has held the opposite. See Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 630 (6th Cir. 2016) (citing McKay v. Thompson, 226 F.3d 752, 756 (6th Cir. 2000)).

This circuit split is widely recognized. At the stay stage, the plaintiffs acknowledged it. See Stay-Opp.20 (acknowledging that the "Sixth Circuit" has "reach[ed] a contrary conclusion" from the Third and Eleventh Circuits). And several courts have recognized the split as well. E.g., Vote.Org, 2022 WL 2389566, at *5 n.5 ("Courts are divided on this point."); Navajo Nation Hum. Rts. Comm'n v. San Juan Cnty., 215 F. Supp. 3d 1201, 1218 & n.6 (D. Utah 2016) (discussing this "circuit split"); Ne. Ohio Coal., 837 F.3d at 630 (Sixth Circuit recognizing that the Eleventh Circuit had "reached the opposite conclusion"). This "conflict" over an "important" issue is precisely the kind of question that this Court grants certiorari to review. S. Ct. R. 10(a); e.g., Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 422 n.6 (1987) (granting certiorari to resolve a 1-1 split on whether a federal statute could be enforced via §1983).

This split would have been ripe for this Court's review. The issue has percolated for two decades, divided three circuits, and been thoroughly addressed in numerous federal decisions. *E.g.*, *Dekom v. New York*, 2013 WL 3095010, at *18 (E.D.N.Y. June 18) (collecting cases), *aff'd*, 583 F. App'x 15 (2d Cir. 2014); *Duran v. Lollis*, 2019 WL 691203, at *9 (E.D. Cal. Feb. 19); *Navajo Nation*, 215 F. Supp. 3d at 1219; *League of Women Voters of Ark. v. Thurston*, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15). The split is not disappearing, as the Sixth Circuit has reaffirmed its position even after this Court's most recent precedent interpreting §1983. *Ne. Ohio Coal.*, 837 F.3d at 630. And the lower courts will continue to split on this question because there are persuasive points on both sides.

The Sixth Circuit's position best conforms to Congress's design and this Court's precedent. Even if a federal statute creates individual rights, §1983 is not available if Congress "did not intend that remedy" for the statute in question. City of Rancho Palos Verdes v. *Abrams*, 544 U.S. 113, 120 (2005). For the materiality statute, Congress included a public judicial remedy for "the Attorney General" of the United States. 52 U.S.C. §10101(c). That remedy is contained in the same statute and is highly detailed—dictating who can be the defendant, creating special forms of relief, articulating rebuttable evidentiary presumptions, creating new federal jurisdiction, eliminating exhaustion requirements, appointing and compensating private referees, specifying fast deadlines, assigning counsel to defendants, and creating jurisdiction for three-judge district courts and direct appeals to this Court. See §10101(c)-(g). The "express provision of one

method of enforcing a substantive rule," especially a "comprehensive enforcement scheme" like this one, means that "Congress intended to preclude others." *Rancho Palos Verdes*, 544 U.S. at 120-21.

That this case would have raised a question that has split the circuits—a classic justification for certiorari—means that vacatur under *Munsingwear* is an easy call now. The logic of the United States' position on pre-certiorari vacatur is presumably rooted in equity: Denying vacatur to a party who would have gotten review is unfair because it falsely treats him as though he got review *and lost. Camreta*, 563 U.S. at 712. And granting vacatur does not prejudice the party who won below because, given the likelihood of this Court's review, that party's win was "only preliminary." *Alvarez*, 558 U.S. at 94. So too here.

III. The equities alone warrant vacatur.

Even if this Court would have denied certiorari, vacatur would still be appropriate. The United States admits that its position on pre-certiorari vacatur is not absolute. See Pet. 23 n.4, Garza, 2017 WL 5127296 (explaining that vacatur can be appropriate "even if review were not otherwise warranted"). And this Court has refused to place any "limit" on its "discretion" to vacate cases that became moot before certiorari. Garza, 138 S. Ct. at 1793; see also Alvarez, 558 U.S. at 94 ("The statute that enables us to vacate a lower court judgment when a case becomes moot is flexible"). This Court has granted vacatur many times in this posture, including recently in cases that were mooted by the 2020 election. See id. (collecting cases); e.g., Bognet, 141 S. Ct. at 2508; Trump v. D.C., 141

S. Ct. 1262 (2021); Trump v. CREW, 141 S. Ct. 1262 (2021); Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021); Yellen v. U.S. House of Representatives, 142 S. Ct. 332 (2021); Slatery v. Adams & Boyle, P.C., 141 S. Ct. 1262 (2021).

Requiring this Court to "undertake a hypothetical disposition of the petition" before it grants pre-certiorari vacatur would impose an "unwarranted burden." 13C Fed. Prac. & Proc. Juris. §3533.10.3 (3d ed.). It might make sense to deny vacatur when it is "apparent that certiorari would not have been granted." *Id.* But that principle cannot be dispositive here, where three Justices have already concluded that the Third Circuit's decision is "sufficiently questionable and important to warrant review." *Ritter*, 2022 WL 2070669, at *1 (Alito, J., dissental).

At bottom, this Court should simply ask the core question that it always asks when deciding whether to invoke *Munsingwear*: Is vacatur equitable under "the conditions and circumstances of the particular case"? *Garza*, 138 S. Ct. at 1792. Vacatur is equitable here for at least four reasons.

1. This Court should vacate because the "mootness occur[red] through happenstance," rather than Ritter's own conduct. *Arizonans for Off. Eng.*, 520 U.S. at 71. This case plainly falls on "the 'happenstance' side of the line" because it was mooted by "the ordinary course of ... proceedings." *Alvarez*, 558 U.S. at 95-96. The disputed ballots were counted, the results were certified, and the election ended. Ritter did not cause any of that to happen; in fact, he tried to stop it by

seeking emergency relief from this Court. And no matter how fast he acted after this Court denied a stay, his petition could not have been granted and resolved before the election ended. When mootness is caused by "the election outcome," as the United States recently explained, then the mootness is "unattributable to any of the parties." Reply 8, *Trump v. D.C.*, 2020 WL 7681471 (U.S. Dec. 2020).

When "happenstance" prevents this Court from reviewing a decision, then "the normal rule" applies and the equities favor vacatur. Camreta, 563 U.S. at 713. "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 25 (1994). "Vacatur then rightly strips the decision below of its binding effect and clears the path for future relitigation." Camreta, 563 U.S. at 713 (cleaned up). This Court has struck that equitable balance in "countless cases," Great W. Sugar Co. v. Nelson, 442 U.S. 92, 93 (1979), and nothing about this case warrants a different result. In short, "mootness by happenstance provides sufficient reason to vacate." Bancorp, 513 U.S. at 25 n.3 (emphasis added).

2. No countervailing purpose would be served by leaving the Third Circuit's decision intact. The primary interest that weighs against vacatur is the notion that "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole." *Id.* at 26. Of course, that interest is not sufficient to

avoid vacatur when mootness occurs due to happenstance. See id. at 25 & n.3. But it has even less purchase here. While three judges of the Third Circuit obviously believe that their decision is correct, three Justices of this Court have concluded that their decision is "very likely incorrect." Ritter, 2022 WL 2070669, at *3 (Alito, J., dissental). So have three Judges of the Fifth Circuit, several Pennsylvania judges, and every federal court until very recently. See Vote.Org, 2022 WL 2389566, at *6 & n.6; Ritter, 2022 WL 16577, at *9; Friedman, 345 F. Supp. 2d at 1371.

Other factors unique to the Third Circuit's decision cut further against its preservation. That decision was issued on a highly "expedited" schedule. App.11 n.24. The entire appeal was briefed, argued, and decided in two months. And the Third Circuit issued its judgment well before its opinion explaining that judgment. Such "rushed, high-stakes, low-information" litigation does not correlate with "good judicial decisions." DHS v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring). Relatedly, the Third Circuit's opinion includes virtually no engagement with the statutory text. See Ritter, 2022 WL 2070669, at *1 (Alito, J., dissental). It dedicates its entire analvsis of the statute to the *interests* served by Pennsylvania's dating requirement, an issue that has no grounding in any element of the statute. Vacatur is thus needed to "clea[r] the path for future relitigation" of the important and nuanced questions surrounding the proper interpretation of the materiality statute, rather than entrenching the Third Circuit's rushed and underdeveloped decision. Arizonans for Off. Eng., 520 U.S. at 71.

3. This Court should vacate the Third Circuit's decision because "it could well affect the outcome of the fall elections." Ritter, 2022 WL 2070669, at *1 (Alito, J., dissental). Absent vacatur, the Third Circuit's decision will invalidate Pennsylvania's dating requirement for all elections in November. See Guidance 2-3. Removing this safeguard against fraud will decrease voter confidence and discourage participation in those elections. Purcell v. Gonzales, 549 U.S. 1, 4-5 (2006). And it could illegitimately change the outcome of individual elections, as it did here. The logic of the Third Circuit's decision, moreover, undermines the legality of many other regulations of mail-in voting. Signing the declaration no more goes to a voter's qualifications than dating it, as Justice Alito explained. Ritter, 2022 WL 2070669, at *2 (Alito, J., dissental). The same could be said of many other regulations of mail-in voting, including requirements that voters sign a declaration, find a witness, use a pen, seal the envelope, write their name, fill out the right address, and more.

These extensions of the Third Circuit's decision are not theoretical and won't be confined to Pennsylvania. Plaintiffs across the country are using the Third Circuit's decision as the lead precedent for challenging all sorts of routine regulations of mail-in voting. The United States participated as an amicus in this case, agreeing with the plaintiffs that the materiality statute invalidates Pennsylvania's dating requirement. See CA3 Dkts. 45, 75. Based on that interpretation, it is now suing Texas for requiring mail-in voters to provide minimal identifying information. See United States v. Texas, Dkt. 1 ¶¶71-76, No. 5:21-cv-

1085 (W.D. Tex. Nov. 4, 2021). And it just sued Arizona for requiring voters to provide certain proof of citizenship. See United States v. Arizona, Dkt. 1 ¶¶66-71, No. 2:22-cv-1124 (D. Ariz. July 5, 2022). The Democratic Party, too, is in on the act. It is suing New York on the theory that the materiality statute preempts laws requiring mail-in ballots to be sent to certain places, receive a postmark, avoid identifying marks, and be placed in secrecy envelopes. See DCCC, Dkt. 97 at 18-19, No. 1:22-cv-1029 (S.D.N.Y.).

These cases will continue to proliferate, and several more are pending now. *E.g.*, *Dondiego*, 5:22-cv-2111 (E.D. Pa.); *Vote.org v. Callanen*, 2022 WL 2181867 (W.D. Tex. June 16); *Afr. Methodist Episcopal Church v. Kemp*, 2021 WL 6495360 (N.D. Ga. Dec. 9, 2021); *Common Cause v. Thomsen*, 2021 WL 5833971 (W.D. Wis. Dec. 9); *League of Women Voters of Ark.*, 2021 WL 5312640. Only vacatur can prevent the Third Circuit's "unreviewable decision from spawning any legal consequences" in this new hotbed of litigation. *Camreta*, 563 U.S. at 713.

4. The *Purcell* principle also favors vacatur here. It is a "bedrock tenet" of election law that "federal courts ordinarily should not enjoin a state's election laws in the period close to an election." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurral). That principle applies with even more force when a federal court changes the rules after the election has already ended. *See Republican Party of Penn.*, 141 S. Ct. at 734-35 (Thomas, J., dissental); *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 925 (7th Cir. 2020). The Third Circuit violated this principle by

granting the plaintiffs' tardy request for sweeping injunctive relief. Especially given its limitless scope, the Third Circuit's decision will confuse voters, candidates, and administrators about what the rules are for the November elections. *Ritter*, 2022 WL 2070669, at *2 (Alito, J., dissental).

Vacating the Third Circuit's decision would not present any similar concerns. That decision does not create a new electoral status quo; it has not been on the books long, and Pennsylvania has warned administrators and voters not to rely on it until this Court resolves this case. See Guidance 2. More broadly, Purcell exists to protect a "state's election laws" from federal judicial intervention, not to protect lower courts from this Court's review. Milligan, 142 S. Ct. at 880 (Kavanaugh, J., concurral). "Correcting an erroneous lower court injunction," as vacatur would do, "does not itself constitute a Purcell problem. Otherwise, appellate courts could never correct a late-breaking lower court injunction of a state election law. That would be absurd and is not the law." Id. at 882 n.3.

Finally, the fact that this Court denied Ritter's emergency application for a stay does not prevent vacatur. While emergency stays are "extraordinary," *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers), vacatur under *Munsingwear* is "ordinary," *Alvarez*, 558 U.S. at 94-95. The two requests present entirely different equitable considerations. And emergency stays must be decided quickly, whereas vacatur decisions can be made after longer study and fuller consideration. The two requests also present different demands on this Court's

time and resources. Here, for example, six Justices might have been unwilling to "enter a stay," "grant review," "set an expedited briefing schedule," and "set the case for argument in October." *Ritter*, 2022 WL 2070669, at *1 (Alito, J., dissental). But vacatur eliminates the negative effects of the Third Circuit's decision with very little expenditure of this Court's time and resources.

Things have also changed since this Court denied a stay. The Fifth Circuit has now weighed in against the Third Circuit's view. See Vote. Org, 2022 WL 2389566, at *6 & n.6. And many of the assurances that the plaintiffs offered in their stay opposition have proven false. The Third Circuit's invalidation of Pennsylvania's dating requirement will not be confined to this one election. Contra Stay-Opp.2, 17. A court applied it to the very next election, and the State has instructed counties to apply it to all future elections (absent action from this Court). The Third Circuit's judgment also does undermine laws other than the dating requirement. Other plaintiffs, the Democratic Party, and the United States have all used it as a basis to attack many routine regulations of mail-in voting. The plaintiffs' assurance that the Third Circuit's decision would not change the outcome of elections was proven false as well, as it flipped the outcome of Ritter's election. And the plaintiffs' main arguments on the equities—that a stay would leave the election unresolved and their votes uncounted—is no longer a concern after the election was certified. See Stay-Opp.36-37.

This Court was closely divided on whether to grant an emergency stay. But important developments have occurred since then, and vacatur under *Munsingwear* is a far lighter lift for the Court. Given the havoc that the Third Circuit's decision threatens to wreak on the upcoming elections, vacatur is the only equitable outcome now.

CONCLUSION

This Court should grant certiorari, vacate the Third Circuit's decision, and remand with instructions to dismiss the case as moot.

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July 7, 2022

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Appendix 47

<u></u>	Search documents in this case: Search
No. 22-30	
Title:	David Ritter, Petitioner v. Linda Migliori, et al.
Docketed:	July 11, 2022
Linked with 21A772	
Lower Ct:	United States Court of Appeals for the Third Circuit
Case Numbers:	(22-1499)
Decision Date:	May 27, 2022

DATE	PROCEEDINGS AND ORDERS
May 27 2022	Application (21A772) for a stay, submitted to Justice Alito.
	Main Document Lower Court Orders/Opinions Proof of Service
May 27 2022	Response to application (21A772) requested by Justice Alito, due by noon (EDT), Tuesday, May 31st, 2022.
May 30 2022	Motion for Leave to File Amici Curiae Brief in Support of Applicant filed by Doctor Oz for Senate and Dr. Mehmet Oz.
	Main Document Other Other Proof of Service
May 31 2022	Upon consideration of the application of counsel for the applicant and the responses filed thereto, it is ordered that the mandate of the United States Court of Appeals for the Third Circuit, case No. 22-1499, is hereby stayed pending further order of Justice Alito or of the Court.
May 31 2022	Response to application from Bonin, Adam C. Zac Cohen filed.
	Main Document Proof of Service

EXHIBIT

May 31 2022	Response to application from respondent Linda Migliori, et al. filed.	
	Main Document Proof of Service	
May 31 2022	Letter of respondent Lehigh County Board of Elections filed.	
	Main Document	
Jun 01 2022	Reply of applicant David Ritter filed.	
	Reply Proof of Service	
Jun 02 2022	Supplemental letter on behalf of respondents filed.	
	Main Document	
Jun 03 2022	Supplemental letter of applicant David Ritter filed.	
	Main Document Proof of Service	
Jun 09 2022	Application (21A772) referred to the Court.	
Jun 09 2022	The application (21A772) for stay presented to Justice Alito and by him referred to the Court is denied. The order heretofore entered by Justice Alito is vacated. Justice Alito, with whom Justice Thomas and Justice Gorsuch join, dissenting from the denial of the application for stay. (Detached Opinion)	
Jul 07 2022	Petition for a writ of certiorari filed. (Response due August 10, 2022)	
	Petition Appendix Certificate of Word Count Proof of Service	

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Appendix 48

2020 WL 8225383 (W.D.Pa.) (Trial Motion, Memorandum and Affidavit) United States District Court, W.D. Pennsylvania.

Nicole ZICCARELLI, Plaintiff,

THE ALLEGHENY COUNTY BOARD OF ELECTIONS, et al., Defendants.

No. 2:20-cv-001831-NR. December 30, 2020.

Memorandum of Law in Support of Motion of Secretary of the Commonwealth of Pennsylvania Kathy Boockvar to Dismiss the Amended Complaint or, in the Alternative, to Grant Summary Judgment

Mark A. Aronchick, Michele D. Hangley, * Robert A. Wiygul, * John G. Coit, ** Hangley Aronchick Segal Pudlin & Schiller, One Logan Square, 27 th Floor, Philadelphia, PA 19103, Telephone: (215) 496-7050, Email: mhangley@hangley.com, for defendant Kathy Boockvar, in her official capacity as the Secretary of the Commonwealth of Pennsylvania.

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I. INTRODUCTION

Plaintiff, Nicole Ziccarelli, asks this federal court to overrule a decision of the Pennsylvania Supreme Court on an issue of Pennsylvania law. After the November 2020 general election, Plaintiff, a candidate for a state Senate seat, asked the Allegheny County Court of Common Pleas to order the County's Board of Elections to set aside and not count more than 2000 ballots that had arrived in envelopes with undated declarations. The Court of Common Pleas rejected her arguments and held that the Allegheny Board was required to count the ballots. On appeal, the Pennsylvania Supreme Court agreed that the Court of Common Pleas' order should stand and the ballots should be counted. This should have been the final word on whether, under state law, the ballots in question were valid. Now, however, Plaintiff has filed suit in this Court, asking it to hold that the Pennsylvania Supreme Court committed a legal error and that the Allegheny Board must therefore throw out the same ballots that the state courts told it to count. For a number of reasons, this Court should reject what is, in essence, a disappointed litigant's effort to "appeal" an adverse state-court decision to a federal court.

As an initial matter, the Court lacks jurisdiction. Despite several efforts to reframe her allegations, Plaintiff cannot escape the fact that her alleged harm stems from the Pennsylvania Supreme Court's judgment and that her claims necessarily require a finding that the Pennsylvania Supreme Court erred. Under the Rooker-Feldman doctrine, this Court cannot consider such a challenge to a state court's decision. Plaintiff also lacks standing; the Third Circuit has rejected her theory that votes can be "diluted" by votes that are "invalid" under state law, and she cannot assert claims on behalf of other voters. The Court also lacks jurisdiction over the claims against the Secretary because they are in reality state-law claims, for which the Eleventh Amendment confers immunity.

Even putting aside these jurisdictional defects, the Court should dismiss Plaintiff's claims. They are barred by res judicata because Plaintiff has already litigated the same dispute against the primary Defendant, the Allegheny Board. And they are legally insufficient. Plaintiff has not stated a claim of an equal protection violation; she does not allege that she personally received disparate treatment or that the Secretary treated similarly situated voters differently. She can show only that two different counties reached different decisions on the details of election management, and that the state courts agreed with one of those decisions and did not review the other one. These kinds of independent decisions, even if they lead to inconsistent treatment of certain ballots, cannot constitute an equal protection violation, particularly where the state courts have decided the issue. And neither Plaintiff's allegations nor the evidence she presents even arguably rise to the level of a due process violation.

Finally, even if the Court were to find that Plaintiff's claims have merit, there is no relief that this Court could grant. Plaintiff has tied this Court's hands by choosing to pursue claims against the Allegheny Board, which counted undated ballots in compliance with the Pennsylvania Supreme Court's ruling, and not against the Westmoreland County Board of Elections, which refused to count undated ballots (in accordance with Plaintiff's own request). If the Court were to find that the discrepancy between the two counties gives rise to an equal protection claim, the only acceptable remedy would be to order the Westmoreland Board to count its undated ballots; the alternative demanded by Plaintiff—disenfranchising hundreds or thousands of Allegheny County voters—would create a far more serious Constitutional violation than the one it would remedy. But Plaintiff has not brought the Westmoreland Board before this Court. Accordingly, even if Plaintiff could show that she was wronged, her strategic decisions would leave her without a remedy.

II. STATEMENT OF FACTS

A. Relevant Aspects of Pennsylvania Election Law

1. The Responsibilities of Pennsylvania's County Boards of Elections and the Secretary

Pennsylvania's Election Code, 25 P.S. § 2601 et seq., provides for a decentralized election system. Primary responsibility for administering elections lies with the boards of elections of the Commonwealth's 67 counties. "The Election Code vests county boards of elections with discretion to conduct elections and to implement procedures intended to ensure the honesty, efficiency, and uniformity of Pennsylvania's elections." Donald J. Trump for President, Inc. v. Boockvar, — F. Supp. 3d – 2020 WL 5997680, at *9 (W.D. Pa. Oct. 10, 2020) ("Trump I"); see id. at *30-31 (outlining areas of county discretion). The Election Code charges county boards with various responsibilities, including "[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors," "[t]o instruct election officers in their duties," and to canvass, compute, and certify election returns. 25 P.S. § 2642(f)–(g), (k). For all but local races, once the county board has certified the returns, it must forward a copy to the Secretary. 25 P.S. § 3158.

The Election Code also gives the Secretary powers and duties, including the duty to "receive from county boards of elections the returns of primaries and elections, to canvass and compute the votes cast ... to proclaim the results of such primaries and elections, and to issue certificates of election to the successful candidates." 25 P.S. § 2621(f); see 25 P.S. § 3159 ("Upon receiving the certified returns of any primary or election from the various county boards, the Secretary ... shall forthwith proceed to tabulate, compute and canvass the votes cast"). While the Secretary issues guidance to the county boards, nothing in the Election Code gives her the authority to refuse to accept returns or to decide which ballots are to be counted and which are not. "The Secretary ... has no authority to declare ballots null and void.... Moreover, the Secretary has no authority to order the sixty-seven county boards of election to take any particular actions with respect to the receipt of ballots." In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election, No. 29 WAP 2020, 2020 WL 6866415, at *15 n.6 (Pa. Nov. 23, 2020) (Opinion Announcing the Judgment of the Court, or "OAJC").

If a candidate or elector is dissatisfied with a county board of elections' canvassing decision, the remedy is to appeal to the state courts, not to the Secretary. See 25 P.S. § 3157(a) (procedures for appeals by "person[s] aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election, or regarding any recount or recanvass thereof"). The Code provides that while such an appeal is pending, "the county board shall suspend any official certification of the votes cast" in any election district that is the subject of an appeal. 25 P.S. § 3157(b).

2. The 2019 and 2020 Changes to Vote-by-Mail Procedures

In late 2019, the Pennsylvania General Assembly passed and Governor Wolf signed legislation—Act 77—that made significant changes to the Election Code, including the extension of mail-in voting to all qualified electors. Act of Oct. 31, 2019 (P.L. 552, No. 77), 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421). Further changes to the Election Code followed with Act 12 of 2020. Act of Mar. 27, 2020 (P.L. 41, No. 12), 2020 Pa. Legis. Serv. Act. 2020-12 (S.B. 422). The COVID-19 pandemic sparked extensive voter interest in the new mail-in procedures; heavy use of mail-in balloting, in turn, led to litigation over how the procedures were to be implemented. The jump in numbers of mail ballots

transformed the incentives of probing the mail-in balloting provisions for vulnerabilities in furtherance of invalidating votes. For the first time, a successful challenge arising from a given technical violation of statutory requirements might result in the invalidation of many thousands of no-excuse mail-in ballots rather than scores or hundreds of absentee ballots.

In re Canvass, 2020 WL 6866415, at *24 (Wecht, J., concurring).

Over the last several months, the Pennsylvania state courts have accordingly been called upon to interpret a number of the Code's provisions for the first time—even provisions with language that was in the Code before the passage of Act 77. For example, to the Secretary's knowledge, no reported decision before 2020 analyzed the "fill out, date and sign" language in 25 P.S. §§ 3146.6(a) and 3150.16(a) that Plaintiff highlights in this case.

B. Plaintiff's Unsuccessful State-Court Appeal

In Allegheny County, of the estimated 350,000 mail-in and absentee ballots cast in the November 3, 2020, general election, 2,349 arrived in envelopes with declarations that were signed but undated. Stip. Facts ¶¶ 27, 29. Of these undated ballots, 311 came from voters in Senate District 45, the seat for which Plaintiff was running. Id. ¶ 31. On Tuesday, November 10, 2020, the Allegheny Board voted to count all 2,349 undated ballots. *Id.* ¶ 33.

Plaintiff appealed this decision to the Allegheny County Court of Common Pleas. Id. ¶ 34. After a hearing, at which counsel for Plaintiff and the Allegheny Board appeared, Judge Joseph James affirmed the Allegheny Board's decision to count the ballots. He concluded that the date provision in Section 3150.16(a) is directory, not mandatory, and that "ballots containing mere minor irregularities should only be stricken for compelling reasons." Ziccarelli v. Allegheny Cnty. Bd. of Elections, No. GD 20-011654, 2020 WL 7012634, at *1 (C.P. Allegheny Cnty. Nov. 18, 2020) ("Ziccarelli") (citing Shambach v. Bickhart, 845 A.2d 793, 798 (Pa. 2004)). Judge James' Memorandum concluded that "[T]he [Allegheny] Board properly overruled [Plaintiff's] objections to the 2,349 challenged mail-in ballots. These ballots must be counted. The Petition for Review is denied and the Board's decision [to count the ballots] is affirmed." *Id.* at *2.

Plaintiff appealed Judge James' decision to the Commonwealth Court, which reversed the decision and ruled in Plaintiff's favor. In re 2,349 Ballots in the 2020 Gen. Election, No. 1162 C.D. 2020, 2020 WL 6820816 (Pa. Commw. Ct. Nov. 23, 2020). The Pennsylvania Supreme Court then granted the Allegheny Board's petition for allowance of appeal, reversed the Commonwealth Court's decision, and reinstated the decision of the Court of Common Pleas. *In re Canvass*, 2020 WL 6866415, at *16. In the OAJC, three Justices concluded that the Allegheny Board should count the undated ballots because a voter's failure to date a ballot envelope was a technical violation of the Election Code that should not result in disenfranchisement. Id. Justice Wecht concurred with much of the OAJC, but disagreed with its conclusion that the Election Code does not mandate that voters date their ballot envelopes. He opined, however, that his interpretation should apply "only prospectively," because he could not "say with any confidence that even diligent electors were adequately informed as to what was required to avoid the consequence of disqualification in this case [I]t would be unfair to punish voters for the incidents of systemic growing pains." Id. at *16, 24 (Wecht, J., concurring).

Accordingly, Justice Wecht joined the three signers of the OAJC in reinstating the Court of Common Pleas' decision that the Allegheny Board had acted "properly" and that the undated ballots "must be counted." Ziccarelli, 2020 WL 7012634, at *2 (emphasis added); see ECF 29 ¶ 33 (acknowledging that "four justices had voted to reverse the Commonwealth Court and reinstate the Allegheny County Court of Common Pleas decision"). Plaintiff filed an Emergency Application for Reargument, in which she asserted that the Supreme Court had committed a legal error when it held the Allegheny Board should count undated ballots. The Supreme Court denied the Application. Stip. Facts, Ex. G.

On November 23, 2020, before the Pennsylvania Supreme Court ruled, the Allegheny Board certified a set of election results that did not include the undated ballots. Stip. Facts ¶ 51; ECF 3, at 6. On November 25, after the ruling, the Allegheny Board submitted an amended certification of vote totals to the Secretary that included the undated ballots. Stip. Facts ¶¶ 52, 54.

C. Westmoreland County's Unchallenged Decision to Set Aside Undated Ballots

The Westmoreland County Board of Elections received approximately 60,000 mail-in and absentee ballots for the 2020 general election; of these, 343 were signed but undated. Stip. Facts ¶¶ 56-57. The Board did not count the undated ballots after the election. On November 13, 2020, and again on November 30, 2020, one of the Board members proposed a motion to count the undated ballots. At the November 30 meeting, Plaintiff's counsel urged the Board not to consider the motion and not to count the undated ballots. The motion did not receive a second and the undated ballots remained uncounted. Id. ¶¶ 58–65.

On November 30, 2020, the Westmoreland Board certified its final election results; this certification did not include any count of the undated ballots. Id. ¶65. Unlike in neighboring Allegheny County, there was no court challenge to the Westmoreland Board's decisions. Id. ¶ 66. Indeed, as discussed below, Plaintiff's counsel urged the Westmoreland Board not to count the ballots.

D. The Current Proceedings

1. Plaintiff's Original Complaint and Motion for Injunctive Relief

On November 25, 2020, Plaintiff filed her original Complaint, which alleged that the Pennsylvania Supreme Court's decision was the foundation of her injuries. Indeed, the first sentence of the first paragraph stated that "[t]his is an action concerning, inter alia, the Pennsylvania Supreme Court's recent decision ... where a majority of the Court concluded that 2,349 signed but undated mail-in ballots ... in Allegheny County ... should be counted." ECF 1 ¶ 1. According to the Complaint, the Pennsylvania Supreme Court's decision had injured Plaintiff because it would cause the Allegheny Board to amend its certification to include the undated ballots, which would cause her to lose the election. ECF 1 ¶¶ 30, 39-43. Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction, filed the same day, similarly alleged that the Pennsylvania Supreme Court had violated the rights of Plaintiff and other voters. ECF 3, at 9 ("Because the Pennsylvania Supreme Court simultaneously ruled that mail-in ballots lacking the statutorily-required date information are invalid but applied its ruling prospectively, it engaged in arbitrary and disparate treatment").

At the telephonic hearing on Plaintiff's Motion, Defendants' and Intervenors' counsel argued that because Plaintiff alleged that her injuries arose from a state court's ruling, her claims were barred under the Rooker-Feldman doctrine. Transcript dated November 25, 2020, ECF 15, at 19–22. The Court observed that to the extent Plaintiff could state an equal protection claim based on the Allegheny and Westmoreland Boards' procedural differences, the potential ways to even the playing field would be to "level up"—ordering the Westmoreland Board to count its undated ballots—or to "level down"—ordering the Allegheny Board to remove those ballots from its count. Id. at 13-14. The Court noted that Plaintiff had not named Westmoreland County as a defendant. Id. at 14-15. Plaintiff's counsel responded that, in Plaintiff's view, the Allegheny Board had counted "invalid" votes, the Westmoreland Board had not, and "we don't need Westmoreland here because they did what the Election Code requires." Id. at 15–17. The Court denied relief, stating that the order Plaintiff sought—a direction that the Allegheny Board should not certify the undated ballots—would not be in the public interest, because it would disenfranchise and harm thousands of Allegheny County voters. Id. at 28-29.

On November 30, 2020, Intervenors' counsel told the Westmoreland Board about the Pennsylvania Supreme Court's ruling and asked it to count Westmoreland County's undated ballots. Stip. Facts ¶ 60 & Ex. I. Later that day, Intervenors' counsel appeared before the Westmoreland Board and again asked it to count those ballots. Plaintiff's counsel also appeared and argued that the Board should not count the ballots. Stip. Facts ¶ 62 & Ex. J. Westmoreland County certified the election results without including the undated ballots. Stip. Facts ¶ 65. No one appealed the Westmoreland Board's determination, and Plaintiff has not taken any steps to add the Westmoreland Board as a defendant in this proceeding.

2. Plaintiff's Amended Complaint

On December 1, 2020, Plaintiff filed an Amended Complaint. ECF 29. This pleading deleted the references to the Pennsylvania Supreme Court quoted above—and even deleted the first paragraph summarizing her complaint. See Appendix hereto (redline comparison of Complaint and Amended Complaint). In the Amended Complaint, Plaintiff no longer points to the Pennsylvania Supreme Court as the source of Plaintiff's alleged injury. Instead, Plaintiff alleges, the Allegheny Board committed the original error by voting to count the undated ballots, and the Pennsylvania Supreme Court and the Allegheny County Court of Common Pleas merely "affirmed" and "ratified" that "independent and intentional decision." ECF 29 ¶¶ 35–36. Plaintiff also alleges that the Secretary somehow violated someone's rights by "intentionally accept[ing]" the Allegheny Board's amended certification. Plaintiff does not explain how the Secretary could lawfully have refused to accept the certification, given the Pennsylvania Supreme Court's decision and the Secretary's statutory obligations.

3. Plaintiff's Motion for Summary Judgment

In her Motion for Summary Judgment, Plaintiff continues her effort to soft-pedal the fact that accepting her claims requires a conclusion that the Pennsylvania Supreme Court erred. Indeed, in the Motion, the specifics of that Court's ruling have faded away, leaving only the incorrect implication that the Court held that the ballots in question were "invalid" and "illegal." According to Plaintiff, a majority of the Supreme Court announced the "legal principle" that all ballots with undated declarations —including the Allegheny County ballots at issue here—are "invalid under the Election Code." ECF 47, at 15. Plaintiff brushes aside Justice Wecht's firmly stated opinion that the Allegheny County undated ballots from the November 2020 election should be counted, characterizing that opinion as a mere "preference." Id. at 14. And she never acknowledges that, by reversing the Commonwealth Court and reinstating the decision of the Court of Common Pleas, a majority of the Court decided that the undated ballots in question should count—and therefore could not, by definition, be "invalid" or "illegal."

Plaintiff's Motion includes several other significant misinterpretations and misstatements of Pennsylvania law. For example, Plaintiff argues that the Secretary was required to ignore the Pennsylvania Supreme Court's decision because, according to Plaintiff, that decision conflicted with guidance and briefs that the Secretary had issued and filed before the Supreme Court ruled. ECF 47 at 1, 16-17, 24-25, 29. Even if Plaintiff's characterizations of the Secretary's guidance and briefs were correct (they are not), these documents are now completely irrelevant. The Court's rulings bind the Secretary, not the other way around; the Secretary does not have the authority to ignore the Court's interpretation of the Election Code in favor of her own.

Plaintiff also offers the following bold, but totally unsupportable, argument: "[A]s a matter of state law, [the Secretary] was, and remains, duty-bound to critically examine the votes she receives from counties ... she cannot simply certify election totals knowing full well they are infected with the fatal disease of arbitrary, disparate treatment of identically situated voters." ECF 47, at 17. Plaintiff manufactures this "duty" from thin air. Nothing in the Election Code requires the Secretary to reject county boards' certifications based on her own independent constitutional analysis; indeed, nothing in the Election Code permits her to do so. The Code provides that appeals of county board decisions go to the state courts, not to the Secretary, and does not authorize the Secretary to overrule decisions of those courts.

III. ARGUMENT

A. This Court Lacks Jurisdiction Over Plaintiff's Claims

1. Plaintiff's Claims Are Barred by the Rooker-Feldman Doctrine

As a threshold matter, this Court lacks jurisdiction over Plaintiff's claims under the Rooker-Feldman doctrine. The doctrine recognizes that "federal district courts lack jurisdiction over suits that are essentially appeals from state-court judgments." Great

W. Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 165 (3d Cir. 2010); see also Hoblock v. Albany Cnty. Bd. of Elections, 422 F.3d 77, 85 (2d Cir. 2005) ("Underlying the Rooker-Feldman doctrine is the principle, expressed by Congress in 28 U.S.C. § 1257, that within the federal judicial system, only the Supreme Court may review state-court decisions."). As clarified by the Supreme Court's decision in Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005), the Rooker-Feldman doctrine applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of the state court's judgments." Id. at 284. Accordingly, the doctrine bars jurisdiction where four requirements are satisfied: "(1) the federal plaintiff lost in state court; (2) the plaintiff complains of injuries caused by the state-court judgments; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state judgments." Great W. Mining, 615 F.3d at 166 (cleaned up). The first and third of these requirements "may be loosely termed procedural," and the second and fourth "may be termed substantive." Hoblock, 422 F.3d at 85.

(a) Plaintiff's Claims Satisfy All the Elements of the Rooker-Feldman Doctrine

Each of these requirements is met here. Plaintiff lost in state court. 1 She contended that 2.349 mail-in ballots returned to the Allegheny Board with a signed but undated declaration were per se invalid under the Pennsylvania Election Code and thus must be excluded from the election returns. The Allegheny County Court of Common Pleas rejected Plaintiff's argument, holding that "[t]he ballots [at issue] must be counted." Ziccarelli, 2020 WL 7012634, at *2 (emphasis added). The Pennsylvania Supreme Court reinstated the decision of the Court of Common Pleas. As a result of the Pennsylvania Supreme Court's holding, the Allegheny Board included the votes from those ballots in its certified returns, and the Secretary included them in her certification. In short, the state-court judgment was directly adverse to Plaintiff's position.

Rooker-Feldman's other procedural requirement is also met: The Pennsylvania Supreme Court's judgment was "rendered before the federal suit was filed." Great W. Mining, 615 F.3d at 166. Indeed, Plaintiff's original and amended complaints repeatedly refer to the Pennsylvania Supreme Court's judgment. See ECF 1 ¶¶ 1, 30–40, 49–52; ECF 29 ¶¶ 28–38.

The two substantive requirements are also satisfied. First, Plaintiff "complains of injuries caused by the state-court judgments." Great W. Mining, 615 F.3d at 166. As discussed above, see supra § II.D.1, she admitted as much in her Complaint. The Complaint likewise makes clear that Plaintiff "is inviting [this Court] to review and reject the state judgments." Great W. Mining, 615 F.3d at 166. At its core, the Complaint contends that the Pennsylvania Supreme Court's judgment is somehow inconsistent with the reasoning of a majority of that Court: "[A] majority of the [Supreme] Court concluded that [the] 2,349 signed but undated mail-in ballots ... were *invalid*, but ... a separate majority of the Court concluded nonetheless [they] should be *counted*." ECF 1 ¶ 1. Moreover, the Complaint expressly alleges that this Court should reject the Pennsylvania Supreme Court's decision on the purported grounds that it violates the federal Constitution: "The Pennsylvania Supreme Court, by simultaneously ruling that mail-in ballots lacking the ... date information are invalid, but applying its ruling prospectively, engaged in arbitrary and disparate treatment that treated voters in the 45th Senatorial District differently depending on which of the two counties comprising that District the voters resides." ECF 1 ¶ 49; accord id. ¶ 51. Indeed, a clearer case of a federal plaintiff complaining about an alleged injury caused by an adverse state-court judgment, and asking a federal district court to review and reject that judgment on purported federal-law grounds, is difficult to imagine. 2 See id. ¶ 52 (alleging that "the Pennsylvania Supreme Court's ruling ... violates the Constitution's mandate of one person, one vote"). The Rooker-Feldman doctrine squarely bars Plaintiff's claims. 3

(b) Plaintiff's Attempt to Plead Around the Rooker-Feldman Doctrine Is Unavailing

After Defendants pointed out the Rooker-Feldman bar at the November 25 hearing, Plaintiff filed her Amended Complaint in an apparent effort to plead around the doctrine. As described supra § II.D.2, the Amended Complaint backed away from the original Complaint's allegations that the Supreme Court's alleged errors had harmed Plaintiff, and shifted to allegations of an injury that the Board caused and the Supreme Court merely "ratified."

For at least two reasons, Plaintiff's "artful pleading is insufficient to bypass Rooker-Feldman." Roberts, 2014 WL 2883418, at *3. First, Plaintiff misunderstands the roles played by the county boards and the Pennsylvania courts. It is true that where "a plaintiff sues his employer in state court for violating ... anti-discrimination law ... and loses," the Rooker-Feldman doctrine does not bar the plaintiff from "bring[ing] the same suit in federal court" (though the federal-court claims may well be barred by preclusion doctrines). Great W. Mining, 615 F.3d at 167 (internal quotation marks omitted). In such cases, the alleged injury is not based on the state-court judgment but solely "on the employer's discrimination. The fact that the state court chose not to remedy the injury does not transform the subsequent federal suit on the same matter into an appeal, forbidden by Rooker-Feldman, of the state-court judgment." Id. But the Allegheny Board is not analogous to a private employer-defendant, and the Pennsylvania Supreme Court's decision is not analogous to a ruling that alleged employment discrimination should not be remedied. Under Pennsylvania law, decisions about whether ballots should be counted are committed to county boards of election in the first instance, subject to appellate review by the Pennsylvania courts. See 25 P.S. § 3157. The question that Plaintiff raises here—whether ballots returned with signed but undated declarations are per se invalid and must be rejected under the Pennsylvania Election Code—is a question of law. The Pennsylvania Supreme Court rejected Plaintiff's position and held that, at least for purposes of the November 2020 election, such ballots are not per se invalid. As Plaintiff's original Complaint recognized, that ruling is the source of Plaintiff's alleged injury. To state the obvious: if the Supreme Court had instead ruled in Plaintiff's favor, the 2,349 ballots would not have been counted, and no injury would exist.

In asserting that the Pennsylvania Supreme Court merely "ratified" the Board's decision, Plaintiff appears to seek support in certain language in the Second Circuit's *Hoblock* decision. But the attempt is unavailing. *Hoblock* held that, for *Rooker-Feldman* purposes, a New York Court of Appeals ruling that certain absentee ballots were invalid under state law *did* cause the injury the plaintiffs complained of in their subsequent federal lawsuit challenging the Albany County Board of Elections' refusal to tally those ballots. *Hoblock*, 422 F.3d at 81–83, 88–89. In so holding, the Court observed that "the Board, had it been left to its own devices, would have counted [the absentee ballots]," and that "[t]he state-court judgment did not ratify, acquiesce in, or leave unpunished an anterior decision by the Board not to count the ballots." *Id.* at 89.

Insofar as Plaintiff reads the *Hoblock* opinion to suggest, in dicta, that the *Rooker-Feldman* doctrine would not have applied if the Albany County Board had instead been inclined *not* to count the absentee ballots, and then further contends that such a proposition controls this case, Plaintiff is mistaken. Such an argument ignores the important distinction, noted above, between private defendants and agencies, like the Allegheny Board, that make quasi-judicial decisions subject to appellate review by courts. *See Boord v. Maurer*, 22 A.2d 902, 904 (Pa. 1941) (Pennsylvania Election Code "clothes [county boards of elections] with quasi-judicial functions"). As courts including the Third Circuit have repeatedly recognized, challenges to state-court decisions can fall within the scope of the *Rooker-Feldman* bar notwithstanding that they uphold agency decisions. *See, e.g., Johnson v. Phila. Hous. Auth.*, 448 F. App'x 190, 191–92 (3d Cir. 2011) ("[t]o the extent" that a federal civil rights complaint "calls into question the validity" of a Court of Common Pleas judgment denying an appeal from a decision of the Philadelphia Housing Authority, the federal "complaint is barred by *Rooker-Feldman*"); *Davison v. Gov't of Puerto Rico*, 471 F.3d 220, 221–23 (1st Cir. 2006) (federal-court challenge to decisions of Puerto Rico courts upholding order of Puerto Rico Firefighters Corps was barred by *Rooker-Feldman*); *Prince v. Ark. Bd. of Exam'rs in Psychology*, 380 F.3d 337, 341 (8th Cir. 2004) (*Rooker-Feldman* barred federal challenge brought by litigant who had pursued state-court appeal of state administrative agency determination).

Moreover, Plaintiff herself alleges that the Allegheny Board did not actually add the 2,349 ballots to its certified vote count until *after* the Pennsylvania Supreme Court's ruling. *See* ECF 1 ¶ 30 ("On November 23, 2020, prior to the issuance of the Supreme Court's decision in this matter, the Board certified its election results, *excluding* any certification of the Disputed Ballots."); ECF 29 ¶ 37 ("Following the Supreme Court's decision, on November 25, 2020, the Board ... canvassed and certified the results from the [undated] Ballots to Secretary Boockvar"). That chronology reflects the Board's indisputable obligation to abide by the Supreme Court's decision with respect to whether the ballots were *per se* invalid under Pennsylvania law. ⁴

In addition, Plaintiff's attempt to avoid *Rooker-Feldman* overlooks that her federal claims would necessarily require this Court to overturn the Pennsylvania Supreme Court's decision. The Pennsylvania Supreme Court held that the 2,349 ballots were

properly counted under Pennsylvania law. But Plaintiff insists that counting the ballots was *improper*, and further contends that the proper remedy for the alleged equal protection violation is to "level down"—that is, to enjoin Defendants from counting the 2,349 ballots—because that is what Pennsylvania law purportedly "command[s]." ECF 47, at 28–29; see also Sessions v. Morales-Santana, 137 S. Ct. 1678, 1698 & n.23 (2017) (noting that how the remedy of equal treatment is achieved is a matter of state law that should generally be decided by state courts). To sustain this contention, Plaintiff must take the position—as she does—that the Pennsylvania Supreme Court somehow interpreted Pennsylvania law and violated that interpretation in the same ruling. By inviting this Court to reject the Pennsylvania Supreme Court's decision as to the requirements of state law, not only does Plaintiff run afoul of the principle that state courts—not federal district courts—are the definitive expositors of state law, see Wirth v. Aetna U.S. Healthcare, 469 F.3d 305, 309 (3d Cir. 2006); she also contravenes the Rooker-Feldman doctrine.

Second, and independently, even if the Rooker-Feldman doctrine did not bar Plaintiff's claims against the Allegheny Board (as it does), it would still bar her claims against the Secretary. The action by the Secretary of which Plaintiff complains is the acceptance of the Board's amended certified results containing the 2,349 ballots at issue. As the Amended Complaint alleges, this action occurred after the Pennsylvania Supreme Court's decision. See ECF 29 ¶¶ 37–38. It was also done pursuant to that decision. Plaintiff's suggestion that the Secretary should have excluded those ballots, despite the Pennsylvania Supreme Court's holding that they were properly counted, is as astonishing as it is incorrect. The Pennsylvania Election Code provides for the state judiciary—ultimately, the Pennsylvania Supreme Court—to resolve disputes over which ballots should be counted; for the county boards of election to certify election results, reflecting the resolution of any such disputes, to the Secretary; and for the Secretary to tabulate and certify the votes cast for each race based on the certified returns received. 25 P.S. §§ 3157–3159. As the Second Circuit has explained, "[w]here a state-court judgment causes the challenged third-party action, any challenge to that third-party action is necessarily the kind of challenge to the state judgment that only the Supreme Court [of the United States] can hear." Hoblock, 422 F.3d at 88. Accordingly, just as, "if the state has taken custody of a child pursuant to a state judgment, the parent cannot escape Rooker-Feldman simply by alleging in federal court that he was injured by the state employees who took his child rather than by the judgment authorizing them to take the child," id., so too can Plaintiff not evade Rooker-Feldman by alleging that she was injured by the Secretary who tabulated election results pursuant to the statecourt judgment in Plaintiff's case.

2. Plaintiff Lacks Standing to Assert Third Parties' Claims or to Pursue a "Vote Dilution" Theory

Plaintiff alleges three kinds of injury in her Amended Complaint: (1) that Defendants' alleged acts caused Plaintiff to lose the race for State Senator for the 45th District, ECF 29 ¶ 5; (2) that counting supposedly "invalid" ballots dilutes the votes of "persons who voted in complete compliance with the Election Code in both counties—including Ziccarelli herself," id. ¶¶ 61, 70, 71; and (3) that voters who neglected to date their ballots were treated differently, depending on what county they voted in, because undated ballots were counted in Allegheny County but not in Westmoreland County, id. ¶ 60. Of these alleged injuries, Plaintiff only has standing to assert the first—her loss of the election. ⁵ The second alleged injury, which is critical to much of Plaintiff's case—"dilution" of "valid" votes by "invalid" ones—is foreclosed by binding Third Circuit precedent. Plaintiff also cannot pursue relief for the third alleged injury, because she does not allege that she forgot to date her ballot, and she cannot assert claims on behalf of the 343 Westmoreland County voters who submitted undated ballots.

Plaintiff thus fails to establish the "irreducible constitutional minimum of standing" with respect to any injury other than her loss of the election. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (plaintiff must demonstrate the familiar elements of injury in fact, causation, and redressability). Plaintiff cannot bear the burden of proving each element of standing "with the manner and degree of evidence required at the successive stages of the litigation." Pa. Prison Soc'y v. Cortés, 508 F.3d 156, 161 (3d Cir. 2007). 6

(a) Plaintiff's "Vote Dilution" Theory Cannot Establish Standing

In a recent, precedential opinion that Plaintiff fails to cite, the Third Circuit found that generalized "vote dilution" claims such as Plaintiff's could not establish standing. The Court noted that "the foremost element of standing is injury in fact, which requires the plaintiff to show a harm that is both 'concrete and particularized." Bognet v. Sec'y Commonwealth of Pa., 980 F.3d 336, 352 (3d Cir. 2020) (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547-48 (2016)). Plaintiff's vote dilution allegations fail to meet either criterion.

Bognet considered voter-plaintiffs' allegation that allegedly unlawful votes diluted their votes in violation of the Equal Protection Clause. The Court found that this harm did not meet Article III's standards because "this conceptualization of vote dilutionstate actors counting ballots in violation of state election law—is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment." Bognet, 980 F.3d at 354. Nor is it "particularized," because "the illegal counting of unlawful votes, 'dilute[s]' the influence of all voters in Pennsylvania equally and in an 'undifferentiated' manner and do[es] not dilute a certain group of voters particularly." *Id.* at 356. Plaintiff alleges exactly the same injury—that Defendants' counting of "unlawful" votes dilutes "lawful" votes. See, e.g., ECF 29 ¶¶ 57-64. This injury is not cognizable under Bognet.

To the extent Plaintiff alleges some generic violation of the one-person, one-vote principle announced in Reynolds v. Sims, 377 U.S. 533, 561–62 (1964), the Third Circuit has likewise emphasized that "vote dilution under the Equal Protection Clause is concerned with votes being weighed differently [I]f dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots 'were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity." Bognet, 980 F.3d at 355 (citing Trump I, 2020 WL 5997680, at *45–46). Here, Plaintiff has not shown that any Defendant "weighed" two identical votes differently, and as such the presence of allegedly "unlawful votes" in the overall count does not injure "lawful" voters for purposes of Article III.

(b) Plaintiff Cannot Assert Injuries of Absent Third Parties

Furthermore, Plaintiff cannot assert third-party standing on behalf of absent "Ziccarelli Voters" who neglected to date their Westmoreland County ballots. The Supreme Court has permitted third-party standing only in limited circumstances, by "requiring that a party seeking third-party standing make two additional showings. First, [the Court has] asked whether the party asserting the right has a 'close' relationship with the person who possesses the right. Second, [the Court has] considered whether there is a 'hindrance' to the possessor's ability to protect his own interests." Kowalski v. Tesmer, 543 U.S. 125, 130 (2004). Here, Plaintiff has not alleged any barrier to Ziccarelli voters bringing claims to vindicate their own rights. Nor can she. For one thing, these claims have already been fully litigated in state court. And nothing stands in these voters' way if they want to bring a claim to vindicate their own rights, as Plaintiff purports to do here. Because Plaintiff lacks standing to bring claims on behalf of these absent third parties, the Court should not consider their alleged injuries when analyzing its jurisdiction under Article III.

3. Plaintiff's Claims Are Barred by the Doctrine of Sovereign Immunity

This Court also lacks jurisdiction to adjudicate Plaintiff's claims by virtue of Eleventh Amendment sovereign immunity. Put simply, federal courts lack jurisdiction to hear claims for injunctive and declaratory relief based on a "claim that state officials violated state law in carrying out their official responsibilities." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 121 (1984). See generally 13 Charles Alan Wright et al., Federal Practice & Procedure § 3524.3 (3d ed.). Plaintiff's state-law claims in federal constitutional claims' clothing are precisely that—allegations that the Secretary violated the Election Code (or, more specifically, Plaintiff's incorrect interpretation of the Election Code) in carrying out her duties. Her claims are thus barred, because there is no ongoing violation of federal law and Plaintiff seeks only an order compelling state officials to comply with Plaintiff's incorrect understanding of state law.

First, Plaintiff fails to identify any ongoing violation of federal law that might justify this federal court exercising judicial power under the narrow exception for a litigant seeking prospective injunctive relief premised on a violation of the U.S. Constitution. See Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 269 (1997) (summarizing the rule of Ex parte Young, 209 U.S. 123 (1908)). The Third Circuit has dismissed claims just like Plaintiff's for failure to seek "prospective injunctive relief" when "specific allegations target past conduct, and the ... remedy is not intended to halt a present, continuing violation of federal law." Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 698 (3d Cir. 1996); see also Nemeth v. Office of Clerk of Superior Court of N.J., — F. App'x —, No. 20-2244, 2020 WL 7385082, at *2 (3d Cir. 2020). Other federal courts have emphasized that "[i]n order to state a viable claim for prospective injunctive relief, an event that occurred once in the past does not support a claim of an ongoing violation of federal law in the future." Richards v. Dayton, No. 13-3029, 2015 WL 1522199, at *16 (D. Minn. 2015) (dismissing complaint for lack of subject matter jurisdiction under the Eleventh Amendment because "none of the [Office of Secretary of State] Defendants have any connection with the enforcement of the actions that [Plaintiff] seeks to remedy").

Here, Plaintiff has failed to allege that the Secretary's "actions are currently violating federal law." *Williams ex rel. J.E. v. Reeves*, 954 F.3d 729, 737 (5th Cir. 2020); see also Green v. Mansour, 474 U.S. 64, 68, 73 (1985) ("There is no claimed continuing violation of federal law, and therefore no occasion to issue an injunction."). Plaintiff alleges only that the Secretary "accept[ed]" the vote tallies from Allegheny and Westmoreland counties. See ECF 29 ¶¶ 44, 52. There are no further allegations that the Secretary is now violating, or will in the future violate, Plaintiff's federal constitutional rights. See generally id.

Second, Plaintiff's claims are barred because, properly construed, they derive entirely from state law and are thus an improper attempt to smuggle a state-law claim into the *Ex Parte Young* framework. *See Trump I*, 2020 WL 5997680, at *75 (noting that Secretary may have sovereign immunity as to state-law claims). The only relief Plaintiff seeks is an order compelling Defendants to comply with her incorrect interpretation of the Pennsylvania Election Code. *See* ECF 29 at Prayer for Relief. Although Plaintiff pleads federal constitutional claims, "the determinative question [under *Pennhurst*] is not the relief ordered, but whether the relief was ordered pursuant to state or federal law." *Brown v. Ga. Dep't of Revenue*, 881 F.2d 1018, 1023 (11th Cir. 1989). Creative pleading—alleging that tabulating election results as required by state law raises a federal issue—cannot do an end-run around *Pennhurst. See Williams*, 954 F.3d at 741; *S&M Brands, Inc. v. Georgia ex rel. Carr*, 925 F.3d 1198, 1205 (11th Cir. 2019). Plaintiff's own Amended Complaint reveals as much. Count One explicitly alleges that "the Defective Ballots are invalid under the plain language of the Election Code" and seeks to have the Allegheny ballots removed from the final tally because "disqualifying such ballots reflects the General Assembly's express intent." ECF 29 ¶ 64; *see also id.* ¶ 68 (Count Two, "the Board counted and certified the results of the Defective Ballots even though these ballots are invalid under the Election Code"). The Eleventh Amendment bars this bald attempt to re-litigate the state-law claim Plaintiff lost before the Pennsylvania Supreme Court.

B. Plaintiff's Claims Are Barred by Res Judicata

Even if the *Rooker-Feldman* doctrine did not bar Plaintiff's claims, those claims would be precluded under the doctrine of res judicata. *See Great W. Mining*, 615 F.3d at 170 ("should the *Rooker-Feldman* doctrine not apply such that the district court has jurisdiction, disposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law"; "the *Rooker-Feldman* inquiry is distinct from the question of whether claim preclusion (res judicata) or issue preclusion (collateral estoppel) defeats the federal suit").

A "federal court must 'give the same preclusive effect to a state-court judgment as another court of that State would give." *Id.* (quoting *Exxon Mobil*, 544 U.S. at 293). Under Pennsylvania's doctrine of res judicata, "[a]ny final, valid judgment on the merits by a court of competent jurisdiction precludes any future suit between the parties or their privies on the same cause of action." *Hammond v. Krak*, No. 17-00952, 2020 WL 1032296, at *3 (W.D. Pa. Mar. 3, 2020) (quoting *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995)). "A claim is barred by res judicata when the former and current actions share the same four conditions: '(1) the thing sued upon or for; (2) the cause of action; (3) the persons and parties to the action; and (4) the capacity of the parties to sue or be sued."" *Id.* (quoting *Turner v. Crawford Square Apartments III, L.P.*, 449 F.3d 542, 548 (3d Cir. 2006)). Because the doctrine serves the essential purpose of "reliev[ing] the parties of the cost and vexation of multiple lawsuits, conserv[ing] judicial resources, prevent[ing] inconsistent decisions, and encourag[ing] reliance on adjudications," *id.* (quoting *Turner*, 449 F.3d at 551), Pennsylvania jurisprudence holds that "res judicata 'must be liberally construed and applied

without technical restriction." Id. (quoting Radakovich v. Radakovich, 846 A.2d 709, 715 (Pa. Super. Ct. 2004)); see also Tobias v. Halifax Twp., 28 A.3d 223, 226 (Pa. Commw. Ct. 2011) ("it is well-settled that res judicata will not be 'defeated by minor differences of form, parties, or allegations" (internal quotation marks omitted)).

All four elements exist here. First, "the thing sued upon or for" element is met. Here, as in the underlying state-court proceedings, Plaintiff seeks to exclude the undated ballots from the vote count in her race. Second, both proceedings involve the same "cause of action." Importantly, the fact that Plaintiff did not actually assert her federal equal protection or due process claims in the state-court proceedings is irrelevant, as res judicata "bars litigation of claims that were or could have been raised in a prior action which resulted in a final judgment on the merits, so long as the claims derive from the same cause of action." Id. (quoting In re Estate of Plance, 175 A.3d 249, 258 (Pa. 2017)); accord Tobias, 28 A.3d at 227 ("a party cannot avoid res judicata simply by varying the legal theory for relief"). "Pennsylvania courts have instructed that causes of action are identical when the 'subject matter' and the 'ultimate issues' are the same in both the 'old and new proceedings.' A 'cause of action' or 'claim' is to be defined 'broadly in transactional terms, regardless of the number of substantive theories advanced in the multiple suits by the plaintiff." Cemex, Inc. v. Indus. Contracting & Erecting, Inc., No. 02-1240, 2006 WL 1785564, at *5 (W.D. Pa. June 26, 2006) (citations omitted), aff'd, 254 F. App'x 148 (3d Cir. 2007). Here, both the state-court and federal-court proceedings arise from the same subject matter and involve the same ultimate issues—namely, the November 2020 election and whether 2,349 specific mail-in ballots may lawfully be counted. Further, nothing prevented Plaintiff from asserting her federal equal protection and due process claims during the state-court proceedings. Accordingly, the earlier and present proceedings demonstrate an identity of "causes of action."

The third element—identity of parties—is also satisfied. Plaintiff and the Allegheny Board were both parties to the state-court proceedings. Although Plaintiff has added additional Defendants to this federal proceeding—namely, each member of the Board and the Secretary—these additions do not defeat res judicata. "Where," as here, "res judicata is invoked against a plaintiff who has twice asserted essentially the same claim against different defendants, courts have ... enlarged the area of res judicata beyond any definable categories of privity between the defendants." Hammond, 2020 WL 1032296, at *4 (quoting Bruszewski v. United States, 181 F.2d 419, 422 (3d Cir. 1950)); see also Cicchiello v. SEIU 1199P Union Serv. Employees Int'l Union, No. 361 M.D. 2015, 2016 WL 1639015, at *4 (Pa. Commw. Ct. Apr. 26, 2016) ("as observed by the federal courts, merely naming additional defendants will not convert one cause of action into a second cause of action if both actions involve the same liability-creating conduct on the part of the defendants and the same alleged invasion of the plaintiff's rights"). Here, in both the state-and federal-court proceedings, Plaintiff has complained that Pennsylvania election officials are unlawfully counting certain specific ballots that, in Plaintiff's view, should not be counted. The connections between the Defendants are more than close enough to satisfy the third element of the res judicata test.

Finally, the fourth element of res judicata is satisfied because the capacity of the parties is the same in both the state- and federalcourt proceedings. Accordingly, under the doctrine of res judicata, the Pennsylvania Supreme Court's judgment precludes Plaintiff's claims in this action.

C. Defendants Are Entitled to Judgment as a Matter of Law on Both Claims

1. The Court Should Dismiss the Equal Protection Claim

(a) Independent County Procedures, Even if Inconsistent, Do Not Give Rise to an Equal Protection Claim

Plaintiff fails to state a claim under the Equal Protection Clause because variation in canvassing decisions between county boards is not an equal protection violation. Plaintiff relies heavily on Bush v. Gore, which turned on "a statewide recount under the authority of a single state judicial officer," and the "the minimum procedures necessary to protect the fundamental right of each voter" in the process. 531 U.S. 98, 109 (2000). But Bush expressly stated that it was not addressing "whether local entities ... may develop different systems for implementing elections." Id. And Third Circuit precedent makes clear that county-bycounty variation does not offend the Equal Protection Clause; only a statewide decision or rule that fails to provide "rudimentary requirements of equal treatment and fundamental fairness" gives rise to equal protection claims, id.

Two Third Circuit cases have recently clarified the boundaries to equal protection claims under Bush v. Gore. In Bognet, the Third Circuit noted that "Bush v. Gore does not require us to perform an Equal Protection Clause analysis of Pennsylvania election law as interpreted by the Pennsylvania Supreme Court." Bognet, 980 F.3d at 355 n.11. Likewise, in Donald J. Trump for President, Inc. v. Boockvar ("Trump II"), the Third Circuit held that "Pennsylvania's Election Code gives counties specific guidelines. To be sure, counties vary in implementing that guidance, but that is normal. Reasonable county-to-county variation is not discrimination." 830 F. App'x 377, 388 (3d Cir. 2020). Two counties independently deciding close questions of the Election Code differently cannot suffice to state an equal protection claim under Bush v. Gore because Plaintiff has alleged no statewide action, and no discrimination. This is true a fortiori where, as here, Pennsylvania law provides a readily available mechanism to obtain a uniform statewide result—namely, appeal to an appellate court with statewide jurisdiction; that court has clearly indicated that it would impose a uniform result, see In re Canvass, 2020 WL 6866415; and the only reason there remains variation among counties is that Plaintiff, knowing what the result would be, has voluntarily declined to seek judicial review of one county's decision. This Court should therefore dismiss Count One because it seeks to extend equal protection beyond the limits of *Bognet* and *Trump II*.

(b) Even if Inter-County Variations Could Support an Equal Protection Claim, Plaintiff Cannot Allege or Prove That Anyone Violated Her Right to Equal Protection

To state a claim under the Equal Protection Clause, a § 1983 plaintiff "must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class." Trefelner ex rel. Trefelner v. Burrell Sch. Dist., 655 F. Supp. 2d 581, 589 (W.D. Pa. 2009) (citing Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410, 423 (3d Cir. 2000)). Protected classes include those based upon suspect distinctions, such as race, religion, and alienage, and those impacting fundamental rights. Artway v. Attorney Gen., 81 F.3d 1235, 1267 (3d Cir. 1996). Stripped of its third party and vote dilution theories of injury, which are foreclosed by Bognet, Plaintiff's Amended Complaint cannot state a claim under the Equal Protection Clause because it fails to allege that Plaintiff is a member of a protected class or that her fundamental rights have been burdened.

First, and most significantly, Plaintiff fails to allege that any Defendant discriminated against her. "To bring a successful claim under 42 U.S.C. § 1983 for a denial of equal protection, plaintiffs must prove the existence of purposeful discrimination. They must demonstrate that they 'receiv[ed] different treatment from that received by other individuals similarly situated," Andrews v. City of Phila., 895 F.2d 1469, 1478 (3d Cir. 1990) (citations omitted); see also Kasper v. County of Bucks, 514 F. App'x 210, 214–15 (3d Cir. 2013) (finding plaintiff's "§ 1983 assertions are plainly defective in that they fail to allege disparate treatment relative to other similarly situated people"). Plaintiff's Amended Complaint does not make this basic, threshold allegation. Plaintiff simply alleges that two county boards of elections made different decisions concerning whether to count absentee or mail-in votes with undated ballot envelopes, and that the Secretary "accepted the certified final returns." ECF 29 ¶¶ 38, 52. No allegation shows a Defendant treated Plaintiff differently than another similarly-situated individual. Indeed, both parties simply carried out mandatory duties under state law with an even hand; the Allegheny Board obeyed the Pennsylvania Supreme Court's order reinstating the Allegheny County Court of Common Pleas' ruling that the undated ballots "must be counted," see Ziccarelli, 2020 WL 7012634, at *2, and the Secretary accepted ballots as required by 25 P.S. § 2621(f). Not only has Plaintiff failed to allege that she received "different treatment," she has shown that each Defendant did exactly what state law required. This failure to allege differential treatment is, by itself, fatal to Plaintiff's equal protection claim.

To the extent Plaintiff argues there was different treatment because the Secretary failed to properly "count" or "canvass" returns from Allegheny and Westmoreland counties, ⁸ Plaintiff misconceives the role of the Secretary in the Commonwealth's election process and fails to adduce necessary proof for an equal protection claim. As discussed supra § II.A.1, the Secretary may not independently determine whether a vote is lawful, or second-guess canvassing decisions of county boards of elections. See In re Canvass, 2020 WL 6866415, at *15 n.6; see also id. at *20 (Wecht, J., concurring). This is especially so when the Pennsylvania Supreme Court has reinstated a decision that the ballots in question "must be counted." Ziccarelli, 2020 WL 7012634, at *2. Therefore, because the Election Code and the Pennsylvania Supreme Court prevent the Secretary from canvassing returns as Plaintiff alleges she should have, Plaintiff fails to show any alleged failure on the Secretary's part treated her unequally. Without an allegation that Defendants treated Plaintiff differently, Plaintiff cannot state an equal protection claim.

Even if Plaintiff could allege differential treatment, Plaintiff cannot show any burden to her fundamental rights, or that such a burden outweighs the state's interest in an orderly election process. As this Court has held, to the extent *Anderson-Burdick* applies to these types of "square peg, round hole" situations of "burden[ing] the right to vote through **inaction**," the Court must "weigh any burden stemming from the government's alleged failures against the government's interest in enacting the broader election scheme it has erected." *Trump I*, 2020 WL 5997680, at *47 (emphasis in original). Here, the burden on Plaintiff is slight, if it exists at all; apart from her foreclosed vote dilution claims, she articulates no direct burden on her own fundamental rights, and the Secretary cannot imagine one. Whatever this burden adds up to is easily overcome by the state's interest in an orderly, timely-certified election. Pennsylvania's regulatory interests in a uniform election pursuant to established procedures are more than sufficient to withstand scrutiny. *Timmons*, 520 U.S. at 358; *Trump I*, 2020 WL 5997680, at *63. Not only is Pennsylvania's interest sufficient on its own, but the type of independent ballot-by-ballot constitutional review Plaintiff seems to be asking for would not only bring the election process to a standstill; it would ask the Secretary to issue proclamations on the lawfulness of votes in conflict with the judgment of the Supreme Court of Pennsylvania. That is not the law of the Election Code, and that cannot be what the Equal Protection Clause requires. Because Plaintiff has not provided any evidence to show how the burden to her individual rights outweighs the significant benefits to the Commonwealth in a uniform election pursuant to established procedures, this Court should grant judgment as a matter of law to Defendants on Count One. ⁹

2. The Court Should Dismiss the Due Process Claim

In Count Two, Plaintiff claims that the Secretary violated her rights under the Due Process Clause when the Secretary accepted the counties' election results. This argument does not come close to meeting Plaintiff's heavy burden to make out a due process claim.

This Court has held that substantive due process challenges that rely on the same allegations as equal protection challenges "demand[] even stricter proof," and "exist[] in only the most extraordinary circumstances." *Trump I*, 2020 WL 5997680, at *51. In the Third Circuit, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense"—the "executive action must be so ill-conceived or malicious that it 'shocks the conscience." *Id.* (quoting *Miller v. City of Phila.*, 174 F.3d 368, 375 (3d Cir. 1999) (cleaned up)). It is only when "the election process itself reaches the point of patent and fundamental unfairness[] [that] a violation of the due process clause may be indicated." *Acosta v. Democratic City Comm.*, 288 F. Supp. 3d 597, 645 (E.D. Pa. 2018) (citation omitted). Indeed, the federal courts have historically intervened in state elections only where there has been "purposeful or systematic discrimination against voters of a certain class, geographic area, or political affiliation," or "willful conduct which undermines the organic processes by which candidates are elected." *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975) (collecting cases).

The fact that the Allegheny County Board of Elections decided to count ballots timely returned by eligible voters with signed declarations, where there is no allegation or evidence of any fraud—and that the Secretary later carried out the straightforward task of accepting and tabulating vote totals, in compliance with the Election Code and the Pennsylvania Supreme Court's judgment—hardly "shocks the conscience." Count II is simply another species of the "vote dilution" argument in Count One, and should be dismissed for the same reasons. ¹⁰

Plaintiff also advances a broad "fundamental unfairness" argument, alleging that "certification effectively changed the rules of the election after the election had already been conducted." Plaintiff alleges that the Secretary altered the "rules" by certifying election results that (according to Plaintiff) conflicted with a previous guidance and brief. ECF 47, at 23–24. Plaintiff is wrong that the Secretary is "contraven[ing] a rule that she articulated." *Id.* at 25. Even if the guidance and brief had the meaning that

Plaintiff ascribes to them (they do not), "it is the Election Code's express terms that control, not the written guidance provided by the Department." *In re Scroggin*, 237 A.3d 1006, 1021 (Pa. 2020).

Plaintiff attempts to rely on Roe v. Mobile County Appointing Board for the proposition that counting a set of ballots found valid post-election by a state supreme court "changed the rules of the election after the election had already been conducted." ECF 47, at 22–23 (citing Roe, 43 F.3d 574 (11th Cir. 1975)). In Roe, however, the Eleventh Circuit confronted a state supreme court decision that, after the election, had retroactively eliminated the requirement that absentee ballots contain "the signature of two witness or a notary"; the Eleventh Circuit explicitly relied on the finding that candidates would have changed their campaign strategies and "supporters of [the plaintiff candidates] who did not vote would have voted" had they known that the state supreme court would change the rule. 43 F.3d at 582 (emphasis added). ¹¹ Here, Plaintiff can point to no evidence that any voter or candidate would have changed their conduct based on a belief that undated ballots would be counted. Moreover, on remand in Roe, the District Court found the "rule" that had been changed by the state court decision had previously been a consistent practice of all counties in Alabama but one for over fifteen years. 904 F. Supp. 1315, 1335 (S.D. Ala. 1995), aff'd sub nom. Roe v. Alabama, 68 F.3d 404 (11th Cir. 1995). Here, by contrast, Justice Wecht observed that "[one] cannot say with any confidence that even diligent electors were adequately informed as to what was required to avoid the consequence of disqualification in this case." In Re Canvass, 2020 WL 6866415, at *24 (Wecht, J., concurring). Plaintiff's additional theory for a due process violation should be rejected, and the claim should be dismissed, or summary judgment entered in Defendants' favor.

D. If There Is a Constitutional Violation Here, the Remedy Cannot Be to Create More Constitutional Violations

Even if the Court were to find a constitutional violation here, the proper remedy should not be to create at least hundreds or thousands of new constitutional violations for the sake of remedying one. Judge Brann persuasively summarized the remedies available to a District Court in these cases:

When remedying an equal-protection violation, a court may either "level up" or "level down." This means that a court may either extend a benefit to one that has been wrongfully denied it, thus leveling up and bringing that person on par with others who already enjoy the right, or a court may level down by withdrawing the benefit from those who currently possess it. Generally, "the preferred rule in a typical case is to extend favorable treatment" and to level up. In fact, leveling down is impermissible where the withdrawal of a benefit would necessarily violate the Constitution. Such would be the case if a court were to remedy discrimination by striking down a benefit that is constitutionally guaranteed.

Trump II, 2020 WL 6821992, at *12 (citations omitted). As Judge Brann rightly pointed out, "[i]t is not in the power of [a District] Court to violate the Constitution." Id. (citing Marbury v. Madison, 5 U.S. 137, 147 (1803)).

That is precisely what "leveling down" here would mean: The relief Plaintiff asks for would without question violate the constitutional rights of other Pennsylvania voters, something this Court cannot do. Even if the disparity between Allegheny and Westmoreland's processes amounted to a constitutional violation, this occurrence could not possibly justify cancelling the votes of 311 Pennsylvania voters. Such a remedy would place an undue burden on those 311 voters' rights to vote, and force the Allegheny County Board to do what Plaintiff suggests it cannot—count one tranche of undated mail-in or absentee ballots, but not another. See Ne. Ohio Coalition for Homeless v. Husted, 696 F.3d 580, 595, 597-98 (6th Cir. 2012) (rejecting ballots invalidly cast due to poll worker error likely violates due process). And "[t]he disenfranchisement of even one person validly exercising his right to vote is an extremely serious matter." Perles v. Cnty. Return Bd. of Northumberland Cnty., 202 A.2d 538, 540 (Pa. 1964). This Court cannot "level down" as a matter of law, and should not do so at Plaintiff's request here.

There are federalism reasons to refuse to "level down" as well. The Third Circuit made this clear in rejecting another, more significant remedy that would have cancelled the votes of other Pennsylvania voters without sufficient reason to do so: The Pennsylvania Supreme Court has long "liberally construed" its Election Code "to protect voters' right to vote," even when a ballot violates a technical requirement. Shambach v. Bickhart, 577 Pa. 384, 845 A.2d 793, 802 (2004). "Technicalities should not be used to make the right of the voter insecure." Appeal of James, 377 Pa. 405, 105 A.2d 64, 66 (1954) (internal quotation marks omitted). That court recently reiterated: "[T]he Election Code should be liberally construed so as not to deprive, inter alia, electors of their right to elect a candidate of their choice." Pa. Dem. Party, 238 A.3d at 356. Thus, unless there is evidence of fraud, Pennsylvania law overlooks small ballot glitches and respects the expressed intent of every lawful voter. In re: Canvass of Absentee and Mail-in Ballots, 2020 WL 6875017, at *1 (plurality opinion). In our federalist system, we must respect Pennsylvania's approach to running elections. We will not make more of ballot technicalities than Pennsylvania itself does.

Trump II, 830 F. App'x at 391. Although this decision was non-precedential, its persuasive analysis of federalism concerns suggests the relief requested here would create at least as many constitutional problems as it purports to solve.

There are also two key and dispositive differences between the cases Plaintiff cites to support a "level down" remedy and the one before this Court. First, Sessions v. Morales-Santana teaches that rescinding a benefit based on an interpretation of "what [] the legislative body [would] have done with the equal treatment violation had it been presented with it" is appropriate for a federal district court only when construing federal law; the Court in Sessions interpreted what Congress would do with a federal law, and noted that "[b]ecause the manner in which a State eliminates discrimination is an issue of state law ... upon finding state statutes constitutionally infirm, we have generally remanded to permit state courts to choose between extension and invalidation." 137 S. Ct. 1678, 1698, n.23 (2017). Here, the Pennsylvania Supreme Court has already determined the proper application of Pennsylvania law to the ballots at issue: the ballots should be counted. Second, any court "leveling down" may do so only going forward, and cannot grant the type of retrospective relief Plaintiff seeks here. Although the Court in Sessions leveled down, it made clear that its ruling would only do so "prospectively." See id. at 1701; cf. Andino v. Middleton, 141 S. Ct. 9, 10 (2020) (staying a district court order prospectively, but holding that "any ballots cast before this stay issues and received within two days of this order may not be rejected") (emphasis added). No other case Plaintiff cites supports awarding retrospective relief. See ECF 47, at 28. 12

IV. CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court dismiss all claims in the Amended Complaint with prejudice or, in the alternative, grant summary judgment in favor of the Secretary on Counts One and Two.

Respectfully submitted,

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Dated: December 30, 2020

Footnotes

- Admitted pro hac vice
- Pro hac vice motion to be filed
- That Plaintiff added, as defendants in this action, certain parties who were not parties to the state-court proceeding is 1 irrelevant to the Rooker-Feldman analysis. See Russo v. GMAC Morg., LLC, 549 F. App'x 8, 10 (2d Cir. 2013) ("It does not matter that the plaintiff added parties to the federal action who were not parties to the state action. The Rooker-Feldman doctrine bars 'cases ... brought by state-court losers complaining of injuries caused by state-court judgment rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." (citing Exxon Mobil, 544 U.S. at 284 (emphasis added))); Sheikhani v. Wells Fargo Bank, 577 F. App'x 610, 611 (7th Cir. 2014); Udoh v. Minn. Dep't of Human Servs., No. 16-3119, 2017 WL 2683975, at *1 (D. Minn. June 21, 2017); Roberts v. Perez, No. 13-5612, 2014 WL 3883418, at *2-3 (S.D.N.Y. Aug. 7, 2014).
- 2 That Plaintiff did not actually assert her federal constitutional claims in the state-court proceedings is irrelevant. "When a federal plaintiff brings a claim, whether or not raised in state court, that asserts injury caused by a state-court judgment and seeks review and reversal of that judgment, the federal claim is ... barred from review." Mikhail v. Kahn, 991 F. Supp. 2d 596, 615 (E.D. Pa. 2014) (quoting Great W. Mining, 615 F.3d at 170) (emphasis in Mikhail), aff'd, 572 F. App'x 68 (3d Cir. 2014); accord Hoblock, 422 F.3d at 87 ("[A] federal plaintiff cannot escape the Rooker-Feldman bar simply by relying on a legal theory not raised in state court.").
- 3 The "Amicus Brief of Legislative Leaders" asserts an additional argument: that the Pennsylvania Supreme Court's decision in In re Canvass somehow violated the Elections Clause in Article I, § 4 of the U.S. Constitution. See ECF 49-1. This argument, which Plaintiff does not raise, fails for at least three reasons. First, it is well settled that, "in the absence of exceptional circumstances" not present here, courts do not consider "new issues raised by an amicus." A.D. Bedell Wholesale Co. v. Philip Morris Inc., 263 F.3d 239, 266 (3d Cir. 2001). Second, like Plaintiff's claims, amici's argument is barred by, inter alia, the Rooker-Feldman and preclusion doctrines. Third, amici fail to state any Elections Clause claim as a matter of law: The Elections Clause applies only to federal elections, not to state elections like the one here.
- Plaintiff's Amended Complaint emphasizes "the absence of a court order requiring the Board to count the [Disputed] Ballots." ECF 29 ¶ 37. But that argument exalts form over substance. The Court of Common Pleas decision that the Supreme Court reinstated held that, under Pennsylvania law, the 2,349 ballots in dispute "must be counted." Ziccarelli, 2020 WL 7012634, at *2 (emphasis added).

- As discussed below, although Plaintiff may have standing to seek relief for this injury, she is unable to state a claim for relief.
- This Court also lacks jurisdiction over Plaintiff's claims because 28 U.S.C. § 1344 is the only statute that confers jurisdiction upon federal courts to hear election disputes for state offices, and that statute does not apply here. *Keyes v. Gunn*, 890 F.3d 232, 237 (5th Cir. 2018) (reversing and remanding with instructions to dismiss equal protection claim because district court lacked jurisdiction over state election contest for a legislative seat under 28 U.S.C. § 1344).
- 7 Count Two of the Amended Complaint purports to speak for all voters. ECF 29 ¶ 72. Plaintiff's Motion, however, argues for relief only for Plaintiff and her voters. Either way, the analysis is the same: Plaintiff cannot assert claims on behalf of any third-party voters.
- An allegation Plaintiff does not make in her Amended Complaint, but raises for the first time in her brief in support of motion for summary judgment. *See* ECF 47, at 16-17.
- Plaintiff also argues that the Secretary has violated the Equal Protection Clause by accepting "incomplete results," because ballots with certain flaws—missing secrecy envelopes, for example—were not counted. ECF 47, at 17-18. This argument is simply another challenge to the Pennsylvania Supreme Court's determination that under state law, different balloting flaws have different consequences. It also ignores the fact that under the Election Code, county boards of elections, and not the Secretary, determine when results are "complete."
- Plaintiff frames her due process claim as seeking to protect the fundamental right to vote, citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). ECF 29 ¶ 66. The Amended Complaint alleges that "dilution of the votes of the Ziccarelli Voters violates the Due Process Clause of the Constitution" and also alleges an injury to "each voter's fundamental right to vote." *Id.* ¶ 72. For the reasons highlighted above, Plaintiff lacks standing to bring this claim under *Bognet*. Once the vote dilution theory is removed from this case, as it must be, the Amended Complaint alleges no further violation of Plaintiff's fundamental rights.
- It is worth noting that, to the extent earlier portions of the *Roe* opinion could be read to suggest that the alleged "dilution" of votes cast in accordance with the witness/notary signature requirement was itself sufficient to make out a due process claim, the court backed away from that position in addressing the First Circuit's decision in *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825 (1st Cir. 1980). As *Partido Nuevo* recognized, "claims [by plaintiffs] that votes were 'diluted' by the votes of others, not that [the plaintiffs] themselves were prevented from voting," do not state a constitutional injury. *Id.* at 828. *Roe* distinguished *Partido Nuevo* solely on the ground that, in *Roe*, unlike in *Partido Nuevo*, candidates and voters had detrimentally relied on the requirement eliminated by the state supreme court. *Roe*, 43 F.3d at 581–82. Significantly, in a precedential decision issued earlier this month, the Eleventh Circuit expressly agreed with *Bognet* that vote "dilution" of the sort alleged here is not a cognizable injury. *Wood v. Raffensperger*, 981 F.3d 1307, 1314–15 (11th Cir. 2020).
- In fact, in the tax context Plaintiff cites, it has long been the Supreme Court's "practice, for reasons of federal-state comity, to abstain from deciding the remedial effects of such a holding." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 427 (2010) (internal citations omitted).
- * Admitted pro hac vice
- ** Pro hac vice motion to be filed

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Appendix 49

241 A.3d 1058 Supreme Court of Pennsylvania.

IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION

Appeal of: Donald J. Trump for President, Inc. In re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election Appeal of: Donald J. Trump for President, Inc. In re: Canvass of Absentee and Mail-in

Ballots of November 3, 2020 General Election Appeal of: Donald J. Trump for President, Inc.

In re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election Appeal of: Donald J. Trump for President, Inc.

In re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election Appeal of: Donald J. Trump for President, Inc. In re: 2,349 Ballots in the 2020 General Election Appeal of: Allegheny County Board of Elections

> No. 31 EAP 2020 No. 32 EAP 2020 No. 33 EAP 2020 No. 34 EAP 2020 No. 35 EAP 2020 No. 29 WAP 2020 Submitted: November 18, 2020 Submitted: November 20, 2020 Decided: November 23, 2020

Synopsis

Background: Presidential campaign challenged decision of the county board of elections to count 8,329 absentee and mail-in ballots on grounds that the voters who submitted them failed to handwrite their name, street address or the date (or some combination of the three) on the ballot-return outer envelope. The Court of Common Pleas, Philadelphia County,

J-118A-E-2020, James Crumlish, J., upheld the board's decision. Campaign appealed, and the Supreme Court granted the board's application to exercise extraordinary jurisdiction. In separate proceeding, candidate for state senator initiated a statutory appeal from a decision by the county board of elections to canvass and count 2,349 absentee or mail-in ballots for the general election, notwithstanding the lack of a date of signature by the elector on the statutorily required elector declaration on the outside envelope of the ballots. The Court of Common Pleas, Allegheny County, No. GD 20-011654, Joseph M. James, Senior Judge, affirmed. Candidate appealed, and the Commonwealth Court, No. 1162 CD 2020, 2020 WL 6820816, reversed. Board filed emergency petition for appeal, which was granted, and appeals were consolidated.

Holdings: The Supreme Court, Nos. 31-35 EAP 2020 and 29 WAP 2020, Donohue, J., held that:

absentee or mail-in voter's failure to handwrite name and/or address under the full paragraph of the declaration on the back of the outer envelope was not a material violation of statutory directive to "fill out" the declaration, and

Per concurring opinion of Wecht, J., statutory requirement that absentee or mail-in ballot voter date and sign the voter declaration was not a minor irregularity which could be overlooked and thus, in future elections, the omission of either item would be sufficient, without more, to invalidate the ballot in question.

Affirmed; Commonwealth Court reversed.

Wecht, J., concurred in the result and filed concurring and dissenting opinion.

Dougherty, J., concurred in part and dissented in part with opinion in which Saylor, Chief Justice, and Mundy, J., joined.

Procedural Posture(s): On Appeal; Petition for Discretionary Review; Judgment.

*1061 Appeal from the Order of the Commonwealth Court entered November 19, 2020 at No. 1162 CD 2020, reversing the Order of the Court of Common Pleas of Allegheny County entered November 18, 2020 at No. GD 20-011654 and remanding.

Attorneys and Law Firms

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SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

Justice Donohue announces the judgment of the Court, joined by Justices Baer, Todd and Wecht, and files an opinion joined by Justices Baer and Todd

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

JUSTICE DONOHUE

These appeals present the question of whether the Election Code requires a *1062 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. Pursuant to our longstanding jurisprudence, central to the disposition of these appeals is whether the information is made mandatory by the Election Code or whether the inclusion of the information is directory, i.e., a directive from the Legislature that should be followed but the failure to provide the information does not result in invalidation of the ballot.

We are guided by well-established interpretive principles including that where the language of a statute is unambiguous, the language shall be controlling. 1 Pa.C.S. § 1921(b). In the case of ambiguity, we look to ascertain the legislative intent, and in election cases, we adhere to the overarching principle that the Election Code should be liberally construed so as to not deprive, inter alia, electors of their right to elect a candidate of their choice. *Pa. Democratic Party v. Boockvar*, — Pa. —, 238 A.3d 345, 356 (2020). Stated more fully:

Election laws will be strictly enforced to prevent fraud, but ordinarily will be construed liberally in favor of the right to vote. All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor. Where the elective franchise is regulated by statute, the regulation should, when and where possible, be so construed as

to insure rather than defeat the exercise of the right of suffrage. Technicalities should not be used to make the right of the voter insecure. No construction of a statute should be indulged that would disfranchise any voter if the law is reasonably susceptible of any other meaning.

Appeal of James, 377 Pa. 405, 105 A.2d 64, 65-66 (1954).

Guided by these principles and for the reasons discussed at length in this opinion, we conclude that the Election Code does not require boards 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 date, where no fraud or irregularity has been alleged.

In connection with five of these consolidated appeals, Petitioner Donald J. Trump for President, Inc. (the "Campaign") challenges the decision of the Philadelphia County Board of Elections (the "Philadelphia Board") to count 8,329 absentee and mail-in ballots. The Campaign does not contest that these ballots were all timely received by the Philadelphia Board prior to 8:00 p.m. on November 3, 2020 (election day); that they were cast and signed by qualified electors; and that there is no evidence of fraud associated with their casting. The Campaign instead contends that these votes should not be counted because the voters who submitted them failed to handwrite their name, street address or the date (or some combination of the three) on the ballot-return outer envelope. The Philadelphia County Court of Common Pleas, per the Honorable James Crumlish, upheld the Philadelphia Board's decision to count the ballots, ruling that the Election Code does not mandate the disqualification of ballots for a failure to include the challenged information, stressing that the inclusion or exclusion of this information does not prevent or promote fraud. The Campaign pursued an appeal to the Commonwealth Court. This Court granted the Philadelphia Board's application to exercise our extraordinary jurisdiction, *1063 42 Pa. C.S. § 726, over these cases then pending in the Commonwealth Court.

At or around the same time that the matters were being litigated in Philadelphia, across the state in Allegheny County, Nicole Ziccarelli, a candidate for the Pennsylvania Senate in the 45th Senatorial District (Allegheny-Westmoreland counties) 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. Again, all of the outer envelopes were signed, they are conceded to be timely and there are no allegations of fraud or illegality. On November 18, 2020, the Court of Common Pleas of Allegheny County, per the Honorable Joseph James, upheld the decision of the Allegheny County Board to count the ballots. Ziccarelli v. Allegheny County Board of Elections, No. GD-20-011654 (Allegheny Cty. Ct. Com. Pl.). Ziccarelli filed an appeal to the Commonwealth Court and an application in this Court requesting that we exercise extraordinary jurisdiction over her appeal. During the pendency of the request to this Court, on November 19, 2020, a three-judge panel of the Commonwealth Court, with one judge dissenting, reversed the common pleas court decision.

On November 20, 2020, the Allegheny County Board filed an emergency petition for allowance of appeal, which we granted, limited to whether the ballots contained in undated outer envelopes should be invalidated. We stayed the order of the Commonwealth Court pending the outcome of this appeal and consolidated it with the Philadelphia Board cases.

In these appeals, we are called upon to interpret several provisions of the Election Code. We set them forth at the outset since they guide the resolution of these appeals.

Section 3146.6(a) provides as follows with respect to absentee ballots:

> (a) 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 blueblack 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. § 3146.6(a) (emphasis added).

Section 3150.16(a) sets forth the procedure for the submission of a mail-in ballot:

> (a) General rule.--At any time after receiving an official mail-in ballot, but on 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 blueblack 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 *1064 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) (emphasis added).

Sections 3146.4 and 3150.14(b) delegate to the Secretary of the Commonwealth the responsibility to prescribe the form of the elector's declaration on the outer envelope used to mail the absentee and mail-in ballots:

§ 3146.4. Envelopes for official absentee ballots

The county boards of election shall provide two additional envelopes for each official absentee ballot of such size and shape as shall be prescribed by the Secretary of the Commonwealth, in order to permit the placing of one within the other and both within the mailing envelope. On the smaller of the two envelopes to be enclosed in the mailing envelope shall be printed, stamped or endorsed the words "Official Election Ballot," and nothing else. On the larger of the two envelopes, to be enclosed within the mailing envelope, shall be printed the form of the declaration of the elector, and the name and address of the county board of election of the proper **county**. The larger envelope shall also contain information indicating the local election district of the absentee voter. Said form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain among other things a statement of the electors qualifications, together with a statement that such elector has not already voted in such primary or election. The mailing envelope addressed to the elector shall contain the two envelopes, the official absentee ballot, lists of candidates, when authorized by section 1303 subsection (b) of this act, the uniform instructions in form and substance as prescribed by the Secretary of the Commonwealth and nothing else.

25 P.S. § 3146.4 (emphasis added).

§ 3150.14. Envelopes for official mail-in ballots

* * *

(b) Form of declaration and envelope.--The form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain, among other things, a statement of the elector's qualifications, together with a statement that the elector has not already voted in the primary or election.

25 P.S. § 3150.14(b) (emphasis added).

The pre-canvassing or canvassing of absentee and mail-in ballots proceed in accordance with the dictates of 25 P.S. § 3146.8(g)(3), as follows:

§ 3146.8. Canvassing of official absentee ballots and mail-in ballots

When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the "Registered Absentee and Mailin Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the "Registered Absentee *1065 and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File" verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3) (emphasis added).

Pursuant to the authority granted in § 3150.14(b), the Secretary of the Commonwealth developed the following declaration used in connection with the 2020 General Election:

I hereby declare that I am qualified to vote from the below stated address at this election; that I have not already voted in this election; and I further declare that I marked my ballot in secret. I am qualified to vote the enclosed ballot. I understand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand I may only vote by provisional ballot at my polling place, unless I surrender my balloting materials, to be voided, to the judge of elections at my polling place.

[BAR CODE]

X	2401
Date of signing (MM/DD/YYYY)/Fechade firme (M	(M/DD/YYYY)
Voter, print name/Votante, nombre en letra de imp	oreta
Voter, address (street)/Votante, dirreccion (calle)	

Visita and a second basis Alexander Come a second and

[LABEL – Voters' name and address]

In addition, the Secretary issued guidance to the county boards of elections with respect to the examination of ballot return envelopes. First, on September 11, 2020, she issued the following guidance:

3. EXAMINATION OF DECLARATION ON BALLOT **RETURN ENVELOPES:**

The county board of elections is responsible for approving ballots to be counted during pre-canvassing.

To promote consistency across the 67 counties, the county boards of elections should follow the following steps when processing returned absentee and mail-in ballots.

After setting aside ballots of elector's who died prior to the opening of the polls, the county board of elections shall examine the Voter's Declaration on the outer envelope of each returned ballot and compare the information on the outer envelope, i.e., the voter's name and address, with the information contained in the "Registered Absentee and Mail-in Voters File, the absentee voter's list and/or the Military Veterans' and Emergency Civilians Absentee Voters File."

If the Voter's Declaration on the return envelope is blank, that ballot return envelope *1066 must be set aside and not counted. If the board determines that a ballot should not be counted, the final ballot disposition should be noted in SURE. The ballot return status (Resp Type) should be noted using the appropriate drop-down selection.

If the Voter's Declaration on the return envelope is signed and the county board is satisfied that the declaration is sufficient, the mail-in or absentee ballot should be approved for canvassing unless challenged in accordance with the Pennsylvania Election Code.

Guidance Concerning Examination of Absentee and Mailin Ballot Return Envelopes, 9/11/2020, at 3. On September 28, 2020, the Secretary offered additional guidance on the treatment of ballot return envelopes:

With regard to the outer ballot-return envelope:

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.

A ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted. Ballot-return envelopes must be opened in such a manner as not to destroy the declarations executed thereon.

All ballot-return envelopes containing executed declarations must be retained for a period of two years in accordance with the Election Code.

Pre-canvass and Canvass Procedures

At the pre-canvass or canvass, as the case may be, the county board of elections should:

- · Segregate the unopened ballots of voters whose applications were challenged by the challenge deadline (5:00 PM on the Friday before the election).
 - o These ballots must be placed in a secure, sealed container until the board of elections holds a formal hearing on the challenged ballots.
 - o Ballot applications can only be challenged on the basis that the applicant is not qualified to vote.
- Set aside the ballot of any voter who was deceased before election day.
- · Set aside any ballots without a filled out, dated and signed declaration envelope.
- Set aside any ballots without the secrecy envelope and any ballots in a secrecy envelope that include text, mark, or symbol which reveals the identity of the

voter, the voter's political affiliation (party), or the voter's candidate preference.

The Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis.

No challenges may be made to mail-in or absentee ballot applications after 5:00 pm on the Friday before the election.

No challenges may be made to mail-in and absentee ballots at any time based on signature analysis.

NOTE: For more information about the examination of return envelopes, please refer to the Department's September 11, 2020 Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes.

Guidance Concerning Civilian Absentee and Mail-in Ballot Procedures, 9/28/2020, at 5, 8-9.

*1067 I. FACTUAL AND PROCEDURAL BACKGROUND

Pursuant to the General Assembly's passage of Act 77 of 2019, voters in Pennsylvania may cast their ballots in elections by absentee or no-excuse mail-in ballots. To do so, they must submit applications to county boards of elections. and in connection therewith must provide the address at which they are registered to vote. They must also sign a declaration affirming, among other things, that they are "eligible to vote by mail-in [or absentee] ballot at the forthcoming primary or election," and that "all of the information" supplied in the mail-in or absentee ballot application is "true and correct." 25 P.S. §§ 3150.12, 3146.2. Upon receipt of the application, the county board of elections must confirm the elector's qualifications and verify that the elector's address on the application matches the elector's registration. Upon the county board of elections' approval of the application, the elector is provided with a ballot, an inner "secrecy envelope" into which the ballot is to be placed, and an outer envelope into which the secrecy envelope is to be placed and returned to the board. The outer envelope has pre-printed on it (1) a voter's declaration, (2) a label containing the voter's name and address, and (3) a unique nine-digit bar code that links the outer envelope to the voter's registration file contained in the Statewide Uniform Registry of Electors ("SURE") system. After receiving the outer envelope, the board of elections stamps the date of receipt on it and then scans the unique nine-digit bar code, which links the voter's ballot to his or her registration file.

The pre-canvassing or canvassing of absentee and mail-in ballots then proceeds in accordance with the dictates of 25 P.S. § 3146.8(g)(3):

When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File" verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3).

Pursuant to this section, on November 9, 2020, the Philadelphia Board met to determine whether ballots separated into nine categories were "sufficient" to be precanvassed or canvassed. It concluded that four categories were not sufficient to be pre-canvassed or canvassed: (1) 472 ballots where the outer envelope lacked a signature and any other handwritten information; (2) 225 ballots where the outer envelope was not signed by the voter; (3) 112 ballots where the individual who completed the declaration appeared to be different from the individual who had been assigned the ballot; and (4) 4,027 ballots that were not submitted in a secrecy envelope.

In contrast, the Philadelphia Board approved as sufficient to be pre-canvassed or canvassed the ballots in five categories: (1) 1,211 ballots that lacked a handwritten date, address, and printed name on the back of the outer envelope (but were *1068 signed); (2) 1,259 ballots that lacked only a handwritten date on the back of the outer envelope (but were signed and contained a handwritten name and address); (3) 533 ballots that lack only a handwritten name on the back of the outer envelope (but were signed and dated and contained a handwritten address); (4) 860 ballots that lack only a handwritten address on the back of the outer envelope (but

were signed and dated and contained a handwritten name); (5) 4,466 ballots that lack only a handwritten name and address on the back of the outer envelope (but were signed and dated).

On November 10, 2020, the Campaign filed five pleadings entitled "Notice of Appeal via Petition for Review of Decision by the Philadelphia County Board of Elections," one for each of the five categories referenced above that the Philadelphia Board approved as sufficient to be pre-canvassed or canvassed. In each petition for review, the Campaign alleged that this Court, in Pa. Democratic Party v. Boockvar, -238 A.3d 345 (2020), declared that absentee and mail-in ballots cast in violation of the Election Code's mandatory requirements are void and cannot be counted. Petition for Review, 11/10/2020, ¶ 14. The Campaign further alleged that failures to include hand-written names, addresses and dates constituted violations of mandatory obligations under Sections 3146.6(a) and/or 3150.16(a) of the Election Code. Id. at 15-16. Accordingly, the Campaign alleged that the Board's decisions with respect to the absentee and mail-in ballots in the above-referenced five categories were based on a clear error of law and must be reversed. Id. at 32.

On November 13, 2020, Judge Crumlish held oral argument on the issues raised in the Petition for Review. In response to questions from Judge Crumlish, counsel for the Campaign agreed that the Petition for Review was "not proceeding based on allegations of fraud or misconduct." Transcript, 11/13/2020, at 13-14. She further agreed that the Campaign was not challenging the eligibility of the 8,329 voters in question and did not contest either that all of the ballots at issue were signed by the voters or that they had been timely received by the Board. Id. at 30-31, 37. Instead, she indicated that the Campaign was "alleging that the ballots were not filled out correctly." *Id.* at 14. Counsel for the DNC ¹ argued that the failures to handwrite names, addresses and dates "are, at most, minor technical irregularities that the Supreme Court of Pennsylvania has repeatedly said do not warrant disenfranchisement." Id. at 14. Counsel for the Philadelphia Board added that the Election Code includes no provision requiring "absolute technical perfection" when filling out the declaration on the outer envelope containing an absentee or mail-in ballot. Id. at 38.

Later that same day, Judge Crumlish entered five orders affirming the Philadelphia Board's decision to count the contested ballots. In his orders, Judge Crumlish noted that while the declaration contained a specific directive to the voter to sign the declaration, it made no mention of filling out the date or other information. Trial Court Orders, 11/13/2020, ¶ 2. He further found that while the Election Code provides that while the voter shall "fill out" and date the declaration, the term "'fill out' is not a defined term and is ambiguous." Id. at ¶ 4. He indicated that the outer envelope already contains a pre-printed statement of the voter's name and address, and that "[n]either a date nor the elector's *1069 filling out of the printed name or of the address are requirements necessary to prevent fraud." Id. at ¶ 5-6. Concluding that "[t]he Election Code directs the Court of Common Pleas in considering appeals from the County Board of Elections to make such decree as right and justice may require[,]" id. at ¶ 8 (quoting 25 P.S. § 3157), Judge Crumlish upheld the decision of the Philadelphia Board.

The Campaign filed appeals from Judge Crumlish's orders in the Commonwealth Court on November 14, 2020, and the next day the Commonwealth Court issued an order consolidating the five appeals and setting an expedited briefing schedule. On November 17, 2020, the Philadelphia Board filed an application with this Court to exercise its extraordinary jurisdiction, 42 Pa.C.S. § 726, over the consolidated appeals, which we granted by order dated November 18, 2020.

In our order granting the Philadelphia Board's application for the exercise of extraordinary jurisdiction, we stated the issue to be decided as follows:

> Does the Election Code require county boards of elections to disqualify mailin or absentee ballots submitted by qualified electors who signed their ballot's outer envelopes but did not handwrite their name, their address, and/or a date, where no fraud or irregularity has been alleged?

On November 10, 2020, the Allegheny County Board decided to canvass 2,349 mail-in ballots that contained a signed but undated declaration. Ziccarelli challenged the decision in an appeal to the court of common pleas ultimately heard and decided by the Honorable Joseph James. It was not disputed that all 2,349 voters signed and printed their name and address on the outer envelopes and returned the ballots to the Allegheny County Board on time. Each of the ballots was processed in the Statewide Uniform Registry of Electors ("SURE") system and was time-stamped when it was delivered to the Allegheny County Board on or before November 3, 2020. At a hearing, via Microsoft Teams, on November 17, 2020, the Democratic Party and James Brewster (Ziccarelli's opponent in the 45th Senatorial District race) moved to intervene, which motion was granted. At the hearing, Ziccarelli stated that she was not claiming voter fraud regarding the challenged ballots.

In an opinion and order dated November 18, 2020, Judge James affirmed the Allegheny County Board's decision to count the ballots. He concluded that the date provision in Section 3150.16(a) is directory, not mandatory, and that "ballots containing mere minor irregularities should only be stricken for compelling reasons," citing Shambach v. Bickhart, 577 Pa. 384, 845 A.2d 793, 798 (2004). Noting that the ballots were processed in the SURE system and timestamped when delivered to the Allegheny County Board, he found that the technical omission of the handwritten date on a ballot was a minor technical defect and did not render the ballot deficient.

Ziccarelli immediately appealed Judge James' decision to the Commonwealth Court and contemporaneously filed an application to this Court requesting our exercise of extraordinary jurisdiction, noting that the issue presented was accepted by this Court as part of the Philadelphia Board appeals. While the application was pending, the Commonwealth Court ordered expedited briefing and on November 19, 2020, issued an opinion and order reversing the Court of Common Pleas of Allegheny County and remanded. In Re: 2,349 Ballots in the 2020 General Election; Appeal of: Nicole Ziccarelli, 241 A.3d 694, 1162 C.D. 2020 (Commw. Ct. 2020). Ziccarelli then withdrew her application for extraordinary jurisdiction.

*1070 On November 20, 2020, this Court granted the Allegheny County Board's Petition for Allowance of Appeal limited to the question of whether the ballots contained in undated but signed outer envelopes should be invalidated. The opinion of the Commonwealth Court will be discussed, as necessary, in the analysis that follows. The order was stayed pending our disposition of these consolidated cases.

The pertinent scope and standard of review follow: the Court of Common Pleas' decision is reviewed on appeal "to determine whether the findings are supported by competent evidence and to correct any conclusions of law erroneously made." In re Reading Sch. Bd. of Election, 535 Pa. 32, 634 A.2d 170, 171-72 (1993). The Court of Common Pleas, in turn, could reverse the Philadelphia Board's decision only for an abuse of discretion or error of law. See Appeal of McCracken, 370 Pa. 562, 88 A.2d 787, 788 (1952). As the issue involves the proper interpretation of the Election Code, it presents a question of law and our standard of review is de novo and our scope of review is plenary. See, e.g., Banfield v. Cortés, 631 Pa. 229, 110 A.3d 155, 166 (2015).

II. ARGUMENTS OF THE PARTIES

Although more fully developed in our analysis set forth later in this opinion, we here briefly summarize the arguments of the parties and intervenors.

The Campaign argues that the General Assembly set forth in the Election Code the requirements for how a qualified elector can cast a valid absentee or mail-in ballot. Campaign's Brief at 22. One of those requirements is for each elector to "fill out, date, and sign" the declaration on the Outside Envelope. Id. (citing 25 P.S. §§ 3146.6(a) and 3150.16(a)). According to the Campaign, this Court has repeatedly ruled that the requirements of the sections of Election Code relevant here impose mandatory obligations, and that ballots cast in contravention of the these requirements are void and cannot be counted. Id. at 23. As a result, the Campaign insists that the trial court erred in affirming the Board's decision to count the 8,329 non-conforming absentee and mail-in ballots. Id.

The Philadelphia Board, conversely, contends that the Election Code does not require the Philadelphia Board to set aside timely-filed ballots by qualified electors that are merely missing handwritten names, street addresses, and/or dates on the signed voter declaration. Philadelphia Board's Brief at 12. Contrary to the Campaign's contention that the provisions of the Election Code at issue here impose exclusively mandatory requirements, the Philadelphia Board argues that Pennsylvania courts have long held that minor errors or omissions should not result in disenfranchisement, particularly in cases where the errors or omissions do not implicate the board's ability to ascertain the voter's right to vote or the secrecy or sanctity of the ballot. Id. Here, the Philadelphia Board notes that the Campaign does not allege that the voters at issue here were not qualified to vote and have not asserted that any fraud or other impropriety has occurred. Id. As such, it concludes that it acted properly and within its discretion in determining that these omissions were not a basis for setting aside those ballots. Id.

The DNC largely concurs with the Philadelphia Board's arguments, indicating that there is no statutory requirement that voters print their full name or address on the outer envelopes and that adding a date to the envelope serves no compelling purpose. DNC's Brief at 9-10.

Ziccarelli argues further that, in regard to outer envelopes not containing a voter-supplied date, this Court's opinion in *1071 In Re: Nov. 3, 2020 General Election, -Pa. —, 240 A.3d 591 (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 Ziccarelli's reliance on In Re Nov. 3, 2020 General Election by noting that Ziccarelli'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 Ziccarelli relies.

III. ANALYSIS

We begin by recognizing from the outset that it is the "longstanding and overriding policy in this Commonwealth to protect the elective franchise." Shambach v. Bickhart, 577 Pa. 384, 845 A.2d 793, 798 (2004). "The Election Code must be liberally construed so as not to deprive ... the voters of their right to elect a candidate of their choice." Ross Nomination Petition, 411 Pa. 45, 190 A.2d 719, 719 (1963). It is therefore a well-settled principle of Pennsylvania election law that "[e]very rationalization within the realm of common sense should aim at saving the ballot rather than voiding it." Appeal of Norwood, 382 Pa. 547, 116 A.2d 552, 554-55 (1955). It is likewise settled that imbedded in the Election Code is the General Assembly's intent to protect voter privacy in her candidate choice based on Article VII, Section 4 of the Pennsylvania Constitution and to prevent fraud and to otherwise ensure the integrity of the voting process.

We agree with the Campaign's observation that in Sections 3146.6(a) and 3150.16(a), the General Assembly set forth the requirements for how a qualified elector may cast a valid absentee or mail-in ballot. Campaign's Brief at 22. We further agree that these sections of the Election Code specifically provide that each voter "shall fill out, date, and sign" the declaration on the outside envelope. Id. We do not agree with the Campaign's contention, however, that because the General Assembly used the word "shall" in this context, it is of necessity that the directive is a mandatory one, such that a failure to comply with any part of it requires a board of elections to declare the ballot void and that it cannot be counted. It has long been part of the jurisprudence of this Commonwealth that the use of "shall" in a statute is not always indicative of a mandatory directive; in some instances, it is to be interpreted as merely directory. See, e.g., Commonwealth v. Baker, 547 Pa. 214, 690 A.2d 164, 167 (1997) (citing Fishkin v. Hi–Acres, Inc., 462 Pa. 309, 341 A.2d 95 (1975)); see also Commonwealth ex rel. Bell v. Powell, 249 Pa. 144, 94 A. 746, 748 (1915) (quoting Bladen v. Philadelphia, 60 Pa. 464, 466 (1869) ("It would not perhaps be easy to lay down any general rule as to when the provisions of a statute are merely directory, and when mandatory and imperative.")). The Campaign's reliance on this Court's recent decision in Pa. Democratic Party v. Boockvar, — Pa. —, 238 A.3d 345 (2020) for the proposition it asserts is misplaced.

In Pa. Democratic Party, we held that the requirement in Section 3150.16(a) that a mail-in voter place his or her ballot in the inner secrecy envelope was a mandatory requirement and thus a voter's failure to comply rendered the ballot void. Pa. Democratic Party, 238 A.3d at 380. In concluding that the use of the secrecy envelope was a mandatory, rather than a discretionary directive, we reviewed our prior decisions on the distinction between mandatory and discretionary provisions in the Election Code, including Shambach v. Bickhart, 577 Pa. 384, 845 A.2d 793 (2004), *1072 In re Luzerne County Return Board, Appeal of Elmer B. Weiskerger, 447 Pa. 418, 290 A.2d 108 (1972), and In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, Appeal of John Pierce, 577 Pa. 231, 843 A.2d 1223 (2004).

In Shambach, the Court declined to invalidate a write-in vote cast for a candidate who was named on the ballot, in direct violation of the Election Code's instruction that a voter could only write in a person's name if the name of said individual was "not already printed on the ballot for that office." Shambach, 845 A.2d at 795. In reaching that conclusion, the Court observed that "[m]arking a ballot is an imprecise process, the focus of which is upon the unmistakable registration of the voter's will in substantial conformity to the statutory requirements." Id. at 799 (quoting Appeal of Gallagher, 351 Pa. 451, 41 A.2d 630, 632 (1945)).

In Weiskerger, this Court refused to invalidate a ballot based upon the "minor irregularity" that it was completed in the wrong color of ink. The provision of the Election Code in question provided that "' '[a]ny ballot that is marked in blue, black or blue-black ink ... shall be valid and counted.'

Weiskerger, 290 A.2d at 109 (citing 25 P.S. § 3063). In providing that ballots completed in the right color must be counted, we noted that the General Assembly "neither stated nor implied that ballots completed in a different color must not be counted." *Id.* We thus treated the instruction to use blue, black or blue-black ink as merely directory.

In Pa. Democratic Party, we compared these cases to our decision in In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, Appeal of John Pierce, 577 Pa. 231, 843 A.2d 1223 (2004), where we held that the Election Code's "inperson" ballot delivery requirement, see 25 P.S. § 3146.6, was mandatory, and that votes delivered by third persons must not be counted. Appeal of Pierce, 843 A.2d at 1231. There, we recognized that the in-person requirement served important purposes in the Election Code, including "limit[ing] the number of third persons who unnecessarily come in contact with the ballot[,] ... provid[ing] some safeguard that the ballot was filled out by the actual voter, ... and that once the ballot has been marked by the actual voter in secret, no other person has the opportunity to tamper with it." Id. at 1232. We thus explained in Pa. Democratic Party that "the clear thrust of Appeal of Pierce, ... is that, even absent an express sanction, where legislative intent is clear and supported by a weighty interest like fraud prevention, it would be unreasonable to render such a concrete provision ineffective for want of deterrent or enforcement mechanism." Pa. Democratic Party, 238 A.3d at 380 (citing *Appeal of Pierce*, 843 A.2d at 1232).

Based upon this comparison between *Shambach*, *Weiskerger* and Appeal of Pierce, in Pa. Democratic Party we determined that the decision in *Appeal of Pierce* provided the appropriate guidance for the analysis of the secrecy envelope requirement. We held that "[i]t is clear that the Legislature believed that an orderly canvass of mail-in ballots required the completion of two discrete steps before critical identifying information on the ballot could be revealed. The omission of a secrecy envelope defeats this intention." Pa. Democratic Party, 238 A.3d at 380. Unlike in Shambach and Weiskerger which involved "minor irregularities," the use of a secrecy envelope implicated a "weighty interest," namely secrecy in voting protected expressly by Article VII, Section 4 of our state charter. Id. As such, we recognized the use of a secrecy envelope as a mandatory requirement and that failures to comply with the requirement required that the ballot must be disqualified." Id.; see also id. at 378 (quoting JPay, Inc. v. Dep't of Corr. & Governor's Office of Admin., 89 A.3d 756, 763 (Pa. Commw. 2014) ("While *1073 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.")).

To determine whether the Election Code's directive that the voter handwrite their names, address and the date of signing the voter declaration on the back of the outer envelope is a mandatory or directory instruction requires us to determine whether the intent of the General Assembly was clear and whether the failure to handwrite the information constitutes "minor irregularities" or instead represent "weighty interests," like fraud prevention or ballot secrecy that the General Assembly considered to be critical to the integrity of the election.

(1) Failures to include handwritten names and addresses

Beginning with the Campaign's contention that ballots may not be counted if a voter fails to handwrite their name and/ or address under the full paragraph of the declaration on the back of the outer envelope, we conclude that given the factual record in this case and the mechanics of the pre-canvassing and canvassing procedures including the incorporation of reliance on the SURE system, this "requirement" is, at best, a "minor irregularity" and, at worst, entirely immaterial. More to the point, the direction to the voter to provide a handwritten name and/or address is not only not mandatory, it is not a directive expressed in the Election Code. Thus, these directions do not meet the first prong of the test used in Pa. Democratic Party: the clear intent of the General Assembly.

The Election Code does not require that the outer envelope declaration include a handwritten name or address at all. Instead, Sections 3146.4 (absentee) and 3150.14(b) (mail-in) provide only that the declaration must include "a statement of the elector's qualifications, together with a statement that the elector has not already voted in the primary or election." 25 P.S. §§ 3146.4, 3150.14(b). Aside from this information (none of which is relevant to the present issue), the General Assembly delegated to the Secretary of the Commonwealth the obligation to prescribe the form of declaration and envelope for absentee and mail-in ballots, presumably to allow the inclusion of information that would be helpful for administrative or processing purposes. Id. ² As such, the decision to include spaces in the declaration for handwritten names and addresses was made solely by the Secretary of the Commonwealth, not the General Assembly.

It would be a stretch to divine that the General Assembly was advancing any weighty interest for the inclusion of handwritten names and addresses in the declaration such that a voter's failure to include them should result in the ballot not being counted. Moreover, the Campaign does not argue that the Secretary's request for handwritten names and addresses implicated any "weighty interests" that would compel a finding that the request to provide them constituted a mandatory requirement.³

*1074 The Campaign argues that we should read the "handprinted name and address" requirement into the directives in Section 3146.6(a) and 3150.16(a) that the voter "fill out" the declaration. Campaign's Brief at 30. Citing to dictionary definitions, the Campaign contends that "fill out" means "to write or type information in spaces that are provided for it." Id. at 32. Because 8,349 voters did not "fill out" one or more spaces provided on the outer envelope provided in the declaration (including the voter's name and/ or address), the Campaign argues that those ballots were nonconforming and could not be counted. Id. at 29. The directive to "fill out" does not give any legislative definition to the specific information to be placed in the blank spaces. It is the weight of the information that must be tested in the analysis. As stated, since the General Assembly did not choose the information to be provided, its omission is merely a technical defect and does not invalidate the ballot.

Further, as Judge Crumlish observed, the term "fill out" is ambiguous. ⁴ Trial Court Opinion, 11/13/2020, ¶ 4. As Judge Crumlish recognized, the term "fill out" is not a defined term under the Election Code. Id. Moreover, and contrary to the Campaign's contention that no alternative understanding of the term "fill out" has been proffered, the Campaign has failed to recognize, the voter's name and address are already on the back of the outer envelope on a pre-printed label affixed no more than one inch from the declaration itself. A voter could reasonably have concluded that the blanks requesting his or her name and address needed to be "filled out" only if the name and/or address on the label was incorrect or incomplete, as it was unnecessary to provide information that was already on the back of the outer envelope. 5 To add *1075 further confusion, the declaration itself can be read to refer to the label: "I hereby declare that I am qualified to vote from the below stated address" can be read to mean the address as already stated on the label.

The text of the Election Code provides additional evidence of the directory nature of the provisions at issue. With regard to individuals who are not able to sign their name due to illness or physical disability, the General Assembly imposed a requirement that the declarant provide his or her "complete address." 25 P.S. § 3146.6(a)(3); 25 P.S. § 3150.16(a.1). These provisions demonstrate that the General Assembly clearly knew how to impose such a requirement when it wishes to do so. In re Nov. 3, 2020 Gen. Election, — Pa. —, 240 A.3d 591, 610-11 (2020) (stating that the General Assembly's prior inclusion of a signature comparison requirement demonstrated that "it understands how to craft language requiring signature comparisons at canvassing when it chooses to do so"). Moreover, Sections 3146.6(a)(3) and 3150.16(a.1) contain a precise form of declaration, crafted by the General Assembly, pertaining to voters with disabilities evidencing the General Assembly's understanding of how to mandate a precise declaration without resort to delegating non-essential information to the Secretary.

Finally, the text of the Election Code further demonstrates the lack of any need for handwritten names and addresses. Section 3146.8(g)(3), which relates to the canvassing of official absentee ballots and mail-in ballots, provides, in relevant part:

When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable.

25 P.S. § 3146.8(g)(3). The county board of elections' duty to keep a "Military Veterans and Emergency Civilians Absentee Voters File," which is not relevant to the current dispute, is governed by 25 P.S. § 3146.2c(b). Section 3146.2c(a) previously housed the board's duty to keep a "Registered Absentee and Mail-in Voters File." However, the General Assembly recently eliminated this directive. See 2020, March 27, P.L. 41, No. 12, § 8, imd. effective (deleting subsection (a), which required county board of elections to maintain at its office "a file containing the duplicate absentee voter's temporary registration cards of every registered elector to whom an absentee ballot has been sent"). By virtue of this amendment, the General Assembly eliminated one of the reference points that still appear in Section 3146.8(g)(3). The current Section 3146.2c(c) directs the county board to maintain the "the absentee voters' list" referenced in Section 3146.8(g)(3). The General Assembly also amended Section 3146.2c(c), which previously only directed the chief clerk to "prepare a list for each election district showing the names and post office addresses of all voting residents thereof to whom official absentee ballots shall have been issued," to include such voting residents who were issued mail-in ballots. *See* 2019, Oct. 31, P.L. 552, No. 77, § 5.1, imd. effective (inserting "or mail-in" twice in subsection (c)).

*1076 As such, as relevant for our purposes, Section 3146.8(g)(3) directs that "the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the ... the absentee voters' list," which, pursuant to Section 3146.2c(c), now also contains voters who received mail-in ballots. A close reading of the language chosen by the General Assembly here is telling. Section 3146.8(g)(3) directs the board to "examine the declaration on the envelope" and "compare the information thereon" to the absentee (and mailin) voters' list. 25 P.S. § 3146.8(g)(3) (emphasis added). Reading these phrases together, it is clear that the General Assembly intended that the information to be compared to the absentee (and mail-in) voters' list is the information on the outer envelope which includes the pre-printed name and address. If the General Assembly intended for the information written by the voter to be compared to the absentee voters' list, it would have used the term "therein," thus directing the board to compare the information contained "within" the declaration (the handwritten name and address).

The following sentence in this section further suggests that the General Assembly intended such bifurcation. Section 3146.8(g)(3) next states:

If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the ... the absentee voters' list ... verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3). Here, the board is directed to consider whether the declaration is sufficient (i.e., the examination contained in the previous sentence) and also ensure that the absentee voters' list confirms the voter's right to vote (i.e., the comparison of the printed information to the relevant list from the prior sentence).

(2) Failures to include dates

Both the Campaign and Ziccarelli argue that the requirement to state the date on which declaration was signed is a mandatory obligation requiring disenfranchisement for lack of compliance. We disagree, as we conclude that dating the declaration is a directory, rather than a mandatory, instruction, and thus the inadvertent failure to comply does not require that ballots lacking a date be excluded from counting. As reviewed hereinabove, in our recent decision in Pa. *Democratic Party*, we reiterated that the distinction between directory and mandatory instructions applies with respect to a voter's obligations under the Election Code, and that only failures to comply with mandatory obligations, which implicate both legislative intent and "weighty interests" in the election process, like ballot confidentiality or fraud prevention, will require disqualification. Pa. Democratic Party, 238 A.3d at 379-80.

The Commonwealth Court and Ziccarelli relied upon the Election Code's use of the of "shall ... date" language in construing the date obligation as mandatory. In Re: 2,349 Ballots in the 2020 General Election, Appeal of: Nicole Ziccarelli, 241 A.3d 694, 1162 C.D. 2020, 10 (Pa. Comm. 2020). Although unlike the handwritten name and address, which are not mentioned in the statute, the inclusion of the word "date" in the statute does not change the analysis because the word "shall" is not determinative as to whether the obligation is mandatory or directive in nature. That distinction turns on whether the obligation carries "weighty interests." The date that the declaration is signed is irrelevant to a board of elections' comparison of the voter declaration *1077 to the applicable voter list, and a board can reasonably determine that a voter's declaration is sufficient even without the date of signature. Every one of the 8,329 ballots challenged in Philadelphia County, as well as all of the 2,349 ballots at issue in Allegheny County, were received by the boards of elections by 8:00 p.m. on Election Day, so there is no danger that any of these ballots was untimely or fraudulently back-dated. Moreover, in all cases, the receipt date of the ballots is verifiable, as upon receipt of the ballot, the county board stamps the date of receipt on the ballotreturn and records the date the ballot is received in the SURE system. The date stamp and the SURE system provide a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superflous.

Ziccarelli offers two alternative "weighty interests" for our consideration. She first contends that the date on which the declaration was signed may reflect whether the person is a "qualified elector" entitled to vote in a particular election. Pursuant to Section 3150.12b (entitled "Approval of application for mail-in ballot"), a board of elections may have determined that the person was a qualified elector and thus entitled to receive a mail-in ballot. Pursuant to Section 2811, however, to be a qualified elector, "[h]e or she shall have resided in the election district where he or she shall offer to vote at least thirty days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within thirty days preceding the election." 25 P.S. § 2811. As a result, Ziccarelli contends that the person may have been qualified to vote in a particular voting district at the time of applying for a mail-in ballot, but no longer a qualified elector in that voting district on Election Day. Ziccarelli's Brief at 16.

This unlikely hypothetical scenario is not evidence of a "weighty interest" in the date on the document for assuring the integrity of Pennsylvania's system for administering mailin voting. Among other things, the canvassing statute, 25 P.S. $\S 3146.8(g)(3)$, directs the board to examine the declaration on the envelope of each ballot and compare the information thereon with that contained in the now defunct "Registered Absentee and Mail-in Voters File." See discussion supra pp. 1073-75. The date of signing the declaration will not be of any benefit in performing this task, as the name of the voter at issue will be on this list (as a result of his or her approval to receive a mail-in ballot), and the date of signing will provide no information with respect to whether or not he or she has left the voting district in the interim. Most critically, our current statutory framework includes no requirement that a county board of elections investigate whether an individual who had been confirmed as a qualified elector at the time of approval to receive a mail-in ballot remains as a qualified elector on Election Day. If the General Assembly had so intended, it would certainly have expressly stated it, as opposed to nebulously tucking such an unprecedented requirement into the instructions to the Secretary for designing the declaration. Second, Ziccarelli argues that the date of signature of the declaration will serve to prevent double voting, as "whether an elector has already voted in the election for which the ballot is issued, by its very nature, depends on the date on which the declaration was signed." Ziccarelli's Brief at 16. Boards of elections do not use signatures or any handwritten information to prevent double voting. Duplicate voting is detected by the use of bar codes through the SURE system, and the board identifies the earlier cast vote by referencing the date it received the ballot, not the date on which the declaration was signed.

*1078 Ziccarelli and the Commonwealth Court insist that this Court "has already held that mail-in ballots with undated declarations are not 'sufficient' and, thus, must be set aside." Ziccarelli's Brief at 9; In Re: 2,349 Ballots in the 2020 General Election, 1162 C.D. 2020, at 10. In support of this contention, they reference an observation in our recent decision in In re November 3, 2020 General Election, — Pa. —, 240 A.3d 591 (2020), that when assessing the sufficiency of a voter's declaration, "the county board is required to ascertain whether the return envelope has been filled out, dated, and signed - and if it fails to do so then the ballot cannot be designated as "sufficient" and must be set aside. 6 Id. at 608-09. This statement is being taken out of context. Our statement in 2020 General Election was in reference to the limitations on what an election board is directed by the statute to do when assessing the sufficiency of a voter's declaration for the express purpose of indicating what they were not to do, i.e., signature comparisons. The question in In Re: Nov. 3, 2020 General Election was a narrow one. We did not address (as it was not at issue) whether a county board of elections could find a declaration as sufficient even though it was undated. That question requires an entirely different analysis that depends in significant part on whether dating was a mandatory, as opposed to a directive, requirement. We have conducted that analysis here and we hold that a signed but undated declaration is sufficient and does not implicate any weighty interest. Hence, the lack of a handwritten date cannot result in vote disqualification.

IV. CONCLUSION

As we recognized in Pa. Democratic Party, "while both mandatory and *1079 directory provisions of the Legislature are meant to be followed, the difference between a mandatory and directory provision is the consequence for noncompliance: 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. Here we conclude that while failures to include a handwritten name, address or date in the voter declaration on the back of the outer envelope, while constituting technical violations of the Election Code, do not warrant the wholesale disenfranchisement of thousands of Pennsylvania voters. As we acknowledged in Shambach, "ballots containing mere minor irregularities should only be stricken for compelling reasons." Shambach, 845 A.2d at 799; see also Appeal of Gallagher, 351 Pa. 451, 41 A.2d 630, 632 (1945) ("[T]he power to throw out a ballot for minor irregularities ... must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons."). Having found no compelling reasons to do so, we decline to intercede in the counting of the votes at issue in these appeals.

The decision of the Philadelphia Court of Common Pleas is hereby affirmed. The decision of the Commonwealth Court is hereby reversed and the decision of the Allegheny County Court of Common Pleas is reinstated.

Justices Baer and Todd join the opinion.

Justice Wecht concurs in the result and files a concurring and dissenting opinion.

Justice Dougherty files a concurring and dissenting opinion in which Chief Justice Saylor and Justice Mundy join.

CONCURRING AND DISSENTING OPINION

JUSTICE WECHT

I agree with the conclusion that no mail-in or absentee ballot should be set aside solely because the voter failed to hand print his or her name and/or address on the declaration form on the ballot mailing envelope. These items are prescribed not by statute but by the Secretary of the Commonwealth under legislatively delegated authority. Absent evidence of legislative intent that what in context amounts to redundant information must be furnished to validate a mail ballot, their omission alone should not deny an elector his or her vote. But I part ways with the conclusion reflected in the Opinion Announcing the Judgment of the Court ("OAJC") that a voter's failure to comply with the statutory requirement that voters date the voter declaration should be overlooked as a "minor irregularity." This requirement is stated in unambiguously mandatory terms, and nothing in the Election Code 1 suggests that the legislature intended that courts should construe its mandatory language as directory. Thus, in future elections, I would treat the date and sign requirement as mandatory in both particulars, with the omission of either item sufficient without more to invalidate the ballot in question.² However, under the circumstances *1080 in which the issue has arisen, I would apply my interpretation only prospectively. So despite my reservations about the OAJC's analysis, I concur in its disposition of these consolidated cases.

Concurring in this Court's recent decision in Pennsylvania Democratic Party v. Boockvar, I expressed my increasing discomfort with this Court's willingness to peer behind the curtain of mandatory statutory language in search of some unspoken directory intent.

[If this Court is] to maintain a principled approach to statutory interpretation that comports with the mandate of our Statutory Construction Act, ³ if we are to maximize the likelihood that we interpret statutes faithfully to the drafters' intended effect, we must read mandatory language as it appears, and we must recognize that a mandate without consequence is no mandate at all. 4

There, I wrote separately in support of this Court's ruling requiring the invalidation of mail-in ballots that were returned to boards of elections not sealed in their secrecy envelopes as required by statutory language. The secrecy envelope requirement at issue in that case was no less ambiguous than the "fill out, date and sign" mandate at issue in this case. 5 Nonetheless, departing from that holding for reasons that do not bear close scrutiny, the OAJC concludes that invalidation should not follow for failure to comply with the Election Code provisions requiring that "the elector shall ... fill out, date and sign the declaration printed on" the ballot mailing envelope, even though this requirement appears in precisely the same statutory provisions as were at issue in *PDP*.

Section 3150.16 of the Election Code, governing "[v]oting by mail-in electors"—and its counterpart for absentee ballots, which employs the same operative language ⁶—provides:

> At any time after receiving an official mail-in ballot, but on 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 *1081 franked, or deliver it in person to said county board of election. 7

While this Court has not reviewed every constituent step this provision prescribes, we have addressed several of the requirements, taking it upon ourselves to weigh in each instance whether to interpret the mandatory statutory language as being mandatory in fact. The law those cases now comprise is so muddled as to defy consistent application, an inevitable consequence of well-meaning judicial efforts to embody a given view of what is faithful to the spirit of the law, with the unfortunate consequence that it is no longer clear what "shall" even means.

Nearly fifty years ago, this Court considered whether a ballot completed in red or green ink should be counted given that the statute provided by its terms only for the canvassing of ballots completed in blue/black ink. 8 Then-applicable Section 3063 of the Election Code provided that "[a]ny ballot that is marked in blue, black or blue-black ink, in fountain pen or ball point pen, or black lead pencil or indelible pencil, shall be valid and counted." ⁹ The Court determined that the Code did not require the invalidation of ballots completed in other colors, holding that the mandatory language was merely directory in effect:

[T]he power to throw out a ballot for minor irregularities should be sparingly used. It should be done only for very compelling reasons. Marking a ballot in voting is a matter not of precision engineering but of an unmistakable registration of the voter's will in substantial conformity to statutory requirements. In construing election laws[,] while we must strictly enforce all provisions to prevent fraud over overriding concern at all times must be to be flexible in order to favor the right to vote. Our goal must be to enfranchise and not to disenfranchise. This section of the code merely assures the validity of ballots marked in blue, black or blue-black ink. It does not ... specify that any other type of marking will necessarily be void. We have noted in other cases that the dominant theme of this section is to prevent ballots from being identifiable. A ballot should not be invalidated under [25 P.S. § 3063] unless the voter purposely makes a mark thereon or commits some other act in connection with this ballot to distinguish and identify it. The proper interpretation of this portion of the statute considering the occasion for its enactment, the mischief to be remedied, and the policy to liberally construe voting laws in the absence of fraud, is that the ballot is valid unless there is a clear showing that the ink used was for the purpose of making the ballot identifiable. 10

As this Court later stressed in *Appeal of Pierce*, *Weiskerger* "was decided before the enactment of the Statutory Construction Act [("SCA")], which dictates that legislative intent is to be considered only when a statute is ambiguous." 11 Thus, while *Pierce* focused on distinguishing *1082 Weiskerger, it nonetheless implicitly called into question the Weiskerger Court's casual dismissal of the language of the statute there at issue because the various factors the Weiskerger Court cited as relevant to its decision not to give "shall" mandatory effect are relevant under the SCA only when the statute is susceptible of two or more reasonable interpretations. 12

In insisting that a court's goal should be to "enfranchise and not to disenfranchise" and to be "flexible" in furtherance of that goal, the Weiskerger Court found itself awash in language so slippery as to defy consistent application. The Court posited the existence of "minor irregularities," a term we repeat often but have yet to define with suitable rigor, ¹³ and posited that ballots should be invalidated only for "very compelling reasons." 14 It also blessed "substantial conformity," and directed courts to "be flexible in order to favor the right to vote"—evidently even when doing so runs counter to statutory directives stated in mandatory terms. ¹⁵

Perhaps most troublingly, the Court posited that its "goal must be to enfranchise and not to disenfranchise." ¹⁶ A court's only "goal" should be to remain faithful to the terms of the statute that the General Assembly enacted, employing only one juridical presumption when faced with unambiguous language: that the legislature meant what it said. And even where the legislature's goal, however objectionable, is to impose a requirement that appears to have a disenfranchising effect, it may do so to any extent that steers clear of constitutional protections. In any event, even if the Weiskerger Court faithfully applied the common-law principles it cited, it did so inconsistently with the SCA's contrary guidance, which issued later the same year and binds us today. ¹⁷

*1083 But the advent of the SCA did not prevent this Court from repeating the same mistake even decades later. In Shambach v. Bickhart, ¹⁸ a voter wrote in a candidate for office despite the fact that the candidate appeared on the official ballot for that office. This facially violated the Election Code, which provided that the voter shall, in the designated area, "write the identification of the office in question and the name of any person not already printed on the ballot for that office, and such mark and written insertion shall count as a vote for that person for such office." ¹⁹ Echoing Weiskerger, the Shambach Court observed that, "although election laws must be strictly construed to prevent fraud, they ordinarily will be construed liberally in favor of the right to vote." ²⁰ Thus, the Court

"[has] held that ballots containing mere irregularities should only be stricken for compelling reasons." ²¹ In support of this particular proposition, though, the Court cited only decisions that predated the SCA. 22 Much as in Weiskerger, the Court held that the absence of statutory language requiring the invalidation of a ballot completed in violation of the mandatory language of Section 3031.12(b)(3), combined with the amorphous principles it drew from the Court's prior cases, precluded the invalidation of a nonconforming ballot, effectively writing unambiguous language out of the Election Code entirely.

We restored a greater degree of rigor in *Pierce*. In that case, we considered whether absentee ballots delivered by third persons on behalf of non-disabled voters were invalid under the Election Code, which provided that "the elector shall send [the absentee ballot] by mail, postage prepaid, except where franked, or deliver it in person to said county board of election." ²³ There, in a step the *Shambach* Court tacitly bypassed, the Court underscored the SCA's direction that a court's sole objective in construing a statute is to "ascertain and effectuate the intention of the General Assembly," and that, "[g]enerally speaking, the best indication of legislative intent is the plain language of a statute." ²⁴ "[I]t is only when the words of a statute 'are not explicit' that a court may resort to other considerations, such as the statute's perceived 'purpose,' in order to ascertain legislative intent." ²⁵ In this light, the Court turned to the legislature's use of the word "shall." "Although some contexts may leave the precise meaning of the word 'shall' in doubt," the Court opined, "this *1084 Court has repeatedly recognized the unambiguous meaning of the word in most contexts." ²⁶ As noted *supra*, this Court in *Pierce* declined to treat *Weiskerger* as controlling in part because it was decided before the enactment of the SCA. While we did not assert Weiskerger's abrogation, we certainly cast doubt upon its probity, as well, by extension, as all similarly permissive Election Code case law relying upon the presumption to count votes that violated the Code's unambiguous directives.

In *In re Scroggin*, ²⁷ too, we applied the relevant statutory language strictly in conformity with its terms, despite colorable arguments that doing so would deny ballot access to a candidate who had "substantially complied" with the statutory requirements. And at issue in that case was not merely the votes of a small percentage of otherwise qualified voters, but whether a political body's Presidential candidate would appear on the ballot at all in the wake of a placeholder nominee's failure to satisfy the Code's mandatory affidavit requirement. "[T]he provisions of the election laws relating to the form of nominating petitions and the accompanying affidavits are not mere technicalities," we explained, "but are necessary measures to prevent fraud and to preserve the integrity of the election process. ... Thus, the policy of the liberal reading of the Election Code cannot be distorted to emasculate those requirements necessary to assure the probity of the process." 28

Finally, in *PDP*, we held that the failure strictly to comply with the Election Code's mandatory requirement that mail-in ballots be sealed in the provided "Official Election Ballot" envelope required invalidation. Again, we specifically rejected the appellants' reliance upon Weiskerger and Shambach, relying instead upon Pierce. As in Pierce, we found that to interpret "shall" as directory rather than mandatory would render the Code's requirements "meaningless and, ultimately, absurd," notwithstanding the absence of an express, statutorily-prescribed sanction for non-compliance. 29 While we did not go out of our way to express as jaundiced a view of our cases holding that "minor irregularities" might be overlooked, the gravamen of our decision in that case, as in *Pierce*, was clear: shall means shall. 30

Although I joined the Majority in that case, I wrote separately to underscore the difficulties endemic to judicial efforts to discern ulterior meanings ostensibly obscured by the legislature's use of mandatory language. I observed that relying upon such unbounded investigations invited courts "to bend unclear texts toward whatever ends that they believe to be consonant with legislative intent, but with little or no contemporaneous insight into whether they have done so successfully." ³¹ Acknowledging that legislation is sometimes less than a model of clarity, and that this Court consequently will continue to face invitations to treat mandatory language as something less, I wrote: "[I]f we are to *1085 maintain a principled approach to statutory interpretation that comports with the mandate of [the SCA], if we are to maximize the likelihood that we interpret statutes faithfully to the drafters' intended effect, we must read mandatory language as it appears, and we must recognize that a mandate without consequence is no mandate at all." 32

It is against this case law, and particularly the views I expressed in PDP, that I review the question now before us, briefly addressing the Secretary-imposed name and address requirement first, before proceeding to consider the statutory requirement that the voter date and sign the voter declaration.

As to the former question, I agree with the OAJC's conclusion, although I subscribe to the narrower approach briefly set forth by Justice Dougherty in his Concurring and Dissenting Opinion and developed variously in the OAJC's analysis. But while the OAJC acknowledges the reasons that Justice Dougherty cites as militating against invalidation, it supplements them with the minor-irregularity analysis familiar from Weiskerger and Shambach, which is neither necessary nor advisable. Justice Dougherty's approach requires no reliance upon cases that *Pierce* and *PDP* rightly have called into question. Rather, the fact that the name and address requirement does not stem from mandatory statutory language, 33 as well as questions about the Secretary's authority to compel county boards of elections to conform with whatever guidance the Secretary offers. 34 combined with our presumption in favor of treating qualified voters' ballots as valid absent clear legal mandates to the contrary where statutory language is less than clear, ³⁵ collectively recommend against invalidating ballots for this omission alone. ³⁶ That is enough for me.

The same cannot be said about the date and sign requirement, which derives from an unmistakable statutory directive. Drawing upon our less rigorous case law, and relying heavily upon the interpretive latitude this Court has arrogated to itself sporadically for generations, the OAJC assumes that our mission is to determine whether the apparent mandate is in fact directory, hanging the entire inquiry upon the question of mandatory versus directory effect. That reading, in turn, must rely upon the "minor irregularity" / "weighty interest" dichotomy underlying the cases that Pierce and PDP have called into question.

> To determine whether the Election Code's directive that the voter handwrite their names, address, and the date of signing the voter declaration on the back of the outer envelope is a mandatory *1086 or directory instruction requires us to determine whether the intent of the General Assembly was clear and whether the failure to handwrite

the information constitutes "minor irregularities" or instead represent[s] "weighty interests" ... that the General Assembly considered to be critical to the integrity of the election. ³⁷

To be clear, the OAJC offers a commendably thorough analysis, but its length and involution is necessary only because of the open-ended inquiry it embarks upon. And it is no surprise that, like the cases upon which it relies, the OAJC involves protean characterizations of voting requirements as "technicalities," 38 "minor irregularities," 39 and even "superfluous." ⁴⁰ As illustrated in my review of earlier case law, the OAJC does not conjure this terminology from the ether—all but the last of these terms have been central to this Court's decisional law going back decades. But properly understood, all of these terms signal (and implicitly bless) the substitution of judicial appraisals for legislative judgments.

The OAJC's approach ultimately requires that in any case requiring interpretation of the Election Code to determine the validity of votes nonconforming with facially mandatory requirements, the Court must assess the effect of that language de novo before deciding whether the legislature intended for it to be interpreted as mandatory or merely directory. 41 Thus, while a court embracing that test might take it as obvious, e.g., that the signature requirement should be construed as mandatory, it could not merely have taken its mandatory effect as a given by virtue of the statutory language alone. If the mandatory/directory *1087 inquiry is ever appropriately applied to mandatory language, then the Court can only conclude that mandatory language must be applied as such after applying its balancing test, with cases that seem obvious merely reflecting that the Court deemed the "interest" to be protected so "weighty" that its omission clearly cannot be viewed as a "minor irregularity."

The only practical and principled alternative is to read "shall" as mandatory. Only by doing so may we restore to the legislature the onus for making policy judgments about what requirements are necessary to ensure the security of our elections against fraud and avoid inconsistent application of the law, especially given the certainty of disparate views of what constitute "minor irregularities" and countervailing "weighty interests."

I do not dispute that colorable arguments may be mounted to challenge the necessity of the date requirement, and the OAJC recites just such arguments. 42 But colorable arguments also suggest its importance, as detailed in Judge Brobson's opinion as well as Justice Dougherty's Concurring and Dissenting Opinion. ⁴³ And even to *indulge* these arguments requires the court to referee a tug of war in which unambiguous statutory language serves as the rope. That reasonable arguments may be mounted for and against a mandatory reading only illustrates precisely why we have no business doing so.

Ultimately, I agree with Judge Brobson's description of the greatest risk that arises from questioning the intended effect of mandatory language on a case-by-case basis:

> While we realize that our decision in this case means that some votes will not be counted, the decision is grounded in law. It ensures that the votes will not be counted because the votes are invalid as a matter of law. Such adherence to the law ensures equal elections throughout the Commonwealth, on terms set by the General Assembly. The 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 that will have some defective ballots counted and others discarded, depending on the county in which a voter resides. Such a patchwork system does not guarantee voters an "equal" election, particularly where the election involves intercounty and statewide offices. We do not enfranchise voters by absolving them of their responsibility to execute their ballots in accordance with law. 44

We must prefer the sometimes-unsatisfying clarity of interpreting mandatory language as such over the burden of seeking The Good in its subtext. Substantive perfection is the ever-elusive concern of the legislature. Ours must be consistency of interpretive method without fear or favor, a goal that recedes each time a court takes liberties with statutory language in furtherance of salutary abstractions. Because the OAJC favors a more intrusive and ambitious inquiry, I respectfully dissent.

But just because I disagree with the OAJC's interpretation of the date and sign requirement does not inexorably lead me to the conclusion that the votes at issue in *1088 this case must be disqualified. While it is axiomatic that ignorantia legis neminem excusat (ignorance of the law excuses no one), this Court may elect to apply only prospectively a ruling that overturns pre-existing law or issues a ruling of first impression not foreshadowed by existing law. Indeed, we have done so in at least one case under the Election Code. In Appeal of Zentner, 45 we confronted a statute governing candidates' obligation to submit statements of financial interests by a time certain that had been revised specifically to correct our previously fluid interpretations of the predecessor statute. We were forced to consider whether our newly strict construal of the revised statute should result in the invalidation of entire ballots already cast because they included one or more candidates who had failed to satisfy the statutory disclosures. We held, as the legislature clearly intended, that a candidate's "failure to file the requisite financial interests statement within the prescribed time shall be fatal to a candidacy." ⁴⁶ But we also concluded that to "void the results of an election where all candidates were submitted to the voters, with late but nonetheless filed financial statements which left adequate time for study by the electorate, would be an unnecessary disenfranchisement." ⁴⁷ Thus we determined that our holding should apply prospectively but not to the election at issue. ⁴⁸

It goes without saying that 2020 has been an historically tumultuous year. In October of 2019, the legislature enacted Act 77, 49 introducing no-excuse mail-in voting with no inkling that a looming pandemic would motivate millions of people to avail themselves of the opportunity to cast their ballots from home in the very first year that the law applied. Soon thereafter, Act 12. 50 introduced and enacted with unprecedented alacrity in response to the pandemic, further amended the Election Code to address emergent concerns prompted by the looming public health crisis. While aspects of the new provisions that are relevant to this case were not wholly novel to the Code, as such—for example, the provisions that authorized no-excuse mail-in voting by and large just expanded the pool of voters to whom the rules that long had governed absentee balloting applied —the massive expansion of mail-in voting nonetheless presented tremendous challenges to everyone involved in the administration of elections, from local poll workers to the Secretary of the Commonwealth. Importantly, it transformed the incentives of probing the mail-in balloting provisions for vulnerabilities in furtherance of invalidating votes. For the *1089 first time, a successful challenge arising from a given technical violation of statutory requirements might result in the invalidation of many thousands of no-excuse mail-in ballots rather than scores or hundreds of absentee ballots.

In advance of the 2020 election, neither this Court nor the Commonwealth Court had occasion to issue a precedential ruling directly implicating the fill out, date and sign requirement. Moreover, as the OAJC highlights in multiple connections, the Secretary issued confusing, even contradictory guidance on the subject. ⁵¹ Thus, local election officials and voters alike lacked clear information regarding the consequence of, e.g., failing to handwrite one's address on an envelope that already contained preprinted text with that exact address or record the date beside the voter's declaration signature.

I have returned throughout this opinion to our decision in PDP, and I do so once more. I maintained in that case that the Election Code should be interpreted with unstinting fidelity to its terms, and that election officials should disqualify ballots that do not comply with unambiguous statutory requirements, when determining noncompliance requires no exercise of subjective judgment by election officials. 52 The date requirement here presents such a case. But I also emphasized that disqualification is appropriate "[s]o long as the Secretary and county boards of elections provide electors with adequate instructions for completing the declaration of the elector-including conspicuous warnings regarding the consequences for failing strictly to adhere" to those requirements. 53 I cannot say with any confidence that even diligent electors were adequately informed as to what was required to avoid the consequence of disqualification in this case. As in Zentner, it would be unfair to punish voters for the incidents of systemic growing pains.

In case after case involving the Election Code, especially this year, we have been reminded how important it is that the General Assembly provide unambiguous guidance for the administration of the election process. But it is imperative that we recognize when the legislature has done precisely that, and resolve not to question the legislature's chosen language when it has done so. And perhaps it is a silver lining that many of the problems that we have encountered this year, in which a substantially overhauled electoral system has been forced to make its maiden run in stormy seas, are now clear enough that the legislature and Department of State have notice of what statutory refinements are most needful. It is my sincere hope that the General Assembly sees fit to refine and clarify the Election Code scrupulously in the light of lived experience. In particular, because 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. 54

CONCURRING AND DISSENTING OPINION

JUSTICE DOUGHERTY

*1090 I concur in the decision to affirm the lower courts' orders pertaining to ballots where the qualified electors failed to print their name and/or address on the outer envelope containing their absentee or mail-in ballots. However, 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." Opinion Announcing the Judgment of the Court (OAJC) at 1076–77. I therefore respectfully dissent from the holding at Section III(2) of the OAJC which provides that the undated ballots may be counted.

The applicable statutes require that electors "shall [] fill out, date and sign" the declaration printed on the ballot envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). In my view, the term "fill out" is subject to interpretation. Maybe it means printing one's name and address on the envelope, and maybe it does not. Given that our goal in interpreting the Election Code is to construe ambiguous provisions liberally, in order to avoid disenfranchisement where possible, I do not consider the failure of qualified electors to "fill out" their name and address, particularly where the name and address already appear on the other side of the envelope, to require disqualification of the ballot. I am further persuaded of this position by the fact that the blank spaces on the envelope indicating where the name and address should be "filled out" were designated by the Secretary, not the General Assembly. 25 P.S. § 3146.4 ("Said form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth[.]"); see also Concurring and Dissenting Opinion at 1084–85 (Wecht, J.). But, the meaning of the terms "date" and "sign" — which were included by the legislature — are self-evident, they are not subject to interpretation, and the statutory language expressly requires that the elector provide them. See In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election, 577 Pa. 231, 843 A.2d 1223, 1231 (2004) ("[A]ll things being equal, the law will be construed liberally in favor of the right to vote but, at the same time, we cannot ignore the clear mandates of the Election Code.") (citation omitted). Accordingly, I do not view the absence of a date as a mere technical insufficiency we may overlook.

In my opinion, there is an unquestionable purpose behind requiring electors to date and sign the declaration. As Judge Brobson observed below, the date on the ballot envelope provides proof of when the "elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place. The presence of the date also establishes a point in time against which to measure the elector's eligibility to cast the ballot[.]" *1091 In Re: 2,349 Ballots in the 2020 General Election, 1162 C.D. 2020, slip op. at 12, 2020 WL 6820816 (Pa. Cmwlth. Nov. 19, 2020) (memorandum). The date also ensures the elector completed the ballot within the proper time frame and prevents the tabulation of potentially fraudulent back-dated votes. Cf. In re Canvass of Absentee Ballots of November 4, 2003 General Election, 843 A.2d at 1232-33 (statutory requirement that ballot be submitted by elector and not thirdparty is mandatory safeguard against fraud). I recognize there is presently no dispute that all undated ballots at issue here arrived in a timely manner. But I am also cognizant that our interpretation of this relatively new statute will act as precedential guidance for future cases.

Chief Justice Saylor and Justice Mundy join this concurring and dissenting opinion.

All Citations

241 A.3d 1058

Footnotes

- DNA Services Corp./Democratic National Committee (hereinafter "DNC") intervened in the proceedings 1 before the trial court.
- 2 None of the parties have challenged whether these provisions constituted improper delegations of legislative authority. Protz v. Workers' Compensation Appeal Board (Derry Area School District), 639 Pa. 645, 161 A.3d 827 (2017).
- Conversely, the Philadelphia Board and the DNC have both selectively relied upon guidance provided by 3 the Secretary to the county boards of election that indicated that a voter's failure to handwrite his/her name and address was not a ground to set the ballot aside. Philadelphia Board's Brief at 19; DNC's Brief at 15. They have directed the Court to the Guidance published on September 11, 2020, in which the Secretary advised that "[i]f the Voter's Declaration on the return envelope is signed and the county board is satisfied that the declaration is sufficient, the mail-in or absentee ballot should be approved for canvassing." Guidance, 9/11/2020, at 3. As discussed infra at n.6, however, on September 28, 2020 the Secretary issued arguably contrary guidance stating that "[a] ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted." Guidance, 9/28/20, at 9. Confusingly, she also incorporated by reference the September 11, 2020 Guidance. Both sets of Guidance are set forth on pages 1064-66 supra.

- 4 Where an election statute is ambiguous, courts apply the interpretative principle that that "election laws ... ordinarily will be construed liberally in favor of the right to vote." Pa. Democratic Party, 238 A.3d at 360–61.
- 5 The DNC argues, with some persuasive force, that the Campaign's requested interpretation of Pennsylvania's Election Code could lead to a violation of federal law by asking the state to deny the right to vote for immaterial reasons. Nobody acting under color of state law may deny anyone the right to vote "in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is gualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B).

Under this section, the so-called "materiality provision" of the Voting Rights Act, federal courts have barred the enforcement of similar administrative requirements to disqualify electors. See, e.g., Schwier v. Cox, 340 F.3d 1284 (11th Cir. 2003) (disclosure of voter's social security number is not "material" in determining whether a person is qualified to vote under Georgia law for purposes of the Voting Rights Act); Washington Ass'n of Churches v. Reed, 492 F.Supp.2d 1264 (W.D. Wash. 2006) (enjoining enforcement of "matching" statute, requiring state to match potential voter's name to Social Security Administration or Department of Licensing database, because failure to match applicant's information was not material to determining qualification to vote); Martin v. Crittenden, 347 F.Supp.3d 1302 (N.D. Ga. 2018), reconsideration denied, 1:18-CV-4776-LMM, 2018 WL 9943564 (N.D. Ga. Nov. 15, 2018) (voter's ability to correctly recite his or her year of birth on absentee ballot envelope was not material to determining said voter's qualifications).

6 In her brief, Ziccarelli cites to the Guidance distributed by the Secretary of the Commonwealth on September 28, 2020 to the county boards of elections, advising that "[a] ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted." As noted in footnote 3 supra, however, the Secretary also issued Guidance on September 11, 2020, which was cited with approval by the Philadelphia Board and the DNC. No party referenced both sets of Guidance, however, even though the September 28 Guidance incorporated the September 11 Guidance. See Guidance, 9/28/2020, at 9 ("For more information about the examination of return envelopes, please refer to the Department's September 11, 2020 Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes.").

In any event, we will not consider this Guidance in making our decision. Neither of the parties explain how the potentially contradictory directives are to be understood. More importantly, the Secretary has no authority to definitively interpret the provisions of the Election Code, as that is the function, ultimately, of this Court. The Secretary also clearly has no authority to declare ballots null and void. "[I]t is the Election Code's express terms that control, not the written guidance provided by the Department and as this Court repeatedly has cautioned, even erroneous guidance from the Department or county boards of elections cannot nullify the express provisions of the Election Code." In re Scroggin, — Pa. —, 237 A.3d 1006, 1021 (2020). Moreover, the Secretary has no authority to order the sixty-seven county boards of election to take any particular actions with respect to the receipt of ballots. 25 P.S. § 2621(f.2).

Finally, with respect to the September 28 Guidance indicating that undated ballots must be set aside, we note that in addition to the Philadelphia and Allegheny County Boards, at least two other boards of elections also did not follow it. Donald J. Trump for President Inc. v. Bucks Cnty. Bd. of Elections, No. 2020-05786 (Bucks Cty. Ct. Com. Pl.); Donald J. Trump for President, Inc., et al. v. Montgomery Cnty. Bd. of Elections, No. 2020-18680 (Nov. 13, 2020). Both the Bucks County and Montgomery County Courts of Common Pleas affirmed the counting of the ballots even though the declarations had not been filled out in full. Each of the courts of common pleas appropriately applied this Court's precedent in doing so.

Act of June 3, 1937, P.L. 1333, art. I, § 101, codified as amended at 25 P.S. §§ 2601, et seq.

- None of the parties or courts involved in these consolidated cases dispute that a voter's failure to sign a mailin or absentee ballot's declaration requires invalidation.
- 3 Act of Dec. 6, 1972, No. 290, § 3, codified as amended at 1 Pa.C.S. §§ 1501, et seq.
- 4 Pa. ——, 238 A.3d 345, 391 (2020) (Wecht, J., concurring) (hereinafter "PDP").
- Specifically, 25 P.S. § 3150.16(a) provides that the mail-in ballot 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.' "
- Compare 25 P.S. § 3150.16(a) ("Voting by mail-in electors") with 25 P.S. § 3146.6(a) ("Voting by absentee electors"). Each provision governing the form of mail-in ballots and the voter's obligations in preparing and transmitting them has its verbatim equivalent for absentee ballots, and the issue presented applies equally to both. Hereinafter, for simplicity's sake, I refer exclusively to mail-in ballots and cite and quote only the provisions that apply to mail-in ballots, but my analysis applies identically to both. The OAJC reproduces the relevant sections at length. See OAJC at 1063–65.
- 7 25 P.S. § 3150.16(a) (emphasis added).
- 8 Appeal of Weiskerger, 447 Pa. 418, 290 A.2d 108 (1972).
- 9 25 P.S. § 3063 (applicable through October 30, 2019).
- 10 Weiskerger, 290 A.2d at 109 (cleaned up).
- Appeal of Pierce, 577 Pa. 231, 843 A.2d 1223, 1231 (2004); see 1 Pa.C.S. 1921(b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."); see also Oberneder v. Link Computer Corp., 548 Pa. 201, 696 A.2d 148, 150 n.2 (1997) (rejecting a party's reliance upon a 1965 case because it was at odds with the ambiguity-first, reliance-upon-rules-of-construction-later approach to statutory construction required by the SCA).
- Without suggesting that the ink color language at issue in that case was ambiguous on its face, the Weiskerger Court suggested that interpreting the language required it to consider, inter alia, "the occasion for its enactment" and "the mischief to be remedied." Weiskerger, 290 A.2d at 109. Section 1921 of the SCA similarly provides that courts may consider "[t]he occasion and necessity for the statute" and "[t]he mischief to be remedied"—but only "[w]hen the words of the statute are not explicit." 1 Pa.C.S. § 1921(c).
- See, e.g., Appeal of Norwood, 382 Pa. 547, 116 A.2d 552, 555 (1955); Appeal of Gallagher, 351 Pa. 451, 41 A.2d 630, 632 (1945).
- Weiskerger, 290 A.2d at 109 (quoting In re Petitions to Open Ballot Boxes, 410 Pa. 62, 188 A.2d 254, 256 (1963)).
- In contrast to *Weiskerger*'s capacious understanding of this principle, the Court adopted a more measured tone in *Appeal of Urbano*, 411 Pa. 45, 190 A.2d 719 (1963). There, citing the presumption in favor of counting votes, it allowed for relief from the apparent consequences of failing to satisfy mandatory statutory language, but did so specifically because the common-law presumption was in keeping with additional statutory language expressly granting the court discretion to permit amendments to cure even "material errors or defects." *Id.*

- 16 Weiskerger, 290 A.2d at 109 (emphasis added).
- 17 To be clear, Weiskerger was by no means our original sin in this area. In one earlier example cited by the OAJC, this Court discerned reason to disregard the mandatory connotation of "shall" in Appeal of James, 377 Pa. 405, 105 A.2d 64 (1954). Indeed, one can detect aspects of the same open-ended analysis in, e.g., our 1922 decision in In re Fish's Election, 273 Pa. 410, 117 A. 85, 87 (1922) (quoting Knight v. Borough of Coudersport, 246 Pa. 284, 92 A. 299, 300 (1914)) ("If the law declares a specified irregularity to be fatal, the court will follow that command, irrespective of their views of the importance of the requirement. In the absence of such declaration the judiciary endeavor, as best they may, to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a full and free expression of the popular will. ... [If not], it is considered immaterial."). Our willingness to substitute our judgment for that of the legislature perhaps reached its nadir in Norwood, where we held that "[e]very rationalization within the realm of common sense should aim at saving [a] ballot rather than void it," 116 A.2d at 554-55, an expression that the OAJC embraces as a "well-settled principle of Pennsylvania election law." OAJC at 1071. Perhaps no passage better illustrates the liberties this Court has taken when probing for reasons to treat mandatory language as anything but mandatory.
- 18 577 Pa. 384, 845 A.2d 793 (2004).
- 19 25 P.S. § 3031.12(b)(3) (emphasis added). The language in question has been amended in the intervening years.
- 20 Shambach, 845 A.2d at 798 (quoting James, 105 A.2d at 65).
- 21 Id. at 798.
- 22 See Appeal of Mellody, 449 Pa. 386, 296 A.2d 782, 784 (1972); Reading Defense Committee, 188 A.2d at 256; Gallagher, 41 A.2d at 632. The OAJC similarly relies substantially for these principles on pre-SCA case law. See, e.g., OAJC at 1062 (quoting James, 105 A.2d at 65-66 (Pa. 1954)); id. at 1071 (quoting Urbano, 190 A.2d at 719, and Norwood, 116 A.2d at 554).
- 23 25 P.S. § 3146.6(a) (emphasis added); see Pierce, 843 A.2d at 1231.
- Pierce, 843 A.2d at 1230 (citations omitted). 24
- 25 ld.
- Id. at 1231-32 (citing, inter alia, BRYAN GARNER, DICTIONARY OF MODERN LEGAL USAGE 939 (2d 26 ed. 1995)).
- 27 —— Pa. ——, 237 A.3d 1006 (2020).
- 28 Id. at 1019 (quoting Appeal of Cubbage, 467 Pa. 491, 359 A.2d 383, 384 (1976)).
- 29 PDP, 238 A.3d at 379 (quoting Pierce, 843 A.2d at 1232).
- 30 Id. at 380 ("[Pierce] leads to the inescapable conclusion that a mail-in ballot that is not enclosed in the statutorily-mandated secrecy envelope must be disqualified. ... Accordingly, we hold that the secrecy [envelope] language in Section 3150.16(a) is mandatory and the mail-in elector's failure to comply ... renders the ballot invalid.").
- 31 Id. at 391 (Wecht, J., concurring).

- 32 ld.
- 33 See Conc. & Diss. Op. at 1090 (Dougherty, J.).
- 34 See OAJC at 1078 n.6.
- 35 See PDP, 238 A.3d at 356 ("[T]he Election Code should be liberally construed so as not to deprive, inter alia, electors of their right to elect a candidate of their choice."). Notably, the OAJC cites PDP for the same proposition, correctly qualifying the principle by noting that liberal construction comes into play only "[w]here an election statute is ambiguous." OAJC at 1074 n.4 (emphasis added).
- 36 I also find cause for concern in the absence of clear instruction on the ballot materials indicating that a ballot lacking a name or address will be disqualified, a concern that informs my preference for prospective application of the statutory date requirement. Cf. Reading, 188 A.2d at 256 (declining to invalidate ballots upon which voters did not signal their intended votes strictly with the X or check mark mandated by statute for various reasons—including a "minor irregularity" approach I reject—especially where the printed instruction on the ballot did not specify that only those two methods of signaling one's vote would be recognized).
- 37 OAJC at 1073.
- 38 See id. at 1062 (quoting James, 105 A.2d at 66 ("Technicalities should not be used to make the right of the voter insecure.")). James's tendentious resort to the word "technicalities," which seldom is used constructively when invoked in connection with the law, is contradicted at least in tenor by subsequent pronouncements. See Pierce, 843 A.2d at 1234 ("[S]o-called technicalities of the Election Code are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed"); Appeal of Weber, 399 Pa. 37, 159 A.2d 901, 905 (1960) ("The technicalities of the Election Law (and they are many) are necessary for the preservation of the secrecy and purity of the ballot and must, therefore, be meticulously observed.").
- 39 See OAJC at 1072-73 (counterposing "minor irregularities" and "weighty interests" as the framework for decision). Notably, the question as to which we granted review quite confused the meaning of "irregularity." We proposed to answer the question whether "the Election Code require[s] county boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed their ballot's outer envelopes but did not handwrite their name, their address, and/or a date, where no fraud or irregularity has been alleged?" Id. at 1069. But this formulation is irreconcilable with the question whether failing to date a ballot declaration is, itself, a "minor irregularity" and, as such, not subject to the sanction of ballot invalidation —the very crux of the case, as the OAJC defines it. I raise this discrepancy because it illustrates how these constructs lend themselves to confusion, complicating what should be simple questions by engrafting unenumerated considerations upon plainly worded statutes.
- 40 See id. at 1077 ("The date stamp and the SURE system provide a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superfluous."); cf. id. at 1073 (characterizing the handwritten name and address requirement as, "at best, a 'minor irregularity' and, at worst, entirely immaterial").
- 41 See id. at 1076 ("Although unlike the handwritten name and address, which are not mentioned in the statute, the inclusion of the word 'date' in the statute does not change the analysis because the word 'shall' is not determinative as to whether the obligation is mandatory or direct[ory] in nature." (emphasis added)).
- 42 See id. at 1076-78.
- 43 See In re 2,349 Ballots in the 2020 General Election, 1162 C.D. 2020, slip op. at 12, 2020 WL 6820816 (Pa. Cmwlth. Nov. 19, 2020) (memorandum); Conc. & Diss. Op. at 1090 (Dougherty, J.).

- 44 In re 2,349 Ballots, slip op. at 12-13.
- 533 Pa. 564, 626 A.2d 146 (1993) 45
- 46 Id. at 149.
- 47 ld.
- Cf. Andino v. Middleton, No. 20A55, U.S. —, —, 141 S.Ct. 9, L.Ed.2d —, 2020 WL 48 5887393, *1 (Oct. 5, 2020) (staying the district court's injunction of an absentee ballot witness requirement, "except to the extent that any ballots cast before this stay issues and received within two days of this order may not be rejected for failing to comply with the witness requirement" in light of the fact that voters cast nonconforming absentee ballots in reliance upon the guidance of state elections officials during the pendency of the injunction); In re Beyer, 631 Pa. 612, 115 A.3d 835, 843-44 (2015) (Baer, J., dissenting) (finding it "reasonable for this Court to rule prospectively that a candidate may only designate his occupation or profession as 'lawyer' on nomination papers after he or she has graduated from law school, passed the bar exam, and is in good standing as an active member of the Pennsylvania Bar," but dissenting because, "at the time Candidate Beyer filed his nomination papers, neither a majority of this Court nor the Commonwealth Court had ever made such an express declaration").
- 49 See Act of Oct. 31, 2019, P.L. 552, No. 77.
- 50 See Act of March 27, 2020, P.L. 41, No. 12.
- 51 See OAJC at 1073-74 n.3, 1078 n.6; see also id. at 1065-66 (reproducing all relevant aspects of the guidance documents pertaining to the issues presented).
- 52 See PDP, 238 A.3d at 389 (Wecht, J., concurring).
- 53 See id. (emphasis added).
- 54 In this regard, the OAJC observes that the Democratic National Committee "argues, with some persuasive force, that the Campaign's requested interpretation of Pennsylvania's Election Code could lead to a violation of [the federal Voting Rights Act] by asking the state to deny the right to vote for immaterial reasons." OAJC at 1074 n.5; see 52 U.S.C. § 10101(a)(2) ("No person acting under color of law shall ... (B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election"). The OAJC does not pursue this argument, except to acknowledge a handful of cases that might be read to suggest that the name and address, and perhaps even the date requirement could qualify as "not material in determining whether such individual is qualified under State law to vote." Given the complexity of the question, I would not reach it without the benefit of thorough advocacy. But I certainly would expect the General Assembly to bear that binding provision in mind when it reviews our Election Code. It is inconsistent with protecting the right to vote to insert more impediments to its exercise than considerations of fraud, election security, and voter qualifications require.

End of Document

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Appendix 50

I hereby certify that the foregoing proceedings, docket number 355 M.D. 2022, were reported by me on July 28, 2022, and that I, Judith E. Shuller, have read this transcript and attest that this transcript is a true and accurate record of the proceedings. By: Judith E. Shuller By: Judith E. Shuller 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24	1	CERTIFICATE
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Appendix 51

LEIGH M. CHAPMAN, ACTING SECRETARY OF THE COMMONWEALTH AND THE PENNSYLVANIA DEPARTMENT OF STATE V. BERKS COUNTY BOARD OF ELECTIONS, AND LANCASTER COUNTY BOARD OF ELECTIONS

NO. 355 M.D. 2022

HEARING HELD JULY 28, 2022

PROOF OF SERVICE

I hereby certify that I am this day serving the Notice of Filing of Transcript as indicated above upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

Service by first-class mail addressed as follows:

The Honorable Renée Cohn Jubelirer, President Judge Commonwealth Court of Pennsylvania 601 Commonwealth Avenue Harrisburg, PA 17106

Service by e-mail at following:

mfischer@atorneygeneral.gov, with agreement of:
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Office of Attorney General
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(610) 685-1600 Smith Bukowski, LLC 1050 Spring Street, Suite 1 Wyomissing, PA 19610

(For Respondents, Berks County Board of Election and Lancaster County Board of Elections)

TKing@dmkcg.com, with agreement of: Thomas W. King, III, Esquire

(724) 283-2200

Dillon, McCandless, King, Coulter & Graham, LLP 128 West Cunningham Street

Butler, PA 16001

(For Respondent Fayette County Board of Elections)

DATED: August 5, 2022

Judith E. Shuller, CSR Strehow & Associates, Inc. 54 Friends Lane, Suite 116 Newtown, Pennsylvania 18940

(215) 504-4622

TO: The Honorable Renée Cohn Jubelirer, President Judge

Please be advised that I have this date filed a transcript in the case of:

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEIGH M. CHAPMAN, ACTING SECRETARY OF THE COMMONWEALTH AND THE PENNSYLVANIA DEPARTMENT OF STATE V. BERKS COUNTY BOARD OF ELECTIONS, FAYETTE COUNTY BOARD OF ELECTIONS, AND LANCASTER COUNTY BOARD OF ELECTIONS

NO. 355 M.D. 2022

HEARING HELD JULY 28, 2022

See Pa. R.A.P. 1922(c)

DATED: August 5, 2022

Judith E. Shuller, CSR Strehlow & Assoiates, Inc. 54 Friends Lane, Suite 116 Newtown, Pennsylvania 18940 TO: Michael J. Fischer, Executive Deputy Attorney General

Please be advised that I have this date filed a transcript in the case of:

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEIGH M. CHAPMAN, ACTING SECRETARY OF THE COMMONWEALTH AND THE PENNSYLVANIA DEPARTMENT OF STATE V. BERKS COUNTY BOARD OF ELECTIONS, FAYETTE COUNTY BOARD OF ELECTIONS, AND LANCASTER COUNTY BOARD OF ELECTIONS

NO. 355 M.D. 2022

HEARING HELD JULY 28, 2022

See Pa. R.A.P. 1922(c)

DATED: August 5, 2022

Judith E. Shuller, CSR Strehlow & Assoiates, Inc. 54 Friends Lane, Suite 116 Newtown, Pennsylvania 18940

(215) 504-4622

Please be advised that I have this date filed a transcript in the case of:

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LEIGH M. CHAPMAN, ACTING SECRETARY OF THE COMMONWEALTH AND THE PENNSYLVANIA DEPARTMENT OF STATE V. BERKS COUNTY BOARD OF ELECTIONS, FAYETTE COUNTY BOARD OF ELECTIONS, AND LANCASTER COUNTY BOARD OF ELECTIONS

NO. 355 M.D. 2022

HEARING HELD JULY 28, 2022

See Pa. R.A.P. 1922(c)

DATED: August 5, 2022

Judith E. Shuller, CSR Strehlow & Assoiates, Inc. 54 Friends Lane, Suite 116 Newtown, Pennsylvania 18940

(215) 504-4622

Please be advised that I have this date filed a transcript in the case of:

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEIGH M. CHAPMAN, ACTING SECRETARY OF THE COMMONWEALTH AND THE PENNSYLVANIA DEPARTMENT OF STATE V. BERKS COUNTY BOARD OF ELECTIONS, FAYETTE COUNTY BOARD OF ELECTIONS, AND LANCASTER COUNTY BOARD OF ELECTIONS

NO. 355 M.D. 2022

HEARING HELD JULY 28, 2022

See Pa. R.A.P. 1922(c)

DATED: August 5, 2022

Judith E. Shuller, CSR Strehlow & Assoiates, Inc. 54 Friends Lane, Suite 116 Newtown, Pennsylvania 18940 (215) 504-4622

Appendix 52

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

No. 355 MD 2022

Petitioners,

v.

BERKS COUNTY BOARD OF ELECTIONS, et. al., Respondents.

DECLARATION OF JONATHAN M. MARKS

I, Jonathan M. Marks, declare and affirm under the penalties of 18 Pa.C.S. § 4904 that:

- 1. I am the Deputy Secretary for Elections and Commissions at the Pennsylvania Department of State. I have worked at the Department since 1993 and been involved with the Department's election-related responsibilities since 2002, and have held my current position since February 2019.
- 2. I verified the Petition for Review filed in this matter and also testified at the hearing held on July 28, 2022.
- 3. In my testimony, I stated that only three counties—Berks, Fayette, and Lancaster—had failed to submit certified vote totals to the Department for the May 2022 primary election that included so-called undated ballots, which were timely

received and otherwise valid absentee and mail-in ballots cast by a qualified voter who neglected to hand write a date on the return envelope declaration.

- 4. That statement was based on my review of materials submitted by county election officials as well as my conversations and correspondence with many of the same officials, and I believed it to be true at the time. However, I now realize that it is not correct, and that Butler County also did not submit certified vote totals for the May 2022 primary election that included timely received and otherwise valid undated ballots.
- 5. The Department has a systematic process in place that tracks the certified results of the counties as they are submitted to the Department for each election. For the 2022 general primary election, most of the counties had already provided certified results to the Department in early June, but many of the initial certifications provided by the counties did not include undated ballots.
- 6. On June 17, 2022, following the U.S. Court of Appeals for the Third Circuit's decision in *Migliori v. Lehigh County Board of Elections* and this Court's decision in *McCormick v. Chapman*, I contacted all county boards of elections requesting that they provide the Department with certified results for the 2022 general primary election that included undated ballots. A copy of this email was included in the parties' stipulated facts as Joint Exhibit 6. I also testified about this email during the July 28 hearing.

- 7. Given the exigent circumstances with respect to the litigation surrounding undated ballots and the differing ways in which counties handled their certifications with respect to undated ballots, a manual process was put in place to allow counties to email the Department with their certified results that included undated but timely and otherwise valid absentee and mail-in ballots pursuant to the *Migliori* and *McCormick* decisions. The Department created a spreadsheet to track certification communications from the 67 counties.
- 8. In response to my June 17 email, some county boards of elections submitted certified results for the 2022 general primary election that included undated ballots, some counties responded they did not have any undated ballots, and some counties did not respond. Other county boards responded that they did not plan to include those ballots in their certified results.
- 9. The Butler County Board of Elections responded to my email by letter dated June 21, 2022. That letter indicated that Butler County would not "be canvasing ballots which are not compliant with the statutes of this Commonwealth." A copy of this letter is attached as Joint Exhibit 15 to the supplemental joint stipulation also being filed today. While I have no reason to doubt receiving that letter, I do not have any memory of seeing it until it was just recently brought to my attention.
- 10. Unfortunately, the response contained in this letter was not properly tracked in the spreadsheet created for tracking county responses, and Butler County

was mistakenly identified as a county that had no undated ballots. Due to this inadvertent error, Butler County was excluded from my subsequent communications to county boards of elections that the Department knew had not certified results from the 2022 general primary election as described below.

- 11. On June 27, 2022, I contacted all county boards of elections that the Department knew had not certified results for the 2022 general primary election that included undated ballots, or that had not informed the Department when they would certify results with those ballots. A copy of this email was included in the parties' stipulated facts as Joint Exhibit 8. I also testified about this email during the July 28 hearing.
- 12. Because the Department had not recorded the Butler County Board of Election's June 21 letter, I did not send the June 27 email to the Butler County Board of Elections.
- 13. On June 29, 2022, counsel for the Department wrote all county boards of elections that the Department knew had not certified results for the 2022 general primary election that included undated ballots. A copy of this email was included in the parties' stipulated facts as Joint Exhibit 11. I also testified about this letter during the July 28 hearing.
- 14. Because the Department had not recorded the Butler County Board of Election's June 21 letter, Butler County did not receive a copy of this letter.

- 15. As of July 11, 2022, the day the Petition for Review was filed, the Department was aware of three county boards of elections that had failed to provide the Department certified results for the 2022 general primary election that included undated ballots.
- 16. Those three were the boards for Berks, Fayette, and Lancaster counties, as stated in the Petition and during my testimony.
- 17. On July 28, 2022, the day I testified in this case, I believed that only three county boards of elections, Berks, Fayette and Lancaster Counties had failed to provide the Department certified results for the 2022 general primary election that included undated ballots.
- 18. On August 1, 2022, our counsel in this case informed us that counsel for the Fayette County Board of Elections had said that the Butler County Board of Elections may not have provided the Department certified results for the 2022 general primary election that included undated ballots.
- 19. On August 1, 2022, I reviewed my records and communications with respect to this issue and instructed pertinent Department staff to do the same. It was then that the Department discovered the Butler County Board of Elections' June 21 letter, which made it clear that the Butler County Board of Elections had not provided the Department certified results for the 2022 general primary election that included undated ballots. Department staff did not find any subsequent communications from

Butler County indicating that the Butler County Board of Elections had reconsidered its decision regarding undated ballots. DOS staff also confirmed that Butler County did, in fact, have undated ballots, notwithstanding the Department's original belief to the contrary.

- 20. On August 1 through August 4, 2022, I had my staff conduct another further thorough review of every certification a county board sent the Department of State for the 2022 general primary election by pulling and reviewing all communications relating to this issue. Initially on August 1, all other counties were reviewed to provide a prompt communication to the Court on this issue. Subsequently, an additional in-depth review of every county was undertaken. Through that review, my team confirmed that every county board of election except the boards for Berks, Butler, Fayette, and Lancaster counties, provided the Department of State certified results for the 2022 general primary election that included undated ballots or otherwise informed the Department that said board had no undated ballots.
- 21. I am submitting this declaration to correct my testimony and to clarify that four counties—the three Respondents as well as Butler—have not submitted certified returns to the Department that include undated ballots. Though the Department has systematic processes in place to prevent such errors, ongoing litigation and uncertainties regarding undated ballots necessitated a manual process

for certification tracking which increased the opportunity for human error. There were also other exigencies involved in the certification of the 2022 general primary election, including the mandatory recount in the Republican Senate race. As a result, Butler was not identified as it should have been, and I incorrectly testified that only three counties had refused to include undated ballots in their certified returns. I apologize to the Court for the error.

22. I declare that the facts set for in this Declaration are true and correct. I understand that this Declaration is made subject to the penalties for unsworn falsification to authorities set forth in 18 Pa.C.S. § 4904.

Executed on this 8th day of August, 2022

Jonathan M. Marks

Deputy Secretary for Elections and Commissions

Pennsylvania Department of State

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Appendix 53

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioners,

v.

No. 355 MD 2022

BERKS COUNTY BOARD OF ELECTIONS, et. al.,

Respondents.

SUPPLEMENTAL JOINT STIPULATION OF FACTS

Pursuant to this Court's August 4, 2022 Order, the parties submit the following supplemental joint stipulation of facts.

- 1. On June 15, 2022, the Butler County Board of Elections submitted certified results of the 2022 general primary elections that did not include any votes from timely received undated absentee and mail-in ballots.
- 2. On June 21, 2022, the Butler County Board of Elections sent a letter in response to an email that Jonathan Marks sent to all county boards of elections on June 17, 2022. Mr. Marks' email is in the record as Joint Exhibit 6. The Butler County Board of Elections' letter is attached to this stipulation as Joint Exhibit 15.
- 3. On July 19, 2022, the Acting Secretary of the Commonwealth certified races in the 2022 general primary election for all offices for which she has

certification responsibility, except statewide offices and those district-level offices that include all or parts of Berks, Fayette, and Lancaster Counties.

- 4. The Acting Secretary has certified races for district-level offices that represent all or part of Butler County, including:
 - a. For U.S. House of Representatives District 16, Congressman Mike Kelly (R) and Dan Pastore (D).
 - b. For Pennsylvania House District 8, Rep. Aaron Bernstine (R).
 - c. For Pennsylvania House District 11, Rep. Marci Mustello (R).
 - d. For Pennsylvania House District 12, Stephanie Scialabba (R) and Robert Vigue (D).
 - e. For Pennsylvania House District 17, Rep. Timothy Bonner (R).

Dated: August 8, 2022

Respectfully submitted,

/s/ Jeffrey D. Bukowski

Jeffrey D. Bukowski, Esquire Attorney I.D. No. 76102 SMITH BUKOWSKI, LLC 1050 Spring Street, Suite 1 Wyomissing, PA 19610 (610) 685-1600 JBukowski@SmithBukowski.com

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/s/ Jacob B. Boyer

Jacob B. Boyer (Bar No. 324396) Deputy Attorney General

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Attorneys for Petitioners

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.

Dated: August 8, 2022 /s/ Jacob B. Boyer

Joint Exhibit 15

County of Butler

Board of Commissioners

124 W. Diamond Street, PO Box 1208, Butler, PA 16003-1208 Phone 724-284-5100 Fax 724-284-5400 TDD 724-,284,5473

Commissioners
Leslie A. Osche, Chairman
Kimberly D. Geyer, Vice Chairman
Kevin E. Boozel, M.S., Secretary



Solicitor H. William White, III

Director of Human Resources/Chief Clerk Lori Altman

Budget & Human Services Finance Director Ann M. Brown

June 21, 2022

VIA EMAIL
Jonathan Marks
jmarks@pa.gov

Re: DOS Email - Certification of Undated Ballot Vote Totals

Dear Deputy Secretary Marks:

As Solicitor for the County of Butler, I have been directed to respond to your email correspondence, dated June 17, 2022, which was directed to the Butler County Elections Bureau. After much deliberation and discussion, the County of Butler, its Board of Elections, and the Butler County Elections Bureau must respectfully decline. Butler County will not be canvassing ballots which are not compliant with the statutes of this Commonwealth. Butler County has completed the mandatory recount and has submitted its certified results to the Department of State. I do not anticipate any further canvassing, tabulating, certification, or submission on our part in regard to the General Primary Election of May 17, 2022.

H. William White, III
Butler County Solicitor

HWW/bjr

cc: Leslie A. Osche, Chairman, Board of Commissioners (via email to losche@co.butler.pa.us)
Kimberly D. Geyer, Vice-Chairman, Board of Commissioners (via email to kgeyer@co.butler.pa.us)
Kevin E. Boozel, M.S., Secretary, Board of Commissioners (via email to kboozel@co.butler.pa.us)
Jessica Mathis (via email to jesmathis@pa.gov)
Kori House (via email to korhouse@pa.gov)

Appendix 54

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEIGH M. CHAPMAN, Acting :
Secretary of the Commonwealth :
and the Pennsylvania :
Department of State, :
Petitioners :

v. : NO. 355 M.D. 2022

:

BERKS COUNTY BOARD OF :
ELECTIONS, FAYETTE COUNTY :
Board of Elections, and :
LANCASTER COUNTY BOARD OF :
ELECTIONS, :

Respondents :

Pages 1 through 263 Courtroom 3001

PA Judicial Center

601 Commonwealth Avenue Harrisburg, Pennsylvania

Thursday, July 28, 2022

Met, pursuant to notice, at 10:00 a.m.

BEFORE:

HON. RENÉE COHN JUBELIRER, President Judge

APPEARANCES:

MICHAEL J. FISCHER, Esquire JACOB B. BOYER, Esquire Office of Attorney General 1600 Arch Street, Suite 300 Philadelphia, Pennsylvania 19103 (For the Petitioners)

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THOMAS E. BRETH, Esquire
Dillon McCandless King Coulter & Graham L.L.P.
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(For Respondent, Fayette County Board of Elections)

* * *

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14 15	8 (6/27/22 Kuznik E-mail) 9 (6/27/22 Pfursich E-mail)	3		109	14		
16	9 (6/27/22 Prursich E-mail) 10 (6/28/22 Leinbach E-mail)	3:		109	15		
17	10 (6/28/22 Leinbach E-mail) 11 (6/29/22 Gates Letter)	2'		109	16 17		
18	12 (7/1/22 Kauffman Letter)	3:		109	18		
19	13 (July E-mail Chain Between	3.	-	207	19		
20	Gates and Pfursich)	3	3	109	20		
21	14 (7/8/22 Gates E-mail)	3	3	109	21		
22	Petitioner				22		
23	<pre>1 (6/2/22 Order of Judge Cohn Jubelirer in McCormick)</pre>	10	3	109	23	Any reproduction of this transcript	
24		_0			24	is prohibited without authorization by the certifying reporter.	
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	Page 7	П	Page 9
1	Page 7	1	Secretary Mr. Marks is here who we would call on
2	JUDGE COHN JUBELIRER: Good morning,	2	cross-examination.
3	everyone, and welcome to Commonwealth Court. We are here	3	We're prepared to go however Your Honor
4	today in the matter of Leigh Chapman, Acting Secretary of	4	would see fit, but I think there are preliminary issues
5	the Commonwealth and the Pennsylvania Department of State,	5	that we ought to at least address. I guess we're kind of
6	Petitioners, versus Berks County Board of Elections,	6	addressing them now, but I think we ought to get to those.
7	Fayette County Board of Elections, and Lancaster County	7	And I would think that the Court would most likely have,
8	Board of Elections, Respondents. It is a hearing on	8	with all due respect, would most likely have questions for
9	Petitioners' Emergency Application for Peremptory Judgment	9	both sides about those issues.
10	and Summary Relief. So welcome.	10	JUDGE COHN JUBELIRER: And
11	We will begin. I understand that there are	11	Yes?
12	some witnesses that you anticipating calling. Would you	12	MR. BUKOWSKI: And, Your Honor, I didn't
13	each like to make a brief opening statement or would you	13	introduce myself, so I apologize. Jeff Bukowski on behalf
14	prefer to jump right in?	14	of both Berks and Lancaster County; and I do have
15	MR. BUKOWSKI: I'm not sure, Your Honor, and	15	Commissioner Christian Leinbach, Chairman of the Berks
16	the Court's preference is, you know, one of the issues we	16	County Commissioners, here and Commissioner Ray D'Agostino
17	raised some threshold issues as to how we even get to an	17	from the Lancaster County Board of Commissioners here.
18	evidentiary hearing; and we'll defer to Your Honor on how	18	And I didn't intend to argue it first other
19	you want to handle that, whether you want us to argue those	19	than raise the issue so that if the Court preferred to go
20	first before calling witnesses.	20	that way, maybe Mr. Boyer or Mr. Fischer would try and, you
21	We do think that how we got here is the	21	know, convince the Court why they should be here now and
22	Secretary's filing this action late to challenge the Board,	22	then we would argue why they shouldn't be.
23	the three County Boards of Elections' certified results in	23	JUDGE COHN JUBELIRER: And thank you very
24	an untimely manner in which no voter challenge exists, no	24	much. I appreciate and I understand that you haven't
25	candidate challenge exists, and they're seeking to enforce	25	actually made your arguments. You've just presented what
	Page 8 a directive by the Secretary to have the three counties		Page 10 you would like to, the method you would like to proceed
1 2	recertify their results of their elections in accordance	1 2	with.
3	with the Acting Secretary's interpretation of a Third	3	Counsel?
4	Circuit decision that wasn't even in effect as of the	ΙI	MR. BOYER: Good morning, Your Honor, Jacob
5	deadline and actual date of certification.	4 5	Boyer
	So we can argue those before the Court first	6	JUDGE COHN JUBELIRER: Good morning.
6 7	before putting on witnesses, but we're prepared to proceed	7	MR. BOYER: from the Office of Attorney
8	however the Court would prefer.	8	General on behalf of the Acting Secretary and the
9	MR. KING: Good morning. Thomas W. King,	9	Department of State.
10	III, for the Fayette County Board of Elections. With me is	10	I think our view is we're prepared to
11	my partner, Thomas Breth, who has appeared before you	11	proceed as Your Honor sees fit. Unless Your Honor's
12	previously.	12	prepared to rule on the legal issues right now, I think it
13	I would echo what Mr. Bukowski said. There	13	probably makes sense out of respect to the witnesses to
14	are preliminary matters that I'm certain that the Court has	14	proceed with the evidentiary hearing and then to argument.
15	seen the papers in the case, but there are preliminary	15	I will say a couple of the comments that my
16	matters that call into question the jurisdiction with	16	colleagues on the other side made during their presentation
17	respect to hearing this matter because of the failure to	17	reflects a basic
18	comply with the statutory requirements. Also there is no	18	JUDGE COHN JUBELIRER: And please, you know
19	case or controversy before you; and in addition to that,	19	what, before we continue and this is just more of just a
20	whatever is filed is completely untimely.	20	method of proceeding here, I have no objection if you wish
21	So I'm not sure that we shouldn't at least	21	to speak from your tables where you're sitting because you
22	address those preliminary issues in some way. There are	22	can have all your materials in front of you; and I also
23	witnesses here. There are County Commissioners here. I	23	appreciate the respect accorded to the Court by your
24	have Commissioner Dunn and Commissioner Lohr from Fayette	24	standing when you speak.
25	County made the trip here today, and I know that the Deputy	25	With the streaming of the proceedings so
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	Page 11	П	Page 13
1	that other people can watch this on YouTube without having	1	I am going to be taking all of these matters
2	to be in court, the volume of your voice is difficult to	2	under consideration, so I don't intend to rule
3	hear if you're not sitting or close to the microphone. So	3	preliminarily on the issues that you've raised which are
4	I will not take it amiss if you sit while you speak to the	4	important and I think will benefit from considered thought
5	Court so that the microphone can catch what you're saying	5	and research.
6	or, of course, you may stand at the podium. But I want to	6	So given the fact that you have witnesses
7	make sure that everybody can hear what you're saying.	7	here that may or may not want to remain through all of the
8	So excuse the interruption but please	8	arguments, if there is no objection I think we should begin
9	(Mr. Boyer approached the podium.)	9	with the testimony, allow the witnesses to be questioned,
10	JUDGE COHN JUBELIRER: okay feel free	10	make the record, and then afterwards I do want to hear all
11	to go wherever it's most suitable and convenient.	11	of the arguments that you've raised.
12	MR. BOYER: Thank you, Your Honor, and I	12	Even though we're taking it a little out of
13	appreciate the courtesy.	13	order, given the situation I think that probably makes most
14	I will say we believe that these issues can	14	sense although I appreciate your having brought the
15	be resolved on the paper much like they were in the	15	preliminary threshold issues to the fore.
16	McCormick matter. If Your Honor disagrees and believes	16	MR. KING: Yes, Your Honor. That's fine
17	there are relevant disputed facts, I think our view is that	17	with us. Thank you very much.
18	it makes sense out of courtesy to the witnesses to have	18	MR. BUKOWSKI: Thank you, Your Honor. We
19	them testify and then proceed to argument.	19	will proceed accordingly.
20	The threshold issues that my colleagues	20	JUDGE COHN JUBELIRER: Thank you very much.
21	raised I think reflect a couple basic misunderstandings	21	MR. BUKOWSKI: Thank you.
22	about the issues in this case. Number one, this is not a	22	MR. BOYER: Thank you, Your Honor.
23	case to enforce guidance from the Secretary. This is a	23	JUDGE COHN JUBELIRER: Okay. Given the way
24	case to enforce an order of this Court, state law, and	24	we're going to proceed, would you like to spend a few
25	federal law.	25	minutes before we begin with an opening statement or would
1	Page 12 And, number two, I think they refer to	1	Page 14 you prefer to wait and at the end do the conclusions?
2	issues of timeliness. I believe that's a reference to	2	MR. FISCHER: Your Honor, I think we're fine
3	Section 3157 of the Election Code which doesn't apply here	3	dispensing with opening statements.
4	since it doesn't apply to contests about certification	4	JUDGE COHN JUBELIRER: Okay.
5	which is a ministerial duty that it's supposed to follow	5	Would you?
6	the resolution of issues about computation and canvassing	6	MR. BUKOWSKI: We agree, Your Honor.
7	which are the only things that can be challenged under the	7	JUDGE COHN JUBELIRER: Okay.
8	statutes being alluded to. So I don't think that	8	MR. BUKOWSKI: And since the Court has
9	JUDGE COHN JUBELIRER: I think are you	9	directed that we'll get a full chance to argue, we agree
10	having trouble hearing?	10	that makes sense.
11	THE REPORTER: Yes, and he needs to slow	11	JUDGE COHN JUBELIRER: Absolutely and I will
12	down.	12	place no time limitations on your arguments because I know
13	JUDGE COHN JUBELIRER: And you need to speak	13	how important they are, and I want to make sure that
14	a little slower, please.	14	everyone has the opportunity to make their best arguments
15	MR. BOYER: I'm sorry.	15	and present their best case.
16	JUDGE COHN JUBELIRER: Yes.	16	MR. KING: Thank you very much.
17	MR. BOYER: I apologize.	17	MR. BUKOWSKI: Very good, Your Honor. Thank
18	The threshold issues, Your Honor, in our	18	you.
19	view are actually quite easily resolved and don't apply in	19	JUDGE COHN JUBELIRER: Thank you.
20	this matter. So unless Your Honor is in a position to rule	20	In that case I believe it is up to the
21	ahead of an evidentiary hearing, I think we should proceed	21	Secretary to proceed. Since you are the moving party, you
22	with that and then follow the evidentiary hearing with	22	have the burden.
23	argument.	23	MR. FISCHER: Thank you very much, Your
24	JUDGE COHN JUBELIRER: Okay. Thank you very	24	Honor. We'd like to call Jonathan Marks as our first
25	much.	25	witness.
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1	Page 15 MR. HOLLAND: Please raise your right hand.	1	Page 17 election administration at the State level.
2	Whereupon,	2	Q. Generally speaking, what are the responsibilities
3	JONATHAN MARKS,	3	of the county boards?
4	having been duly sworn, testified as follows:	4	A. Generally speaking, you know, it's to instruct
5	MR. HOLLAND: Please be seated. Thank you.	5	poll workers, to procure and staff polling places
6	MR. KING: Excuse me. May it please the	6	throughout their county. It also includes receiving and
7	Court. Your Honor, with respect to these witnesses, will	7	tabulating both Election Day votes as well as votes cast by
8	the parties be bound by the declarations made to the Court	8	absentee or through the mail.
9	in the form of a proffer that was included in the	9	Q. And what are the responsibilities broadly
10	memorandum filed? So, for example, would the Commonwealth	10	speaking of the Department of State with respect to
11	be bound by the proffer of what this witness is about to	11	elections?
12	testify about?	12	A. Our duties are primarily ministerial in nature.
13	JUDGE COHN JUBELIRER: Is there any	13	We do provide guidance to the counties; but as it relates
14	objection to that?	14	to elections or a given election, you know, our
15	MR. FISCHER: No objection, Your Honor.	15	responsibility primarily is to certify the results of the
16	We've laid out in general terms what we'd like to ask this	16	election upon receipt of the certified election returns
17	witness, but I don't intend to go much beyond that. If Mr.	17	from the various 67 county Boards of Elections.
18	King on cross elicits other points, then we certainly	18	Q. Now, you mentioned guidance issued by the
19	reserve the right on redirect to respond.	19	Department of State. Is the Department of State's guidance
20	MR. KING: That's fine, Your Honor. I just	20	binding on the counties?
21	wanted to make sure what the rules were before we got into	21	A. Guidance, no, it is not binding on the counties.
22	the game here.	22	The Secretary of the Commonwealth does have the authority
23	JUDGE COHN JUBELIRER: Sure. Thank you very	23	to issue directives in some cases. But when we use the
24	much.	24	term guidance, we're talking about something that is what
25	MR. KING: Yes, ma'am. Thank you.	25	the name implies. It's guidance that counties we expect
25		↤	
1	DIRECT EXAMINATION Page 16	1	will follow but as we learned not always.
2	BY MR. FISCHER:	2	Q. Thank you. And who in Pennsylvania has the final
3	Q. Good morning, Mr. Marks.	3	say over disputed questions relating to the administration
4	A. Good morning.	4	of elections?
5	Q. What is your current position, sir?	5	A. The final say, I would think the final say would
6	A. Currently I am the Deputy Secretary for Elections	6	be the Court, you know, a competent Court, whatever that
7	and Commissions at the Pennsylvania Department of State.	7	Court happens to be.
8	Q. How long have you been employed by the	8	Q. Does the Department make an effort to see that
9	Pennsylvania Department of State?	9	its guidance is consistent with relevant decisions from the
10	A. Employed by the Pennsylvania Department of State	10	Courts?
11	27 years, 28 years. I started in the Corporation Bureau	11	A. We do, yes.
12	before I came to Elections.	12	Q. So I'd like to ask you a little about the process
13	Q. How long have you worked in the Elections Bureau?	13	of certifying elections which you mentioned and then
14	A. I've worked in Elections in a variety of	14	specifically relating to the May, 2022 primary. First of
15	positions for over 18 years, since late 2003.	15	all, can I ask a question? What does it mean to canvass
16	Q. And how long have you held your current position?	16	the votes cast?
17	A. Since February of 2019.	17	A. Canvass really means the entire process of, you
18	Q. Thank you. I'd just like to ask you briefly	18	know, the viewing and tabulating of the election returns.
19	about the administration of elections in Pennsylvania.	19	So canvass, the county Board of Elections comes together
20	What governmental entity or entities is responsible for	20	and they will review the returns submitted by the various
21	administering elections on a day-to-day basis?	21	precincts in their counties. It also includes adding those
22	A Primarily the county Boards of Elections. They	22	totals from absentee and mail-in balloting which are done
23	are statutorily given that duty to administer the	23	centrally by the county Board of Elections.
24	day-to-day on election administration. Of course, the	24	So that precanvass that we have that begins on
25	Department of State plays an important role as well in	25	7:00 a.m. on Election Day as well as the official canvass
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1	Page 19 that continues thereafter, all of that is part of the	1	Q. Now, there's a place for the voter to sign and
2	canvass. So it's not just the tabulation of votes. It's	2	mark, sign or mark and then a line below that for the date.
3	also everything that precedes that during the official	3	Do you see that?
4	canvassing.	4	A. I do, yes.
5	Q. But it's fair to say that canvassing includes	5	Q. Could you explain under the Election Code when do
6	counting votes and tabulating votes?	6	mail-in and absentee ballots need to be returned to the
7	A. It does, yes.	7	counties?
8	Q. Thank you. And what does certification of the	8	A. A mail-in or absentee ballot must be returned to
9	election refer to?	9	the county by 8:00 p.m. on Election Day.
10	A. Certification is essentially an act, a	10	Q. And was that true with respect to the May, 2022
11	ministerial act that occurs once the canvass is completed	11	primary?
12	and you've tallied up all the results. The county will	12	A. It was, yes.
13	then certify those results to the Secretary of the	13	Q. And was this certification form in use for the
14	Commonwealth, and subsequently the Secretary will certify	14	May, 2022 primary?
15	the final results after she compiles them.	15	A. It was, yes.
16	Q. So both the counties and the Secretary certify	16	Q. Now, with respect to the November, 2020 general
17	results; is that correct?	17	election, was the deadline 8:00 p.m. on Election Day?
18	A. Correct. Yes.	18	A. No. The deadline was not 8:00 p.m. on Election
19	Q. Does the Secretary strive to make sure that her	19	Day November, 2020. Pursuant to the order of the
20	certification is accurate and complete?	20	Pennsylvania Supreme Court, that deadline for receipt was
21	A. She does, yes.	21	extended to Friday after election.
22	Q. Sir, I'd like to ask you specifically now about	22	Q. How do counties determine whether mail-in and
23	mail-in and absentee ballots, and I'm going to hand you	23	absentee ballots were submitted by the deadline?
24	what's been marked as Joint Exhibit 1.	24	A. Typically the counties will date-stamp or
25	(Whereupon, the document was marked as	25	otherwise put some indicia on the outer envelope indicating
1	Joint Exhibit Number 1 for Page 20	1	Page 22 that it was timely received by the county Board of
2	identification.)	2	Elections.
3	THE WITNESS: Thank you.	3	Q. Do the counties use the date written by the voter
4	BY MR. FISCHER:	4	on the outer envelope to determine timeliness?
5	Q. Sir, are you familiar with this document?	5	
6		1 71	A. Not that I'm aware of, no.
1 1	A. I am, yes.	6	A. Not that I'm aware of, no. Q. Are you aware of any purpose for which the
7	A. I am, yes. Q. What is this document?	1 1	
		6	Q. Are you aware of any purpose for which the
7	Q. What is this document?	6 7	Q. Are you aware of any purpose for which the counties use the date as written on the outer envelope?
7 8	Q. What is this document? A. This is the declaration envelope template drafted	6 7 8	Q. Are you aware of any purpose for which the counties use the date as written on the outer envelope? A. I cannot think of any administrative purpose.
7 8 9	Q. What is this document? A. This is the declaration envelope template drafted by the Department of State. A declaration envelope meaning	6 7 8 9	Q. Are you aware of any purpose for which the counties use the date as written on the outer envelope? A. I cannot think of any administrative purpose. Q. Do voters occasionally omit to write a date on
7 8 9 10	Q. What is this document? A. This is the declaration envelope template drafted by the Department of State. A declaration envelope meaning that outside envelope that the voter inserts their ballot	6 7 8 9	Q. Are you aware of any purpose for which the counties use the date as written on the outer envelope? A. I cannot think of any administrative purpose. Q. Do voters occasionally omit to write a date on the outer envelope?
7 8 9 10	Q. What is this document? A. This is the declaration envelope template drafted by the Department of State. A declaration envelope meaning that outside envelope that the voter inserts their ballot inside the secrecy envelope and they sign the declaration.	6 7 8 9 10	Q. Are you aware of any purpose for which the counties use the date as written on the outer envelope? A. I cannot think of any administrative purpose. Q. Do voters occasionally omit to write a date on the outer envelope? A. Yes, they do.
7 8 9 10 11	Q. What is this document? A. This is the declaration envelope template drafted by the Department of State. A declaration envelope meaning that outside envelope that the voter inserts their ballot inside the secrecy envelope and they sign the declaration. Q. Could you just explain again? You mentioned two	6 7 8 9 10 11	Q. Are you aware of any purpose for which the counties use the date as written on the outer envelope? A. I cannot think of any administrative purpose. Q. Do voters occasionally omit to write a date on the outer envelope? A. Yes, they do. Q. And if I refer to those ballots as undated
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7 8 9 10 11 12 13 14 15 16 17 18 19	Q. What is this document? A. This is the declaration envelope template drafted by the Department of State. A declaration envelope meaning that outside envelope that the voter inserts their ballot inside the secrecy envelope and they sign the declaration. Q. Could you just explain again? You mentioned two different envelopes. Could you just explain the function of the two envelopes? A. Sure. So the secrecy envelope or I believe the statute identifies it as official ballot envelope is just a plain envelope with the wording official election ballot on it that the voter inserts their voted ballot into. The declaration envelope then is the envelope that that inner envelope, that secrecy envelope is inserted into, sealed,	6 7 8 9 10 11 12 13 14 15 16 17 18 19	Q. Are you aware of any purpose for which the counties use the date as written on the outer envelope? A. I cannot think of any administrative purpose. Q. Do voters occasionally omit to write a date on the outer envelope? A. Yes, they do. Q. And if I refer to those ballots as undated ballots, do you understand what I'm referring to? A. I do. Q. And do voters sometimes write a date that is obviously incorrect? A. Yes. Voters, anecdotally we've heard from counties where voters will, you know, either put their birth date on there as they misunderstand what's being requested or they'll put a date with the wrong year or the
7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	Q. What is this document? A. This is the declaration envelope template drafted by the Department of State. A declaration envelope meaning that outside envelope that the voter inserts their ballot inside the secrecy envelope and they sign the declaration. Q. Could you just explain again? You mentioned two different envelopes. Could you just explain the function of the two envelopes? A. Sure. So the secrecy envelope or I believe the statute identifies it as official ballot envelope is just a plain envelope with the wording official election ballot on it that the voter inserts their voted ballot into. The declaration envelope then is the envelope that that inner envelope, that secrecy envelope is inserted into, sealed, and then signed by the elector. And that is then returned	6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	Q. Are you aware of any purpose for which the counties use the date as written on the outer envelope? A. I cannot think of any administrative purpose. Q. Do voters occasionally omit to write a date on the outer envelope? A. Yes, they do. Q. And if I refer to those ballots as undated ballots, do you understand what I'm referring to? A. I do. Q. And do voters sometimes write a date that is obviously incorrect? A. Yes. Voters, anecdotally we've heard from counties where voters will, you know, either put their birth date on there as they misunderstand what's being requested or they'll put a date with the wrong year or the wrong month.
7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	Q. What is this document? A. This is the declaration envelope template drafted by the Department of State. A declaration envelope meaning that outside envelope that the voter inserts their ballot inside the secrecy envelope and they sign the declaration. Q. Could you just explain again? You mentioned two different envelopes. Could you just explain the function of the two envelopes? A. Sure. So the secrecy envelope or I believe the statute identifies it as official ballot envelope is just a plain envelope with the wording official election ballot on it that the voter inserts their voted ballot into. The declaration envelope then is the envelope that that inner envelope, that secrecy envelope is inserted into, sealed, and then signed by the elector. And that is then returned to the county Board of Elections for canvassing.	6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	Q. Are you aware of any purpose for which the counties use the date as written on the outer envelope? A. I cannot think of any administrative purpose. Q. Do voters occasionally omit to write a date on the outer envelope? A. Yes, they do. Q. And if I refer to those ballots as undated ballots, do you understand what I'm referring to? A. I do. Q. And do voters sometimes write a date that is obviously incorrect? A. Yes. Voters, anecdotally we've heard from counties where voters will, you know, either put their birth date on there as they misunderstand what's being requested or they'll put a date with the wrong year or the wrong month. Q. Outside those situations where the date is

\Box	Page 23	П	Page 25
1	Q. Now, earlier you testified about guidance issued	1	Any problem?
2	by the Department. Has the Department issued guidance	2	THE REPORTER: No.
3	relating to undated ballots or wrongly dated ballots as you	3	BY MR. FISCHER:
4	describe them?	4	Q. Mr. Marks, do you recognize this exhibit?
5	A. Yes. Since early June well, actually since	5	A. I do, yes.
6	May 20th I believe when the Third Circuit ruled in the	6	Q. Is this an e-mail that you sent?
7	Migliori case, we issued guidance to the counties at that	7	A. It is, yes.
8	point indicating that the counties should well, sorry.	8	Q. Now, I notice you are the only individual listed
9	I want to make sure I get the timeline correct; but, yes,	9	in the recipient line. Did you only send this e-mail to
10	we've issued guidance prior to the primary. We obviously	10	yourself?
11	issued guidance subsequent to that in light of various	11	A. No. I blind copied several counties. I believe
12	Court rulings.	12	nine counties received this e-mail.
13	Q. So let me drill down a little bit on that. First	13	Q. Is that your typical practice when you're
14	of all, are you an attorney for the Department?	14	e-mailing multiple counties?
15	A. I am not, no.	15	A. Yes. We typically blind copy everyone, and I'll
16	Q. You had mentioned the Department issued guidance	16	send a copy to myself.
17	before and after. Let me ask you specifically about	17	Q. Now, if I could direct you to the second page of
18	wrongly dated ballots. What is the Department's guidance	18	the document, the top half of that page there's a list of
19	as to wrongly dated ballots such as a ballot where the	19	dates.
20	voter lists his or her birth date?	20	A. Yes. I'm sorry. I want to correct one thing. I
21	A. It has been our guidance since I believe	21	was confused on the dates. I believe I sent this e-mail to
22	September of 2020 that counties cannot and should not set	22	all county Boards of Elections, June 17th e-mail.
23	aside ballots that are wrongly dated, meaning a ballot that	23	Q. Thank you for that clarification. What is the
24	has an incorrect date whether it's a birth date or some	24	summary of events that you have here?
25	other error by the voter.	25	A. This was basically a summary of, you know,
1	Page 24 Q. And has the Department's guidance with respect to	1	Page 26 relevant events, mostly, you know, rulings by the Court and
2	wrongly dated ballots only changed over that time?	2	other events in between that led to the Department's
3	A. It has not.	3	determination as to what counties were required to do.
4	Q. Now, with respect to undated ballots, has the	4	Q. Now, I'd like to direct you to the bottom
5	Department's guidance changed over time?	5	e-mail-in this exhibit dated June 17th, 2022, at 9:08 a.m.
6	A. It has, yes.	6	Do you see this e-mail?
7	Q. And what has prompted those changes?	7	A. I do, yes.
8	A. Rulings by the Court, this Court as well as the	8	Q. And did you write and sign this e-mail?
9	Third Circuit.	9	A. I did, yes.
10	Q. So leading up to the May, 2022 primary, what was	10	Q. And what were you trying to communicate to the
11	the Department's guidance with respect to undated ballots?	11	counties in this e-mail?
12	A. It was the Department's guidance leading up to	12	A. We were trying to communicate I was trying to
13	the May, 2022 primary that those ballots could not be	13	communicate that if counties had not already done so that
14	counted and based on our analysis of the 2020 decision by	14	they should canvass, tabulate, and certify votes from
15	the Pennsylvania Supreme Court.	15	undated or wrongly dated ballots as the case may be. And,
16	Q. I'm going to hand you what's been marked as Joint	16	you know, it's our belief that that should be done in an
17	Exhibit 6.	17	open meeting if it had not already been done and that
18	(Whereupon, the document was marked as	18	subsequently they should certify those totals to the
19	Joint Exhibit Number 6 for	19	Department of State.
20	identification.)	20	Q. And what had prompted that change in the
21	THE WITNESS: Thank you.	21	Department's guidance to counties?
22	Your Honor, is my volume okay? I tried to	22	A. Well, it was not only the decision of the Third
23		23	Circuit but also the June 2nd opinion of this Court as well
24	JUDGE COHN JUBELIRER: I think so. Thank	24	as I believe the last item on this list of events is an
25	you.	25	action by the U.S. Supreme Court denying an application for
	-	ادعا	

1	Page 27 stay in the Migliori case.	1	Page 29 Q. And this is an e-mail sent to you from Marybeth
2	Q. Now, you mentioned the June 2nd decision of this	2	Kuznik, am I saying that right?
3	Court. Did that involve litigation regarding the	3	A. Kuznik.
4	republican senate primary?	4	Q. Kuznik, with the Fayette County Election Bureau,
5	A It did, yes.	5	correct?
6	Q. And that was actually brought by Mr. McCormick,	6	A. Correct. Yes.
7	one of the candidates, correct?	7	Q. Dated June 27th?
8	A. Correct.	8	A. That's correct, yes.
9	Q. Sir, I'm going to hand you what's been marked as	9	Q. And what is Ms. Kuznik saying in her e-mail?
10	Joint Exhibit 11.	10	A. So Ms. Kuznik, I'm actually going to read it if
11	(Whereupon, the document was marked as	11	that
12	Joint Exhibit Number 11 for	12	Q. Certainly.
	identification.)	1 1	A pleases the Court. The Board of Elections of
13	BY MR. FISCHER:	13	Fayette County has voted not to open or count the undated
14		14	
15	Q. Have you seen this document before?	15	ballots from the May 17th, 2022 general primary. For this
16	A. I have, yes.	16	reason, I am unable to provide the information you
17	Q. And what is the date on this letter?	17	requested in your e-mail below. Dated ballots with the
18	A. This letter is dated June 29th of 2022.	18	wrong date were counted and were already included in
19	Q. And who is it sent from?	19	Fayette's original certification of the primary and
20	A. It's sent by Chief Counsel of the Department of	20	subsequent recount, referring to the recount, statewide
21	State, Timothy Gates.	21	recount for U.S. Senate.
22	Q. Now, the letter is directed to the Director of	22	Q. So now let's look at your e-mail that she was
23	the Berks County Election Services. Do you recall if this	23	responding to which begins on the bottom of the first page
24	letter was sent to any other county officials?	24	and carries over into the second page. Do you recall
25	A. Yes. My recollection is this letter was sent to	25	sending this e-mail?
1	Page 28 I believe four counties, Berks, Bradford, Fayette, and		Page 30 A. I do, yes. This was sort of my final reminder to
2	Lancaster.	2	the counties who at that point had not yet certified vote
3	Q. And what was the purpose of this letter?	3	totals for undated and wrongly dated ballots.
4	A. The purpose of this letter was to reiterate the	4	Q. Did this go to all 67 counties?
5	Department's position that counties were required, in light	5	A. It did not. This one went to nine counties
6	of relevant rulings by the Courts, the counties were	6	including Bradford, Berks, Fayette, and Lancaster.
7	required to canvass, tabulate, and certify vote totals cast	7	Q. How had you selected those nine counties to
8	on undated or wrongly dated ballots as the case may be.	8	
9		1 7	receive the e-mail?
-	And it outlines how the Department arrived at that	ا م	
10	And it outlines how the Department arrived at that conclusion, briefly summarizes it.	9	A. They were selected based on whether we received
10	conclusion, briefly summarizes it.	10	A. They were selected based on whether we received from those counties a certification per my original request
11	conclusion, briefly summarizes it. Q. And in between your June 17th e-mail and this	10 11	A. They were selected based on whether we received from those counties a certification per my original request of June 17th.
11 12	conclusion, briefly summarizes it. Q. And in between your June 17th e-mail and this June 29th letter, had you been in communication with any	10 11 12	A. They were selected based on whether we received from those counties a certification per my original request of June 17th. Q. All right. Thank you. I'd like to now direct
11 12 13	conclusion, briefly summarizes it. Q. And in between your June 17th e-mail and this June 29th letter, had you been in communication with any counties about those certifications?	10 11 12 13	A. They were selected based on whether we received from those counties a certification per my original request of June 17th. Q. All right. Thank you. I'd like to now direct you to Joint Exhibit 9 which is the next document up there.
11 12 13 14	conclusion, briefly summarizes it. Q. And in between your June 17th e-mail and this June 29th letter, had you been in communication with any counties about those certifications? A. Yes. I certainly received questions, had some	10 11 12 13 14	A. They were selected based on whether we received from those counties a certification per my original request of June 17th. Q. All right. Thank you. I'd like to now direct you to Joint Exhibit 9 which is the next document up there. (Whereupon, the document was marked as
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11 12 13 14 15 16 17 18	conclusion, briefly summarizes it. Q. And in between your June 17th e-mail and this June 29th letter, had you been in communication with any counties about those certifications? A. Yes. I certainly received questions, had some phone conversations with various counties about the June 17th e-mail. Q. I'm going to hand you what's been marked as Joint Exhibit 8 and also give you the next two to save time but I'll let you know when we're ready for those.	10 11 12 13 14 15 16 17 18	A. They were selected based on whether we received from those counties a certification per my original request of June 17th. Q. All right. Thank you. I'd like to now direct you to Joint Exhibit 9 which is the next document up there. (Whereupon, the document was marked as Joint Exhibit Number 9 for identification.) BY MR. FISCHER: Q. This is another e-mail sent to you from Jacquelyn Pfursich. Am I saying that correctly?
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11 12 13 14 15 16 17 18 19 20 21 22	conclusion, briefly summarizes it. Q. And in between your June 17th e-mail and this June 29th letter, had you been in communication with any counties about those certifications? A. Yes. I certainly received questions, had some phone conversations with various counties about the June 17th e-mail. Q. I'm going to hand you what's been marked as Joint Exhibit 8 and also give you the next two to save time but I'll let you know when we're ready for those. (Whereupon, the document was marked as Joint Exhibit Number 8 for identification.)	10 11 12 13 14 15 16 17 18 19 20 21	A. They were selected based on whether we received from those counties a certification per my original request of June 17th. Q. All right. Thank you. I'd like to now direct you to Joint Exhibit 9 which is the next document up there. (Whereupon, the document was marked as Joint Exhibit Number 9 for identification.) BY MR. FISCHER: Q. This is another e-mail sent to you from Jacquelyn Pfursich. Am I saying that correctly? A. I don't know. This is the first time I actually had any interaction with Jacquelyn, so I believe that's correct but don't quote me on that. I'm sure one of the

П	Page 31	П	Page 33
1	MR. FISCHER: Pfursich, thank you.	1	A. Correct.
2	BY MR. FISCHER:	2	Q. And what correspondence is Mr. Kauffman referring
3	Q. What is Ms. Pfursich's position?	3	to there?
4	A. I believe she is the Lancaster County Solicitor.	4	A. He's referring to the June 29th letter from our
5	Q. And this e-mail is dated June 27th?	5	Chief Counsel, from Mr. Gates to the Election Director in
6	A. It is, yes.	6	Berks County.
7	Q. And I won't ask you to read the entire e-mail,	7	Q. I'd like to direct you to Joint Exhibit 13 and
8	but is it fair to say that in this e-mail Ms. Pfursich says	8	specifically the second e-mail in the chain which is from
9	that Lancaster County will not be including undated ballots	9	Ms. Pfursich to Mr. Gates.
10	in its certified totals?	10	(Whereupon, the document was marked as
11	A. Yes, that is correct.	11	Joint Exhibit Number 13 for
12	Q. And now I'd like to go to Joint Exhibit 10.	12	identification.)
13	(Whereupon, the document was marked as	13	BY MR. FISCHER:
14	Joint Exhibit Number 10 for	14	Q. Have you seen this e-mail before?
15	identification.)	15	A. Are you referring to the July 5th, 4:17 p.m.?
16	BY MR. FISCHER:	16	Q. Yes, that's correct.
17	Q. This is another e-mail sent to you from Christian	17	A. I have, yes.
18	Leinbach. Do you know who Mr. Leinbach is?	18	Q. And is it fair to say Ms. Pfursich is reiterating
19	A. I do, yes. I believe he is the Chair of the	19	what she previously said to you which is that Lancaster
20	Berks County Commissioners.	20	County will not be including undated ballots in its total?
21	Q. And this is sent on June 28th, correct?	21	A. That is correct. Yes.
22	A. Correct. Yes.	22	Q. Now, finally I'd like to direct you to Joint
23	Q. And in this e-mail Mr. Leinbach says please help	23	Exhibit 14.
24	me understand where the clear Court guidance is regarding	24	(Whereupon, the document was marked as
25	certification on undated ballots. I do not see it. Do you	25	Joint Exhibit Number 14 for
1	see that?	1	identification.)
2	A. I do, yes.	2	BY MR. FISCHER:
3	Q. So is it fair to say that you understood this	3	Q. This is an e-mail from Mr. Gates to Ms. Kuznik.
4	e-mail to be communicating that Mr. Leinbach did not agree	4	What is the date on this e-mail?
5	with the Department's position?	5	A. This e-mail is are you referring to the one at
6	A. Yes, I think that's a fair	6	the top of the chain
7	Q. I'm going to hand you the next three exhibits	7	Q. Yes.
8	which are 12, 13, and 14. I want to direct you to Joint	8	A which is July 8th, 2022, at 6:31 p.m.?
9	Exhibit 12 first.	9	
10			Q. Thank you. Can you just read what Mr. Gates says
	(Whereupon, the document was marked as	10	Q. Thank you. Can you just read what Mr. Gates says in this e-mail?
11	(Whereupon, the document was marked as Joint Exhibit Number 12 for	10 11	
		ΙI	in this e-mail?
11	Joint Exhibit Number 12 for	11	in this e-mail? A. Following up again. Please advise on your
11 12	Joint Exhibit Number 12 for identification.)	11 12	in this e-mail? A. Following up again. Please advise on your response as requested. Fayette County is the only county
11 12 13	Joint Exhibit Number 12 for identification.) BY MR. FISCHER:	11 12 13	in this e-mail? A. Following up again. Please advise on your response as requested. Fayette County is the only county that I have not yet heard from.
11 12 13 14	Joint Exhibit Number 12 for identification.) BY MR. FISCHER: Q. Now, this is the letter from the Berks County	11 12 13 14	in this e-mail? A. Following up again. Please advise on your response as requested. Fayette County is the only county that I have not yet heard from. Q. And with respect to the subject that Fayette
11 12 13 14 15	Joint Exhibit Number 12 for identification.) BY MR. FISCHER: Q. Now, this is the letter from the Berks County First Assistant Berks County Solicitor to Mr. Gates,	11 12 13 14 15	in this e-mail? A. Following up again. Please advise on your response as requested. Fayette County is the only county that I have not yet heard from. Q. And with respect to the subject that Fayette County did not report to Mr. Gates on, do you have an
11 12 13 14 15	Joint Exhibit Number 12 for identification.) BY MR. FISCHER: Q. Now, this is the letter from the Berks County First Assistant Berks County Solicitor to Mr. Gates, correct?	11 12 13 14 15	in this e-mail? A. Following up again. Please advise on your response as requested. Fayette County is the only county that I have not yet heard from. Q. And with respect to the subject that Fayette County did not report to Mr. Gates on, do you have an understanding of what that refers to?
11 12 13 14 15 16 17	Joint Exhibit Number 12 for identification.) BY MR. FISCHER: Q. Now, this is the letter from the Berks County First Assistant Berks County Solicitor to Mr. Gates, correct? A. Yes, that's correct.	11 12 13 14 15 16	in this e-mail? A. Following up again. Please advise on your response as requested. Fayette County is the only county that I have not yet heard from. Q. And with respect to the subject that Fayette County did not report to Mr. Gates on, do you have an understanding of what that refers to? A. Yes. Following all the way back to the beginning
11 12 13 14 15 16 17	Joint Exhibit Number 12 for identification.) BY MR. FISCHER: Q. Now, this is the letter from the Berks County First Assistant Berks County Solicitor to Mr. Gates, correct? A. Yes, that's correct. Q. And dated July 1st?	11 12 13 14 15 16 17	in this e-mail? A. Following up again. Please advise on your response as requested. Fayette County is the only county that I have not yet heard from. Q. And with respect to the subject that Fayette County did not report to Mr. Gates on, do you have an understanding of what that refers to? A. Yes. Following all the way back to the beginning of this thread, it is follow-up from the June 29th e-mail
11 12 13 14 15 16 17 18	Joint Exhibit Number 12 for identification.) BY MR. FISCHER: Q. Now, this is the letter from the Berks County First Assistant Berks County Solicitor to Mr. Gates, correct? A. Yes, that's correct. Q. And dated July 1st? A. Yes.	11 12 13 14 15 16 17 18	in this e-mail? A. Following up again. Please advise on your response as requested. Fayette County is the only county that I have not yet heard from. Q. And with respect to the subject that Fayette County did not report to Mr. Gates on, do you have an understanding of what that refers to? A. Yes. Following all the way back to the beginning of this thread, it is follow-up from the June 29th e-mail from Mr. Gates where he attaches the letter, the June 29th
11 12 13 14 15 16 17 18 19 20	Joint Exhibit Number 12 for identification.) BY MR. FISCHER: Q. Now, this is the letter from the Berks County First Assistant Berks County Solicitor to Mr. Gates, correct? A. Yes, that's correct. Q. And dated July 1st? A. Yes. Q. And in this letter Mr. Kauffman, the Assistant	11 12 13 14 15 16 17 18 19	in this e-mail? A. Following up again. Please advise on your response as requested. Fayette County is the only county that I have not yet heard from. Q. And with respect to the subject that Fayette County did not report to Mr. Gates on, do you have an understanding of what that refers to? A. Yes. Following all the way back to the beginning of this thread, it is follow-up from the June 29th e-mail from Mr. Gates where he attaches the letter, the June 29th letter, the one to the four counties regarding
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П	Page 35	П	Page 37
1	Kuznik and jackpurcell146@gmail. Do you know who Mr.	1	Q. Good morning, Mr. Marks.
2	Purcell is?	2	A. Good morning.
3	A. I don't. I believe Mr. Purcell may be counsel	3	Q. I introduced myself to the Court earlier. My
4	for Fayette County or I'm really not sure.	4	name is Jeff Bukowski. I'm representing the Election
5	Q. And in this e-mail Mr. Gates says, Jack,	5	Boards from Berks County and Lancaster County in this
6	following up on my e-mail and letter last week. If you do	6	action. Thank you for being here this morning and giving
7	not provide the requested information by 5:00 p.m. today,	7	your testimony.
8	the Acting Secretary intends to pursue all necessary and	8	Let's go back to you still have the exhibit
9	appropriate legal action, Tim. Did I read that correctly?	9	binder in front of you?
10	A. You did, yes.	10	A. I do.
11	Q. Now, I believe earlier you mentioned that Mr.	11	Q. You were asked about Joint Exhibit 1 which is the
12	Gates' letter went to four counties; is that correct?	12	form of the
13	A. Yes, I believe that's correct.	13	A. Yes.
14	Q. Did any of those counties ultimately comply with	14	Q outer envelope?
15	the Department's request to include undated ballots in	15	A. I'm putting them in order. I have a pile of
16	their certified totals?	16	paper.
17	A. Yes, Bradford County.	17	Q. Okay. Take your time.
18	Q. Bradford did. With respect to the other three,	18	A. I have it. You're referring to this
19	did they ultimately comply?	19	(indicating)
20	A. No.	20	Q. Yes.
21	Q. In the Department's view have those three	21	A ballot envelope template?
22	counties complied with their obligation to certify the	22	Q. And that's the form of voter declaration on the
23	results of the May, 2022 primary?	23	outer envelope that's circulated by the Department to the
24	A. No.	24	Boards of Elections; is that right?
25	Q. Now, we've talked a little bit about undated	25	A. It is, yes.
	Page 36	H	Page 38
1	ballots and wrongly dated ballots earlier. Are you aware	1	Q. Okay. And on that form it's two pages. I'm not
2	of any county that excluded wrongly dated ballots from its	2	sure what the difference is. Maybe one's if it's different
3	certified total?	3	for an absentee or a mail-in ballot, but I did not discern
4	A. I am not aware of any county other than these	4	a difference other than one has a nice blue line at the
5	three that have excluded I'm sorry. You said wrongly	5	top. Are they the same?
6	dated ballots?	6	A. The declaration is substantively the same, yes.
7	Q. Wrongly dated ballots.	7	Q. Okay. And the notes, the bold lettering on the
8	A. No. I'm not aware of any county that excluded	8	side running from the left side of the page, so if you turn
9	wrongly dated ballots.	9	it sideways, that says the first line in all caps and
10	Q. But in the submissions from these three counties,	10	bold says your ballot will not be counted unless, correct?
11	it is your understanding that undated ballots were not	11	A. That's correct. Yes.
12	included?	12	Q. And then it has two bullet points or little
13	A. That is correct. Yes.	13	blocks that have the two things that tell the voter what
14	Q. Thank you.	14	would result in their vote not being counted?
15	MR. FISCHER: Thank you. We have no further	15	A. Correct. Yes.
16	questions, Your Honor.	16	Q. Okay. And the first block says you sign and date
17	JUDGE COHN JUBELIRER: Thank you very much.	17	the voter's declaration in your own handwriting; is that
18	Which of you would prefer to go first?	18	right?
19	MR. BUKOWSKI: I'll go first, Your Honor.	19	A. That is correct.
20	JUDGE COHN JUBELIRER: Okay. And if you can	20	Q. So this form promulgated by the Secretary and the
21	either come up here or	21	Department includes clear instructions to the voter that
22	MR. BUKOWSKI: I'll come up.	22	their vote on the ballot will not be counted unless the
23	JUDGE COHN JUBELIRER: Okay.	23	ballot is signed and dated, the voter's declaration is
24	CROSS-EXAMINATION	24	signed and dated in the voters's own handwriting; is that
25	BY MR. BUKOWSKI:	25	right?

1	A. That's correct.	1	Page 41 following year, so I understand how it happens.
2	Q. Okay. And now looking at the voter's declaration	2	Q. It's a good thing we vote in the primary in May
3	and the signature block, so turning it back right side up,	3	then?
4	the voter's declaration states I hereby declare that I am	4	A. Yes.
5	qualified to vote in this election, correct?	5	Q. Thank you. Now, the next exhibit well, before
6	A. Correct.	6	we get into the next exhibit, you had discussed guidance
7	Q. Then it goes on to say that I have not already	7	issued by the Department; is that right?
8	voted in this election, correct?	8	A. That is correct. Yes.
9	A. That's correct.	9	Q. And you conceded that that guidance is not
10	Q. And I further declare that I marked my ballot in	10	binding on county boards of election?
11	secret, correct?	11	A. Correct. Yes.
12	A. Correct.	12	Q. And the guidance at issue well, the guidance
13	Q. And I am qualified to vote the enclosed ballot?	13	that was promulgated by the Department prior to the May,
14	A. Correct.	14	2022 general primary election were two pieces of guidance.
15	Q. It further declares I understand I am no longer	15	There's one that's Joint Exhibit 2 which is guidance issued
16	eligible to vote at my polling place after I returned my	16	September 11th, 2020; is that right?
17	voted ballot?	17	A. I don't have Joint Exhibit 2 in front of me, but
18	A. Correct.	18	the timeline sounds correct.
19	Q. However, if my ballot is not received by the	19	MR. BUKOWSKI: Do you have that?
20	county, I understand I may only vote by provisional ballot	20	MR. BOYER: These are all the exhibits.
	at my polling place unless I surrender my balloting	ΙI	(Documents handed to Mr. Bukowski.)
21	materials to be voted to the Judge of Elections at my	21	MR. BUKOWSKI: Here's a set of all 14 so
22	polling place; is that right?	22	
23		23	I'll direct you. Here you go.
24		24	THE WITNESS: Thank you. BY MR. BUKOWSKI:
25	polling place.	25	
1	Q. To be voided, I apologize. The last one is I	1	Q. Do you have Joint Exhibit 2 now in front of you?
2	understand I may only vote by provisional ballot at ${\tt my}$	2	A. I do, yes.
3	polling place unless I surrender my balloting materials to	3	Q. Okay. And Joint Exhibit 2 is guidance issued by
4	be voided to the Judge of Elections at my polling place?	4	the Department on September 11th, 2020?
5	A. That's correct.	5	A. That is correct. Yes.
6	Q. And below that is a block with a big X that says	6	(Whereupon, the document was marked as
7	voter sign or mark here, right?	7	Joint Exhibit Number 2 for
8	A. Correct.	8	identification.)
9	Q. And in parentheses in bold text it says required?	9	BY MR. BUKOWSKI:
10	A. That's correct.	10	Q. Okay. And now would you turn to Joint Exhibit 3?
11	Q. And below that there's a blank, and below the	11	That's similar guidance. It's guidance issued by the
12	line on that blank it says in bold text today's date?	12	Department of State dated September 28th, 2020?
13	A. Correct.	13	A. Correct, yes.
14	Q. And next to that it says in parentheses in bold	14	(Whereupon, the document was marked as
15	text required?	15	Joint Exhibit Number 3 for
16	A. Correct.	16	identification.)
17	Q. Is there anything on this that would indicate to	17	BY MR. BUKOWSKI:
18	the voter that the date is not required on this?	18	Q. So a couple weeks after the prior guidance?
19	A. No, nothing that would indicate to the voter that	19	A. Right.
20	the date is not required.	20	Q. And the title page of Joint Exhibit 3 says
21	Q. And there's nothing and the date in question	21	Guidance Concerning Civilian Absentee and Mail-in Ballot
22	says pretty plainly, you would agree, wouldn't you, it's	22	Procedures, correct?
23	today's date, the date you sign it?	23	A. Correct.
24	A. I would. I'm one of those people that still puts	24	Q. And then if you turn to page 5 of Joint Exhibit
	the wrong year, though, on checks four months into the	25	3, let me know when you're there.
25			

1	A. I am there.	1	Page 45 Court in our argument later with some of the specific
2	Q. Okay. In the middle of the page above the bullet	2	language. So thank you.
3	points, the second set of bullet points, it says, with	3	BY MR. BUKOWSKI:
4	regard to the outer ballot return envelope. And then there	4	Q. Now, and this guidance, Joint Exhibit 3, I guess
5	are three bullet points; is that right?	5	is guidance to the Boards of Elections on how they should
6	A. That's correct. Yes.	6	canvass and count these absentee and mail-in ballots,
7	Q. And the first bullet point says so I'll read	7	correct?
8	the intro and then the bullet point says, with regard to	8	A. Correct. Yes.
9	the outer ballot return envelope, a ballot return envelope	9	Q. Do you recognize and does the Department
10	with a declaration that is filled out, dated, and signed by	10	recognize that the canvassing and counting or canvassing
11	an elector who was approved to receive an absentee or a	11	and computing of absentee ballots is discretionary, is a
12	mail-in ballot is sufficient and counties should continue	12	discretionary act?
13	to precanvass and canvass these ballots, correct?	13	A. Well, I think certainly the mechanics of it
14	A. Correct.	14	certain are discretionary. Whether or not to count legally
15	Q. The next bullet says, a ballot return envelope	15	cast ballots I don't believe is discretionary. I think
16	with a declaration that is not filled out, dated, and	16	that's a duty.
17	signed is not sufficient and must be set aside, declared	17	Q. Let me rephrase my question. Determining whether
18	void, and may not be counted. Ballot return envelopes must	18	a ballot is legally cast is an act of discretion by the
19	be opened in such a manner as not to destroy the	19	county boards of election and subject to interpretation;
20	declarations executed thereon; is that right?	20	isn't that right?
21	A. That's correct.	21	A. I think I would disagree with you there. I think
22	Q. Now, the language in this, filled out, dated, and	22	the statute, you know, provides direction as to which
23	signed, that stems from the Election Code provision that	23	ballots should be counted; and the statute in this case as
24	requires absentee and mail-in voters to fill out, date, and	24	interpreted by the Courts I believe that's ultimately the
25	sign their ballots, right?	25	authority on which ballots should be counted and which ones
	Page 44	\vdash	Page 46
1	A. Yes. I think that's fair.	1	shouldn't.
2	Q. Okay. And the language in the second bullet,	2	Q. And when you say interpreted by the Courts, are
		1 1	
3	sufficient, a ballot return envelope with a declaration	3	you talking about the 2020 In Re: Canvass Pennsylvania
3 4	that is not filled out, dated, and signed is not sufficient	3 4	you talking about the 2020 In Re: Canvass Pennsylvania Supreme Court decision?
		1 1	Supreme Court decision? A. Well, again you're getting a layman's
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4 5	that is not filled out, dated, and signed is not sufficient and must be set aside. That word sufficient comes from the	4 5	Supreme Court decision? A. Well, again you're getting a layman's
4 5 6	that is not filled out, dated, and signed is not sufficient and must be set aside. That word sufficient comes from the language of the Election Code that directs Boards of	4 5 6	Supreme Court decision? A. Well, again you're getting a layman's interpretation here, but it would be that as well as recent
4 5 6 7	that is not filled out, dated, and signed is not sufficient and must be set aside. That word sufficient comes from the language of the Election Code that directs Boards of Elections to determine if the voter's declaration is	4 5 6 7	Supreme Court decision? A. Well, again you're getting a layman's interpretation here, but it would be that as well as recent decisions including the Third Circuit's decision in
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П	Dags 47	П	Page 49
1	Q. Okay. So up through and is there any	1	A. I believe yes. My recollection is that each of
2	Departmental guidance between September 28th, 2020, and	2	these counties had submitted a certification of election
3	Election Day May 17th, 2022, regarding how to handle	3	results to the Secretary.
4	civilian absentee and mail-in ballots?	4	Q. Okay. And you had testified previously that the
5	A. Generally perhaps but on the question of undated	5	Secretary's role in the process is ministerial, correct?
6	ballots if that's what you're asking, there was no change	6	A. Yes. That's correct.
7	in our guidance during that period of time.	7	Q. And her role is to take in the certified results
8	Q. So the guidance going into Election Day from the	8	from the 67 county Boards of Elections, right, and tabulate
9	Department to the boards was if it's not signed and dated,	9	all those from the statewide votes and to tabulate those
10	those ballots should be set aside and not counted; is that	10	results and then certify the results of those statewide
11	fair?	11	elections?
12	A. Yes. That was certainly our guidance prior to	12	A. Correct.
13	the Third Circuit's ruling in Migliori.	13	Q. Okay. And has the Secretary done that for the
14	Q. And the Department believes that that guidance is	14	2022 primary?
15	consistent with In Re: Canvass, the 2020 PA Supreme Court	15	A. The Secretary has done a partial certification
16	decision?	16	pending resolution in these three counties.
17	MR. FISCHER: Again, Your Honor, I'll	17	Q. What's the partial certification that the
18	object. It calls for a legal conclusion.	18	Secretary has done?
19	MR. BUKOWSKI: I'll withdraw the question.	19	A. The partial certification would be certifying
20	JUDGE COHN JUBELIRER: Okay. Thank you.	20	results for all those offices that are not impacted by this
21	BY MR. BUKOWSKI:	21	litigation.
22	Q Now, going forward to your correspondence, so I	22	Q. Okay. So for example?
23	think that might be in the binder if you had a binder. I	23	A. Some congressional districts, some senatorial,
24	think the first correspondence from	24	and state house districts for example.
25	A. It might be	25	Q. All right. And the statute tells, you know,
\vdash	Page 48	\vdash	Page 50
1	Q from you, sir, is Joint Exhibit 6. Do you	1	describes which elections she tabulates and certifies. So
2	have that?	2	you're saying if it's a county that didn't involve any of
3	A. I do. This is the e-mail dated June 17th at 9:08	3	these three counties and there's a congressional race, that
4	a.m.?	4	result was certified?
5	Q. Right. That's from you to the various county	5	A. Right. It's our position that these three
6	Boards of Elections, correct?	6	counties have not completed certification; and, therefore,
7	A. Correct.	7	we've certified results for all those races in the other 64
8	Q. June 17th, 2022. Now, you did talk about later	8	counties.
9	and I'll get to that but when you talked about the	9	Q. Okay. And so the Secretary has not certified a
10	boards, these particular boards who are parties here,	10	single race in which statewide race that she would
11	Berks, Lancaster, and Fayette, you had testified earlier	11	otherwise be required to certify in which any voter in
12	that at least as of, you know, June 27th through July 1st	12	these three counties, Berks, Lancaster, and Fayette, has
13	of 2022 they had not certified final results and sent those	13	voted; is that right?
14	to the Secretary, that that included votes from undated	14	A. Correct.
15	mail-in or absentee ballots; is that right?	15	Q. And her rationale is that her interpretation of
16	A. Yes. I believe it was June 29th. It was	16	what the Election Code requires differs from the
17		17	interpretation of the independent county Boards of
1 1	counties that had not done it by June 29th was held against		
18	counties that had not done it by June 29th was held against the date of the letter from our counsel.	18	Elections of each of those three counties?
18		18 19	Elections of each of those three counties? A. I don't think it's her interpretation of what the
	the date of the letter from our counsel.	1 1	
19	the date of the letter from our counsel. Q. So the fact that they had not done that, that	19	A. I don't think it's her interpretation of what the
19 20	the date of the letter from our counsel. Q. So the fact that they had not done that, that spurred Mr. Gates to send his letter?	19 20	A. I don't think it's her interpretation of what the Election Code requires. I think it's the Court's
19 20 21	the date of the letter from our counsel. Q. So the fact that they had not done that, that spurred Mr. Gates to send his letter? A. Correct.	19 20 21	A. I don't think it's her interpretation of what the Election Code requires. I think it's the Court's interpretation of what the Election Code requires.
19 20 21 22	the date of the letter from our counsel. Q. So the fact that they had not done that, that spurred Mr. Gates to send his letter? A. Correct. Q. Okay. But prior to that on June 6th, June 7th,	19 20 21 22	A. I don't think it's her interpretation of what the Election Code requires. I think it's the Court's interpretation of what the Election Code requires. Q. Let's talk about the deadline and timing. The

П	Page 51	П	Page 53
1	Q. And would you agree that this year the deadline	1	county boards a directive?
2	because there was a statewide recount ordered for the U.S.	2	A. I don't know that I would describe it as a
3	Senate race, that that deadline was June 8th, 2022?	3	directive. Again, though, I believe that it is, you know,
4	A. That sounds correct. It's June 8th I believe is	4	it was our determination, the Department's determination
5	correct.	5	that, you know, based on the case law counties had a duty
6	Q. And isn't it true that on June 6th Lancaster	6	to certify results that included vote totals from undated
7	submitted its certified results?	7	ballots and that failing to do so essentially would in
8	A. I don't have a copy of that certification in	8	effect mean that the counties have not completed their
9	front of me, but the timeline roughly sounds correct.	9	statutory duty to certify vote totals from all legally cast
10	Q. And I'll rely on our stipulated facts, so I don't	10	ballots.
11	need to explore that with you.	11	And it's my layman's, probably not the most
12	MR. BUKOWSKI: But the stipulated facts,	12	articulate but that's
13	Your Honor, do say that Lancaster submitted certified	13	Q. No, that's fine. And does the Department and the
14	results on June 6th, 2022. Berks did a partial	14	Acting Secretary leave room for any reasonable disagreement
15	certification on June 6th, 2022. It had another issue	15	as to the state of the law on certification of undated
16	regarding provisional ballots. Berks later submitted	16	ballots as of, you know, the deadline for this election?
17	certified results, updated certified results that included	17	A. No. Again I think our position is that without
18	the provisional on June 8th, 2022. And Fayette was in	18	including those vote totals from undated ballots which this
19	between the two and submitted its certified results on June	19	Court had previously asked counties to tabulate, segregate
20	7th, 2022.	20	and tabulate, tabulate, that without including those that
		1 1	
21	BY MR. BUKOWSKI:	21	the certification was not complete, that all legally cast
22	Q. So Berks was the last of those three to certify,	22	ballots in this case would not be counted, you know. So
23	and there's no issue of timeliness in this case. As of	23	that's really our position that the certification is
24	June 8th, 2022, you would agree the Third Circuit's order	24	incomplete in light of the case law.
25	in Migliori was not in effect?	25	Q. And you're aware that the June 2nd, 2022 order
1	Page 52 MR. FISCHER: Objection again to the extent	1	Page 54 from this Court did not say certified ballots, correct?
2	there's a legal	2	A. It did not use the term certified, correct.
3	THE WITNESS: I'm not sure I'm best	3	Q And, in fact, the order said I'm ordering you to
4	qualified to make that determination.	4	do this, tabulate them, report the totals, and if and when
5	MR. BUKOWSKI: The order vacating the stay	5	a final decision on the merits is made, then we'll have the
6	was issued June 9th. I think that's in the stipulated	6	information and you can proceed quickly. Do you agree with
7	facts. If it's not we'll present it for argument, Your	7	that?
8	Honor.	8	A. Yes. I believe generally that's the language
9	THE WITNESS: It is in the timeline in my	9	used in this Court's ruling.
10	e-mail and that date is correct.	10	Q. Now, you got in response to your June 17th e-mail
11	BY MR. BUKOWSKI:	11	which was Joint Exhibit 6, you received responses from all
12	Q. Okay. From Joint Exhibit 6 that's what your	12	three of these counties, Fayette, Lancaster, and Berks;
13	e-mail says?	13	isn't that right?
14	A. Correct.	14	A. Yes.
15	Q. Okay. So all of the your e-mail came June	15	Q. And I won't go through chapter and verse of their
16	17th which is, depending on which county, nine to 11 days	16	responses, but in essence all three of these counties said
17	, alphanana on milon country, nine to it days	17	we disagree and we're not going to do that. We're not
	after the Secretary had received their certified results:		bagice and we is not going to do that. We is not
18	after the Secretary had received their certified results;	1 1	going to certify results that count undated ballots because
	is that right?	18	going to certify results that count undated ballots because
19	is that right? A. Yes. That amount sounds correct.	18 19	we view that as not being required; is that fair?
19 20	is that right? A. Yes. That amount sounds correct. Q. Okay. And the Secretary chose not to challenge	18 19 20	we view that as not being required; is that fair? A. Yes, I think it's fair.
19 20 21	is that right? A. Yes. That amount sounds correct. Q. Okay. And the Secretary chose not to challenge in Court the certified results of those three counties that	18 19 20 21	we view that as not being required; is that fair? A. Yes, I think it's fair. Q. So the dates of their communications, you know,
19 20 21 22	is that right? A. Yes. That amount sounds correct. Q. Okay. And the Secretary chose not to challenge in Court the certified results of those three counties that she had received on June 6th, 7th, and 8th; isn't that	18 19 20 21 22	we view that as not being required; is that fair? A. Yes, I think it's fair. Q. So the dates of their communications, you know, Joint Exhibit 7 is the Berks County Director's response.
19 20 21 22 23	is that right? A. Yes. That amount sounds correct. Q. Okay. And the Secretary chose not to challenge in Court the certified results of those three counties that she had received on June 6th, 7th, and 8th; isn't that right, within two days?	18 19 20 21 22 23	we view that as not being required; is that fair? A. Yes, I think it's fair. Q. So the dates of their communications, you know, Joint Exhibit 7 is the Berks County Director's response. That was June 23rd, so less than a week after your e-mail,
19 20 21 22	is that right? A. Yes. That amount sounds correct. Q. Okay. And the Secretary chose not to challenge in Court the certified results of those three counties that she had received on June 6th, 7th, and 8th; isn't that	18 19 20 21 22	we view that as not being required; is that fair? A. Yes, I think it's fair. Q. So the dates of their communications, you know, Joint Exhibit 7 is the Berks County Director's response.

П	Page 55		Page 57
1	(Whereupon, the document was marked as	1	you know, the mandate from the Courts.
2	Joint Exhibit Number 7 for	2	Q. Okay. And on July 1st Berks County's Assistant
3	identification.)	3	Solicitor, First Assistant County Solicitor Cody Kauffman,
4	BY MR. BUKOWSKI:	4	responded to Mr. Gates and reiterated Berks County's
5	Q. And then Joint Exhibit 8 was the one from Ms.	5	position?
6	Kuznik in Fayette. That was June 27th 2022, correct?	6	A. Correct. Yes.
7	A. Correct.	7	Q. Similarly Attorney Pfursich from Lancaster County
8	Q. And then Attorney Pfursich from Lancaster also	8	reiterated Lancaster's prior response, and she did so by
9	responded in Joint Exhibit 9 on June 27th, 2022, correct?	9	her response e-mail Joint Exhibit 13 which was July 5th?
10	A. That's correct.	10	A. You're referring to?
11	Q. So by June 27th you knew all three of these	11	Q. Joint Exhibit 13 is Ms. Pfursich I'm sorry.
12	counties had stated they were not going to do what you had	12	Hers is, yeah, it's July 5th but it's Joint Exhibit 13
13	requested in your e-mail, correct?	13	which starts with Mr. Gates' follow-up thanking her for
14	A. Correct.	14	clarifying or responding.
15	Q. Now, I want to specifically point out Joint	15	A. Sorry. I'm flipping through all this. Yes, July
16	Exhibit 10 which is the e-mail you received in response	16	5th, correct.
17	from Christian Leinbach, the Chairman of the Berks County	17	Q. Okay. And Attorney Kauffman's response, Joint
18	Commissioners. Do you have that?	18	Exhibit 12, I think I said was July 1st?
19	A. I do, yes.	19	A. That's correct. Yes.
20	Q. That's the e-mail he sent in response to your	20	Q. Okay. So you knew I guess for the second time
21	June or June 17th e-mail, and his response is dated June	21	the Department was aware that Berks and Lancaster were not
22	28th, 2022, at 12:32 p.m.?	22	going to comply because they told Mr. Gates, Attorney Gates
23	A. Correct.	23	that in response to his letter they disagreed, and
24	Q. And you had read into the record the part where	24	therefore they were sticking with the certifications that
25	he said please help me understand where there is clear	25	they had previously submitted; is that right?
	Page 56		Page 58
1	guidance. The last sentence of Mr. Leinbach's e-mail says	1	A. Correct. Yes.
1 2		1 2	A. Correct. Yes. Q. Okay. You testified about Bradford County that
	guidance. The last sentence of Mr. Leinbach's e-mail says		A. Correct. Yes.
2	guidance. The last sentence of Mr. Leinbach's e-mail says I look forward to your response. Do you see that?	2	A. Correct. Yes. Q. Okay. You testified about Bradford County that
2	guidance. The last sentence of Mr. Leinbach's e-mail says I look forward to your response. Do you see that? A. Yes.	2	A. Correct. Yes. Q. Okay. You testified about Bradford County that they complied. Complied with what exactly?
2 3 4	guidance. The last sentence of Mr. Leinbach's e-mail says I look forward to your response. Do you see that? A. Yes. Q. Did you respond to Mr. Leinbach's e-mail?	2 3 4	A. Correct. Yes. Q. Okay. You testified about Bradford County that they complied. Complied with what exactly? A. They complied with our request for them to
2 3 4 5	guidance. The last sentence of Mr. Leinbach's e-mail says I look forward to your response. Do you see that? A. Yes. Q. Did you respond to Mr. Leinbach's e-mail? A. Well, ultimately the Department responded the	2 3 4 5	A. Correct. Yes. Q. Okay. You testified about Bradford County that they complied. Complied with what exactly? A. They complied with our request for them to certify vote totals that included undated ballots.
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2 3 4 5 6 7	guidance. The last sentence of Mr. Leinbach's e-mail says I look forward to your response. Do you see that? A. Yes. Q. Did you respond to Mr. Leinbach's e-mail? A. Well, ultimately the Department responded the next day when Mr. Gates sent the June 29th letter to the counties who had not yet certified.	2 3 4 5 6	A. Correct. Yes. Q. Okay. You testified about Bradford County that they complied. Complied with what exactly? A. They complied with our request for them to certify vote totals that included undated ballots. Q. And I think the language is important. It was a request, wasn't it, to the boards to do?
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\Box			1
1	A. That's correct. Yes.	1	Page 61 please the Court.
2	Q. So the only thing that had happened before	2	I'll wait until you're done with the water.
3	issuing that May 24th guidance was the issuance by the	3	THE WITNESS: Sorry.
4	Third Circuit panel of its decision in the Migliori \boldsymbol{v} .	4	MR. KING: I once observed a witness pour
5	Cohen case; is that fair?	5	water all over his shirt during cross-examination. It
6	A. Yes.	6	wasn't a good thing.
7	Q. Okay. And this guidance, the guidance in Joint	7	THE WITNESS: That would be something I'd be
8	Exhibit 5 does a 180 on the instructions to the counties	8	known to do, yes. Water is okay. I've poured coffee on
9	and says you must count undated ballots, absentee ballots,	9	myself frequently enough.
10	and mail-in ballots provided there are no other	10	MR. KING: Thank you very much.
11	deficiencies, correct?	11	CROSS-EXAMINATION
12	A. Correct.	12	BY MR. KING:
13	Q. And that, you know, May 24th is the week after	13	Q. Mr. Marks, my name is Thomas W. King, III, as you
14	Election Day; is that right?	14	know and I want to thank you for your service to the
15	A. Yes. Again the timing not ideal.	15	Commonwealth. You've spent many, many years in the Bureau
16	Q. Now, were you aware of this Court's	16	of Elections; am I correct?
17	administrative order issued May 27th stating that because a	17	A. I have. It's dating me now so
18	statewide recount had been ordered that appeals from any of	18	Q. Do you know of anyone who spent more time in the
19	the decisions any of the certified results from the	19	Bureau of Elections than you have?
20	recount were to be filed in the Commonwealth Court as	20	A. Actually we do have one employee I think who's
21	opposed to the courts of common pleas?	21	been a year or two longer than I am.
22	A. I am familiar with that. I don't have a copy in	22	Q. Let me go back just so the record is clear on
23	front of me, but I do recall that; and we circulated that	23	this because we had this discussion about whether you're a
24	order to the campaigns as well as the counties.	24	lawyer or you're not a lawyer or you're, you know,
25	Q. Okay. And counsel for Petitioners asked you if	25	seemingly whether you're an expert or not. You have
1	Page 60 you were aware of any counties that had refused or not	1	Page 62 expertise with respect to the Pennsylvania Election Code,
2	certified votes from absentee or mail-in ballots that	2	do you not?
3	included wrong or incorrect dates, and I think your	3	A. I've been accused of being an expert on it, yes.
4	testimony was you were not aware that any of the counties	4	Q. Have you testified as an expert in cases
5	had excluded votes from those types of ballots; is that	5	involving the Pennsylvania Election Code?
6	right?	6	A. I have testified in a multitude of Court cases
7	A. Correct.	7	regarding election matters over the years, yes.
8	Q. Now, doing that is consistent with the guidance	8	Q. Have you ever been rejected as an expert in any
9	issued by the Department doing that let me strike	9	case that you were called to testify in?
10	that. Restart over. Certifying votes from incorrectly	10	A. No, I don't believe so.
11	dated voter declarations is consistent with the	11	Q. And the Courts that you've testified in including
12	Department's guidance; is that right?	12	you've testified all the way to the Lycoming County Court
13	A. It is, yes.	13	of Common Pleas where Mr. Breth examined you a couple weeks
14	Q. Do you know whether there was any contest or	14	ago
15	challenge in any of the 67 counties but more specifically	15	A. Yes.
16	these three counties, Berks, Lancaster, and Fayette, as to	16	Q to the Commonwealth Court to the federal
17	the canvassing and counting of an absentee or mail-in	17	district courts, and your testimony has been accepted in
18	ballot that included an incorrect date?	18	the Supreme Court of Pennsylvania and your testimony has
19	A. I'm not aware of any.	19	made its way to the United States Supreme Court at some
20	Q. Okay.	20	point; is that true?
21	MR. BUKOWSKI: That's all I have for Mr.	21	A. That's correct. Yes.
22	Marks at this time. Thank you very much, sir.	22	Q. All right.
23	THE WITNESS: Thank you.	23	MR. KING: Your Honor, I don't want to
24	JUDGE COHN JUBELIRER: Thank you.	24	belabor this, but there is nobody that knows more about the
25	MR. KING: Thank you, Your Honor. May it	25	Election Code. Ask any of the jurists in this
43	The second secon	23	Jarre Land Control of the Control of

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1	Page 63 Commonwealth, ask the lawyers, ask anybody. Mr. Marks is	1	Page 65
2	the person they all know.	2	BY MR. KING:
3	So I'd like to ask him questions about the	3	Q. So, Mr. Marks, let's go back for a moment. What
4	pleading and about the statute. He is the most	4	is your educational background beyond high school?
5	knowledgeable person perhaps other than Mr. Tabas who I	5	A. I have basically two years of college.
6	consider to be the foremost expert, but Mr. Marks would be	6	Q. From where?
7	if Tabas is number 1A, Marks is 1B. So I would like to	7	A. From Ashford University.
8	examine him in those areas. So I'll go on and I guess	8	Q. Okay. And after you got out of college, when did
9	somebody can object.	9	you begin to work for the Commonwealth of Pennsylvania,
10	MR. FISCHER: Your Honor, we have no	10	Department of State?
11	objection to Mr. Marks being asked about his understanding,	11	A. Actually I took those college courses while I was
12	but he is not the Department's attorney. He can't speak	12	working for the Department of State.
13	for the Department's legal position, and frankly the	13	Q. Oh, you did?
14	Department's legal positions are not at issue in what is a	14	A. So prior to yes. Prior to that I was working
15	factual examination. Legal questions obviously are beyond	15	for the Department with just a high school diploma.
16	the scope of this examination.	16	Q. All right. And at some point you moved. Within
17	So I don't object to him again being asked	17	the Department of State you moved into the elections arena,
18	about his understanding of things, but he's not the	18	correct?
19	Department's lawyer. He's not speaking for the Department	19	A. I did. I started back in the early 2000s as a
20	as to its legal positions.	20	legal assistant assigned to the Bureau of Elections, became
21	MR. KING: I respectfully don't agree with	21	the Chief of the Division of Elections, then the Chief of
22	any of that because first of all, Your Honor, Mr. Marks is	22	the Division of SURE, the Statewide Registry, then the
23	the person who verified this complaint. He signed on and	23	Commissioner of the Bureau of Elections, and ultimately
24	verified the complaint. I'll ask him that, but you can see	24	this position as Deputy Secretary.
25	it from the pleading.	25	Q. So literally there is no position within that
1	Page 64 Secondly, there is nothing involved here	1	Page 66 Department or in that Bureau that you haven't held in terms
2	except statutes and regulations and that's what he does.		of the chain moving up to where you are; is that correct?
3	That's what he communicates to these Commissioners who are	3	A. That's not entirely true; but, yes, I've worked
4	sitting in your courtroom. That's what he communicates to	4	in a lot of the positions
5	the candidates. That's what he communicates to the public.	5	Q. All right.
6	That's what he communicates to the Courts. He knows these	6	A leadership positions related to elections,
7	statutes. He knows whether there are statutes that would	7	yes.
8	provide authority for certain things.	8	Q. Were you whenever litigation is filed in the
9	So that would be the nature of my inquiry.		
			Department, are you consulted? Are you involved in a
1.0	But I didn't want to get into this down the road. I wanted	10	Department, are you consulted? Are you involved in a general sense when litigation is indicated and commenced?
10	But I didn't want to get into this down the road. I wanted to say it up front, so	1 1	
11		11	general sense when litigation is indicated and commenced?
11 12	to say it up front, so	1 1	general sense when litigation is indicated and commenced? A. Litigation related to elections, yes.
11 12 13	to say it up front, so MR. FISCHER: Your Honor, the statutes say	11	general sense when litigation is indicated and commenced? A. Litigation related to elections, yes. Q. Is that are you do you oversee litigation
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			Ţ
1	$$\operatorname{\textsc{Page}}\xspace$ Pennsylvania, and I work directly for the Acting Secretary.	1	Page 69 Westmoreland decided to count these ballots which were
2	So that's why I signed those verifications for these	2	again undated ballots, however Westmoreland decided to
3	various things that are filed with the Courts.	3	count them and however Allegheny decided to count them,
4	Q. Mr. Bukowski earlier said that language is	4	that that was none of the Secretary's business?
5	important here. Language is important here in this arena;	5	A. I think you're paraphrasing.
6	is that correct?	6	Q. I am paraphrasing.
7	A. Yes. I believe language is always important. I	7	A. It might be helpful to have a copy of it in front
8	believe communication is important.	8	of me. I mean I know what quote you're talking about, but
9	Q. Okay. And were you involved in the Ziccarelli	9	I don't have the exact wording in front of me.
10	case?	10	Q. But you know that the result was that
11	A. I don't recall that I was involved directly in	11	Westmoreland counted them one way and Allegheny counted
12	the Ziccarelli case, but I certainly was consulted. This I	12	them a different way, correct?
13	believe is a case out in Western Pennsylvania from 2020 if	13	A. Yes, that is my understanding. Correct.
14	I recall.	14	Q. And had the Secretary been able to force one of
	Q. Well, Ziccarelli determined whether Nicole	15	those two counties to count differently, the result may
15	Ziccarelli was going to be the senator from Westmoreland	1 1	have been different. For example, if the Secretary had the
16		16	
17	and Allegheny	17	ability to say to Westmoreland you have to count these
18	A. Correct.	18	undated ballots and Westmoreland counted them, Ziccarelli
19	Q or Senator Brewster was going to be the	19	would be a senator today and not Brewster, correct?
20	senator from Allegheny and Westmoreland; is that correct?	20	A. Well, I'm not going to, you know.
21	A. Correct. Yes.	21	Q. The possibility exists?
22	Q. You remember that case?	22	A. Certainly if, you know, the Courts had ruled
23	A. I do, yes.	23	differently, the possibility exists that the outcome would
24	Q. And in that Ziccarelli case, the Secretary took	24	be different, but
25	certain positions. The Secretary was involved in that	25	Q. You are the person. This is your signature I
1	case, correct?	1	Page 70
2	A. Yes.	2	MD WING, Many I amount have the many
		4	MR. KING: May I approach, Your Honor?
3	Q. And the Secretary had counsel in that case, the	3	JUDGE COHN JUBELIRER: Yes.
3 4	Q. And the Secretary had counsel in that case, the Aronchick firm in Philadelphia, correct?	3	
4		3 4	JUDGE COHN JUBELIRER: Yes.
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1	Page 71	П	Page 73
1 1	Q. You want to force these three counties that are	1	MR. KING: Listen, Your Honor, if we can't
2	here in the courtroom, you want to force them to do	2	get the answer to that from this gent I think we can.
3	something, correct?	3	And I think Your Honor knows he is an expert. He's also
4	A. Again, I'm not counsel but my understanding of	4	the moving party here. He verified the complaint. And the
5	mandamus is that the person who brings the action believes	5	threshold question here for Your Honor to answer is what
6	that that entity has failed to do some duty that they're	6	authority in the world does the Secretary have to do this?
7	mandated to do and that's why they come before the Court.	7	There's never been a case brought like this
8	Q. When is the last time that you're aware of that	8	before that. Mr. Marks would know of it if there was one.
9	the Department brought an action to mandate any county	9	There hasn't been one, and there hasn't been one for good
10	Board of Elections?	10	reason. There's no authority to do this.
11	A. It has been a very long time. I believe there	11	JUDGE COHN JUBELIRER: Well, the question of
12	was one occasion and do not ask me to tell you what the	12	whether there is authority or is not authority is
13	case was. I believe Allegheny County had to no. I'm	1.3	ultimately a question of law for the Court to decide.
14	sorry. I'm wrong about that actually. Allegheny County	14	MR. KING: Yes, ma'am.
15	filed a mandamus against the Secretary asking that the	15	JUDGE COHN JUBELIRER: So whether Mr. Marks
16	Secretary at that time accept an amended certification of	16	is aware of the section or not aware of the section, his
17	election results.	17	counsel will make arguments on behalf of his client and the
18	I don't recall at least in my tenure at the	18	Court will make the decision.
19	Department that the Department pursued a mandamus against a	19	MR. KING: Yes, ma'am.
20	county.	20	JUDGE COHN JUBELIRER: So if
21	Q. Well, let me ask you this. You want to order	21	MR. KING: I just want to know if he knows.
22	these folks, these Commissioners to do several things I	22	JUDGE COHN JUBELIRER: If he is aware
23	suspect. You tell me if I'm wrong, please. You want them	23	MR. KING: Yes, ma'am.
24	to go back home from here today, and you want them to have	24	JUDGE COHN JUBELIRER: of a section.
25	to advertise and hold a meeting of their Boards of	25	Counsel, would you object to him giving his
1	Page 72	2 1	Page 74 opinion as well I guess based on his experience as to
2	A. To the extent that they did not already do that	2	whether he's aware of a section or
3	as part of the canvass and canvass the undated ballots,	3	MR. FISCHER: If he just testifies as a fact
4			
T T	yes, I think that's fair.	4	witness about his awareness, I would be okay. I don't
5	yes, I think that's fair. Q. So you want Her Honor to, you want her to order	4 5	witness about his awareness, I would be okay. I don't think he's giving opinion testimony frankly on anything.
			*
5	Q. So you want Her Honor to, you want her to order	5	think he's giving opinion testimony frankly on anything.
5 6 7	Q. So you want Her Honor to, you want her to order them to go back and run an ad in the paper and hold a	5	think he's giving opinion testimony frankly on anything. JUDGE COHN JUBELIRER: Right. I don't think
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5 6 7 8	Q. So you want Her Honor to, you want her to order them to go back and run an ad in the paper and hold a meeting, correct? A. If it's necessary for them to do that to complete	5 6 7 8	think he's giving opinion testimony frankly on anything. JUDGE COHN JUBELIRER: Right. I don't think he was qualified as an expert, and that would anyway be a little questionable with regard to legal opinions. We
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5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	Q. So you want Her Honor to, you want her to order them to go back and run an ad in the paper and hold a meeting, correct? A. If it's necessary for them to do that to complete certification, then I believe that's fair, yes. Q. Now, would you be kind enough to tell me where listen, you're familiar with this Election Code. You think about it every day, don't you? A. I do. Q. Every day, Sundays, too? A. True, yes. Q. So tell me the section and tell Her Honor where is it in the Election Code that says that the Secretary of the Commonwealth can order county commissioners who serve as Boards of Elections, who perform quasi-judicial functions according to the Supreme Court of Pennsylvania to go back home and have to schedule a new meeting when they've already certified the election in their counties.	5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	think he's giving opinion testimony frankly on anything. JUDGE COHN JUBELIRER: Right. I don't think he was qualified as an expert, and that would anyway be a little questionable with regard to legal opinions. We don't typically have those offered as testimony. MR. KING: I'm just asking, Your Honor, if he knows. I'm asking what we're here in front of Your Honor. We're taking up a lot of your time today. You followed a very difficult case we've all followed in the news yesterday. So we appreciate the fact that you're with us today. But the question for him is what's the basis for this action? What is the basis? He's the person who signed the complaint. He's involved in these discussions. He said that. He's a truthful man. He'll answer it truthfully to us. MR. FISCHER: Again, sorry. Mr. King is trying to ask him a legal question. I'm sorry. That is a

П	Page 75	Т	Page 77
1	he's aware of a section, he can answer that subject to the	1	the certified returns of any primary or election from the
2	qualifications I've given.	2	various county boards, the Secretary of the Commonwealth
3	MR. KING: Thank you very much, Your Honor.	3	shall forthwith proceed to tabulate, compute, and canvass
4	BY MR. KING:	4	the votes cast for all candidates, correct? And then it
5	Q. Back to you, Mr. Marks.	5	goes on. That's the language you read.
6	A. Okay.	6	So when the county boards submit their
7	Q. Do you want me to repeat the question or do you	7	certifications to the Secretary, what does forthwith
8	know it?	8	generally mean? How long does it generally take you to
9	A. No. I believe I understand your question to be	9	compute, tabulate, and forthwith certify these results?
10	am I aware of a provision in the Election Code	10	MR. FISCHER: Objection. Again this is a
11	Q. Yes.	11	purely legal question.
12	A that gives the Secretary the authority to do	12	JUDGE COHN JUBELIRER: Yes. At this point
13	what she's doing in this case?	13	you're making legal arguments which I think will be better
14	Q. Well, yeah. Yes.	14	suited for the legal arguments that will come later as to
15	A. I'm not aware of anything. You know, I'll	15	what the statute means. If you want to ask how the
16	qualify my answer. I'm clearly not an expert on civil law	16	Secretary tabulates ballots
17	and civil procedure; but I'm not aware of anything in the	17	MR. KING: Yes.
18	Election Code that would enable the Secretary to, you know,	18	JUDGE COHN JUBELIRER: or other questions
19	mandate her discretion on the counties if that makes sense.	19	of fact regarding an issue, facts that would be relevant
20	Q. All right. I think that's fair enough. So are	20	here, that's one thing; but I don't think that tying it to
21	you aware of Section 3159 of the Code, and if you're not	21	the statute is within the scope of appropriate questioning.
22	let me	22	MR. KING: Yes, ma'am. I'll ask the
23	MR. KING: If you don't mind, Your Honor,	23	question that the Court just posed.
24	I'll hand it to him.	24	BY MR. KING:
25	BY MR. KING:	25	Q. So the question that the Court said I could ask I
23		23	
	Dage 76	1 1	Dage 78
1	Q. Are you aware of this section of the Code, 3159?	1	think is
1 2	Page 76 Q. Are you aware of this section of the Code, 3159? MR. KING: This is from our papers.		Page 78 think is JUDGE COHN JUBELIRER: Let's see. Unless
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2 3 4	Q. Are you aware of this section of the Code, 3159? MR. KING: This is from our papers. (Document shown to Mr. Fischer.) MR. FISCHER: Yes.	1 2 3 4	think is JUDGE COHN JUBELIRER: Let's see. Unless there is an objection. I didn't mean to overstate. I was just wanting to create a factual question, and maybe I
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\Box	D 70	П	2 01
1	Page 79 the state. Sometimes the reports may vary a little bit	1	don't need to prolong.
2	based on, you know, the county's voting system, etc.	2	JUDGE COHN JUBELIRER: Yes. Thank you.
3	Q. So it's up to the county board that you want the	3	MR. KING: I'll withdraw it but I do like
4	results, right?	4	the hockey analogy.
5	A. We want the results, yes.	5	THE WITNESS: Are you wearing an orange and
6	Q. And the form is up to them?	6	black tie because you're a Flyers fan or
7	A. We do provide a form through our system; but if	7	MR. KING: My son played professional hockey
8	a county sends a slightly different form, as long as it is	8	so I'm a big fan. No, I'm a Penguins fan.
9	signed and certified by, you know, a majority of the	9	BY MR. KING:
10	members of the Board of Elections and it contains the	10	Q. So when you do certify the election, then what do
11	election results for all the state-level offices, we will	11	you do with that?
12	accept it.	12	A. In the case of a primary, you know, we don't
13	Q. All right. So you get these forms in from the 67	13	certify it necessarily to any individual or body. It
14	counties. You look at them. You make sure they're	14	essentially you know, the Secretary will put her
15	legitimate. What do you do next?	15	signature and seal on the official results and that becomes
16	A. Well and, you know, we're looking at them to make	16	the, you know, official list of nominees for the November
17	sure that they're you use the word legitimate. We're	17	election.
18	looking at them to make sure they're complete, that there	18	In the case of a November election, once the
19	are no obvious errors.	19	Secretary certifies, there are documents that have to be
20	On the certification report there are occasions	20	certified to whether it's the Governor or the legislature,
21	where a county will miss something or they'll put a vote	21	you know, those have to be certified to certain individuals
22	total that, you know, based on our review against	22	or bodies so that they can swear in their members.
23	unofficial returns that we had received from the counties	23	Q. All right. This Ziccarelli case, I want to go
24	previously, you know, appears to be incorrect. You know,	24	back to it because you're aware of the result from the
25	we'll reach out to the county before we finalize our	25	Supreme Court of Pennsylvania with respect to that case,
\vdash	Page 80 certification to make sure that they didn't make a clerical	1	are you not?
1	Page 80 certification to make sure that they didn't make a clerical error when they certified.	1 2	Page 82
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1 2 3 4 5	certification to make sure that they didn't make a clerical error when they certified. But once we've gone through that process, then we'll compile results. How long it takes depends on the	2 3 4 5	are you not? A. I am, yes. Q. And you're aware that the Ziccarelli case likewise ended up in federal court in Pittsburgh, correct?
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1	Page 83 MR. FISCHER: Could you clarify, Mr. King,	1	November 3rd, 2020 General Election.
2	what page you're on?	2	Q. Thank you. So what you just read was the brief
3	MR. KING: Sure.	3	filed by your own lawyers, correct?
4	Can I see that for a minute, Mr. Marks?	4	A. That's correct. Yes.
5	THE WITNESS: Sure.	5	Q. You're aware that the Secretary has no such
6	MR. KING: I'm at what's marked Exhibit D	6	powers, aren't you?
7	and it doesn't look like Mr. Wiygul yes, he did. It's	7	MR. FISCHER: Objection.
8	page 5 of the Memorandum of Law in Support of the Motion of	8	JUDGE COHN JUBELIRER: Yes, I think
9	Secretary of the Commonwealth of Pennsylvania, Kathy	9	MR. KING: He's the affiant, Your Honor.
10	Boockvar, to Dismiss the Amended Complaint or, in the	10	He's the affiant to this complaint. The whole case depends
11	Alternative, to Grant Summary Judgment. It's in the United	11	on whether the Secretary has such powers. He's the person
12	States District Court, Your Honor, in Pittsburgh, in the	12	bringing this case.
13	Western District.	13	JUDGE COHN JUBELIRER: Counsel?
14	(Whereupon, the document was marked as	14	MR. FISCHER: He is not the person bringing
15	Fayette Exhibit Number D for	15	the case, and also he verified the facts. The law is for
16	identification.)	16	the Court to ultimately decide, and his opinion simply
17	BY MR. KING:	17	isn't relevant.
18	Q. Would you look at the second paragraph, second	18	MR. KING: Your Honor?
19	full paragraph of your brief?	19	JUDGE COHN JUBELIRER: Yes.
20	A. The paragraph that begins with the Election Code	20	MR. KING: I'm sorry.
21	also gives?	21	JUDGE COHN JUBELIRER: No, go ahead.
22	Q. Could you read that into the record for me,	22	MR. KING: A person appearing before Your
23	please.	23	Honor needs to come in here and say whether they believe
24	A. Sure. The Election Code also gives the Secretary	24	that the law provides for what they're telling the Court it
25	powers and duties including the duty to, in quotes, receive	25	ought to do. This gentleman
1	Page 84 from county Boards of Elections the returns of primaries	1	Page 86
2	and elections, to canvass and compute the votes cast, to	2	the question, too, is what they're asking the Court to do.
3	proclaim the results of such primaries and elections, and	3	MR. KING: Yes.
4	to issue certificates of election to the successful	4	JUDGE COHN JUBELIRER: And as I understood
5	candidates, end quotes, and then provides two citations to	5	it, the mandamus is requesting the Court to issue the
6	the statute, 25 P.S. Section 2621(f) as well as 25 P.S.	6	order. It's not that the individual who's requesting the
7	Section 3159.	7	relief has the authority to issue the order.
8	Do you want me to read the whole paragraph?	8	MR. KING: Yes.
9	Q. Yes, I do.	9	JUDGE COHN JUBELIRER: So I want to make
10	A. Then there's a parenthetical and in quotes within	10	sure that we're all looking at all of the different legal
11	that, upon receiving the certified returns of any primary	11	issues and potential interpretation. So he's read the
12	or election from the various county boards, the Secretary	12	brief; and, you know, I tend to agree with counsel that
13	shall forthwith proceed to tabulate, compute, and canvass	13	what you're asking is for legal opinion from him.
14	the votes cast, end quote and end of the parenthetical.	14	MR. KING: I'll withdraw the question, Your
15	The next sentence says, while the Secretary	15	Honor.
16	issues guidance to the county boards, nothing in the	16	JUDGE COHN JUBELIRER: Thank you.
17	Election Code gives her the authority to refuse to accept	17	MR. KING: Yes, ma'am.
18	returns or to decide which ballots are to be counted and	18	BY MR. KING:
19	which are not.	19	Q. Mr. Marks, I want to ask you. This may be
20	Then another quote, the Secretary has no	20	somewhat redundant but I want to make sure that I have it
21	authority to declare ballots null and void. Moreover, the	21	in the record as to Fayette County at least. As to Berks
22	Secretary has no authority to order the 67 county Boards of	22	County, Lancaster County, or Fayette County, are you aware
23	Elections take any particular action with respect to the	23	of any citizen who has filed within the statutory periods
24	receipt of ballots. And then it cites the November 3rd,	24	any challenge to the certification of this election in
	2020 case In Re: Canvass of Absentee and Mail-in Ballots of	25	their county?
25	2020 Cabe in Ne. canvado or Abbenicee dila Mari-in Barrols Of	²⁵	chell councy.

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1	A. I am not, no.	1	Page 89 all of the documents submitted by the county Boards of
2	Q. Is there a time limit set to file such a	2	Elections related to both unofficial and official returns.
3	challenge under the Election Code?	3	And then our staff begins to work on the compilation of the
4	A. There are time limits for, you know, for filing a	4	election results.
5	request for recounts or contesting an election, yes.	5	Q. So when these came in from Berks, Lancaster, and
6	Q. And what would those time limits be?	6	Fayette Counties, did somebody input them onto a
7	A. My recollection is that it's 20 days after the	7	spreadsheet or electronically?
8	date of the primary election.	8	A. So the counties actually the way our system
9	Q. So there's a two-day, I believe there's a two-day	9	works, we have a statewide election and campaign finance
10	section in the Code and there's a 20-day section, correct?	10	system. The vast majority of counties data enter them into
11	MR. FISCHER: I'll object. That asks for a	11	that system directly, and then they print out the
12	legal conclusion. I think Mr. Marks can testify about his	12	certification report. So if a county has done that and
13	understanding of the challenge process. I think that's	13	most counties do that, our staff it's a matter of just
14	fine, but he's not speaking authoritatively on the law	14	verifying that what's on the hard copy signed by the Board
15	here.	15	of Elections matches what was entered into the database.
16	MR. KING: This is the case, Your Honor, so	16	Q. Okay. So is that what happened when these three
17	I'll abide by whatever the Court tells me to do.	17	results came in? Were they inputted into the system?
18	JUDGE COHN JUBELIRER: With that	18	A. To the extent that the data was not already
19	qualification he can answer the question.	19	inputted into the system, yes, that's what would happen.
20	MR. KING: Thank you.	20	That's what our staff would do.
21	THE WITNESS: I believe the two-day that	21	Q. What you want to do here I think you tell me
22	you're referencing is there is a provision wherein an	22	if I'm wrong is you want to ask the Court to ask, to
23	individual who is aggrieved by a determination made by the	23	tell these counties, to mandate these counties to recertify
24	Board of Elections can appeal that determination to the	24	these elections because they've already certified them
25	appropriate court of common pleas.	25	once, right?
	Page 88		Page 90
1	BY MR. KING:	1	A. I believe that's fair. I think we're asking the
2	Q. All right. So the two-day you're not aware of	2	Court. We believe that these three counties have not
3	anybody having done that in these three counties?	3	completed certification. They have not completed, you
4	A. I'm not aware of anyone doing that.	4	know, their duty in terms of certifying the election; and
5	Q. Are you aware of anybody having done the 20-day	5	we're asking that the Court mandate that they do so.
6	challenge?	6	Q. But they have certified them. They've certified
7	A. The election contest, no.	7	them to you on the stipulated facts say that. They were
8	Q. All right. So June 6, 7, and 8 I think Mr.	8	certified on the 6th, 7th, and 8th of June of 2022,
9	Bukowski asked you this but I want to make sure it's clear.	9	correct?
10	June 6, 7, 8 these three counties, I don't know which	10	A. I mean, respectfully, I think that's why we're in
11	order, but the three of them it's in the stipulated	11	this courtroom today. We do not believe that these three
12	facts those three counties on three consecutive days in	12	counties have completed certification, and that's really
13	early June certified the elections in their counties and	13	the issue before the Court.
14	they sent them to you, correct?	14	Q. I'd respectfully disagree and I'm going to ask
15	A. Correct.	15	you this. You say that they need to complete
16	Q. That's what happened here?	16	certification. Did you not receive certifications from
17	A. Yes.	17	each of these counties in hand?
18	Q. All right. So when you got them, you got these	18	A. We received certifications from each of the three
19	three certified results. What did you do with the forms	19	counties. Our position is that if those counties do not
1 !	that came in? Physically what did you do?	20	include vote totals from the undated ballots that those
20	a mail 1 1 1	21	certifications are incomplete, and that's really the crux
21	A. Well, you know, as I said, ultimately we compile		5 (3)
21 22	all the results and certify them once we compile them. So	22	of this argument.
21 22 23	all the results and certify them once we compile them. So we put those a lot of what we're doing now we certainly	23	Q. And so not a single voter, not a single
21 22	all the results and certify them once we compile them. So	ll	

	Page 91	П	Page 93
1	A. I'm not aware of any candidate other than the	1	understanding.
2	case related to McCormick before this Court regarding	2	MR. KING: Yes.
3	undated ballots generally.	3	JUDGE COHN JUBELIRER: Clearly there's
4	Q. All right. And that case was ultimately	4	counsel for the Department as well that would
5	MR. KING: And Your Honor handled that case.	5	MR. KING: Yes, ma'am. I'll ask it that
6	BY MR. KING:	6	way.
7	Q. So that case was ultimately dismissed, correct?	7	JUDGE COHN JUBELIRER: All right. But wait.
8	A. I believe that was the outcome, yes.	8	Are you?
9	Q. And but no candidate filed a challenge to the	9	MR. FISCHER: I don't object. If the
10	certification of these three counties' certificates of	10	question is about his understanding, I think that's
11	election?	11	permissible. I also think we've covered this ground
12	A. I'm not aware of any candidate doing that, no.	12	multiple times, and there's no dispute that the guidance
13	Q. And you would be aware of that if it happened,	13	issued by the Department isn't mandatory. That's not an
14	wouldn't you?	14	issue in dispute here. So I'm not sure what the purpose of
15	A. I would think so, yes.	15	this is, but I don't object to the question about his
16	Q. If anybody would be aware, you would be aware,	16	understanding.
17	correct?	17	MR. KING: It was the subject of direct
18	A. Yes.	18	examination. This is cross-examination, Your Honor. May I
19	Q. All right.	19	ask a question?
20	A. There are local party offices, so that's why I,	20	JUDGE COHN JUBELIRER: Yes.
21	you know, I don't want to say for absolutely. Those have	21	MR. KING: Thank you.
22	not necessarily come to the Department of State.	22	BY MR. KING:
23	Q. You mentioned guidance, and the stipulated facts	23	Q. Mr. Marks, do you know the question at this
24	here say that the guidance that you've issued in this case,	24	point?
25	the guidance that's referred to in this case and in your	25	A. I do. I believe you're asking if there are
1	Page 92 pleading is not mandatory. It's not binding on the	1	Page 94 limits to the Secretary of the Commonwealth's power, and
2	counties, correct?	2	the answer is yes.
3	A. Correct. When we use the term guidance, it is	3	Q. All right. And isn't it true as is stated in
4	not mandatory.	4	your brief in Ziccarelli and what's been said by this
5	Q. And there was never a directive issued in this	5	Department on numerous occasions that in Pennsylvania 67
6	case?	6	counties Boards of Elections have primacy with respect to
7	A. No, there was no directive issued by the		the conduct of these elections, correct?
8	Department.	8	A. I believe that's correct within the confines of
9	Q. Are you familiar with the case of Fulton County	9	election law of course.
10	Board of Elections decided by Judge Leavitt?	10	Q. In those Boards of Elections, you're familiar
11	A. I am, yes.	11	with numerous challenges I suspect? You tell me if I'm I
12	Q. All right. And you're aware that with respect to	12	wrong. You're familiar with numerous challenges over the
13	these issues, that the Secretary has limited powers with	13	years that have been made in those Boards of Elections,
14	respect to these matters?	14	correct?
15	MR. FISCHER: Objection, Your Honor. This	15	A. Correct. Yes.
16	is legal territory again, and it's simply not relevant to	16	Q. And there's a reference to the Boards of
17	this case.	17	Elections as performing a quasi-judicial function. Do you
18	MR. KING: I'm just asking him if he's	18	understand what that means?
19	aware.	19	A. I do, yes. I mean they're engaging in, you know,
20	JUDGE COHN JUBELIRER: If he's aware of?	20	a function where they're making determinations that could
21	MR. KING: Of the limited powers. He's the	21	result in further judicial review. I mean it's almost like
22	Deputy Secretary so it's important that he knows. He knows	22	an administrative court if you will.
23	what his powers are. I'm just asking him if he's aware	23	Q. Right. Thank you. That's your understanding.
24	that	24	The Judge knows what
	JUDGE COHN JUBELIRER: It's his	ΙI	A. That's my understanding.
25	OUDGE COMM OUDEDIRER. It'S HIS	25	A. That a my understanding.

П	Page 95	П	Page 97
1	Q. Among all people on Earth, this Judge knows what	1	date it was filed?
2	quasi-judicial means. But that's your understanding,	2	MR. FISCHER: Certainly. Yes, it is the
3	right?	3	complaint.
4	A. Yes.	4	MR. KING: I believe it to be July 11th. We
5	Q. I think it's pretty appropriate.	5	would stipulate with counsel that the filing of this
6	A. Yeah. I mean, I would liken them to an	6	complaint was July 11, 2022.
7	administrative court where they're making administrative	7	BY MR. KING:
8	determinations then that could be reviewed by a court of	8	Q. So July 11, 2022, is more than 30 days beyond the
9	law.	9	date of the certifications that were given to the
10	Q. So, for example and I don't want to get into	10	Department here?
11	too much minutiae but, for example, those county Boards	11	A. That's correct. Yes.
12	of Elections, they will look at ballots that are challenged	12	Q. Thank you. This election that we're talking
13	by candidates or voters or parties or people who live there	13	about today, the Department has not currently certified the
14	or watchers. They'll determine whether a circle is	14	winners of the race for Governor of Pennsylvania; is that
15	completely filled in or if someone put an X instead of a	15	correct?
16	circle. They decide issues like that, correct?	16	A. We have not certified the results of the primary
17	A. Yeah. I think where there's ambiguity it	17	for Governor or U.S. Senate or Lieutenant Governor for that
18	certainly is the power of the Board of Elections to make	18	matter, none of the statewide races.
19	those determinations, and they're subject to judicial	19	Q. The winners of the gubernatorial primary, Mr.
20	review.	20	Shapiro, Mr. Mastriano, neither of them are certified as we
21	Q. And that judicial review so you went through	21	stand hereby today?
22	your knowledge of the two-day, the 20-day deadlines in the	22	A. That's correct. Yes.
23	Election Code. So if someone and you tell me if you	23	Q. The winners of the United States Senate races,
24	know this or not if someone wanted to challenge the	24	Dr. Oz and Mr. Fetterman, Lieutenant Governor Fetterman,
25	decision of the Board of Elections, I think you just said	25	they're not certified either?
1	they would go to court, right?	1	A. Correct.
2	A. Yes. They would go to the court of common pleas	2	Q. And people running for Congress in any of those
3	in that county.	3	three counties, none of them are certified along with
4	Q. That would be 30 days from that date; is that	4	members of the Pennsylvania House and Senate. You haven't
5	correct?	5	certified any of those elections in those counties?
6	MR. FISCHER: Objection again.	6	A. Correct.
7	MR. KING: If he knows.	7	Q. You made a comment in response to somebody's
8	BY MR. KING:	8	question, I don't recall who, about these undated ballots
9	Q. If you know.	9	and you said I think you correct me if I'm wrong and I'm
10	A. I'm not sure. Again, there are a couple of	10	paraphrasing but I think you said that you couldn't
11	different mechanisms, but yes	11	think of any good reason why they would be dated; is that
12	Q. If you hypothetically assume that it's 30 days	12	correct?
13	from the decision of a Board of Elections. So what was the	13	A. I couldn't think of any administrative reason why
14	date that the three certifications were made to you? That	14	the counties would need them to be dated
15	was June 6, 7, and 8, correct?	15	Q. Why is that?
16	A. That's correct. Yes.	16	A by the electors. Well, in determining whether
17	Q. What's the date of this lawsuit? What is the	17	they're legally cast and in determining whether they're
18	date that this lawsuit was filed?	18	timely, I don't know that the date inserted by the voter is
19	A. I don't have it in front of me so I can't give	19	relevant in making that determination. It's the date that
20	you the exact date. It was	20	the county receives the ballot from the voter that is
21	Q. It's not a trick. Let me get it for you.	21	relevant.
22	MR. KING: If I might, Your Honor?	22	Q. You're familiar with Justice Dougherty in the
23	THE WITNESS: certainly subsequent to the	23	Supreme Court of Pennsylvania suggesting that the dating
24	June 29th letter, early July.	24	does have merit with respect to preventing fraud; is that
	MR. KING: You want to just stipulate the	25	correct?
25			

	D 00	1 1	D 101
1	Page 99 A. I believe that was again, you know, I have not	1	Page 101 at least one of these cases is in Lancaster County. Are
2	read that opinion recently; but that was I believe that's	2	you aware of the cases where someone has been accused of
3	the long and short of Dougherty's opinion, yes.	3	fraud with respect to a ballot that was cast by somebody
4	Q. You think what I said is a fair analysis of Mr.	4	who died, and there's a date on that envelope. There's a
5	Justice Dougherty's comments?	5	date on that particular envelope that says when this ballot
6	MR. FISCHER: Objection. This is plainly	6	was allegedly filled out and that date was instrumental
7	outside the scope of	7	with respect to whether or not the person that died on or
8	MR. KING: Oh, I'm going to get to it.	8	before the date that the ballot was cast.
9	JUDGE COHN JUBELIRER: I'm going to is	9	You're familiar with that case, aren't you?
10	there	10	MR. FISCHER: Objection. That was about six
11	MR. KING: I'll be brief.	11	questions in one.
	JUDGE COHN JUBELIRER: Okay. I'm going to	1 1	MR. KING: I'll rephrase it.
12	allow him to answer this	12	
13		13	JUDGE COHN JUBELIRER: Thank you.
14	MR. KING: Yes, ma'am.	14	BY MR. KING:
15	JUDGE COHN JUBELIRER: but the Court can	15	Q. Do you know about any cases where somebody has
16	read the opinion and know what it said, and I'm sure you'll	16	cast a ballot and been accused of fraud with respect to
17	be arguing about that as well.	17	these mail-in ballots and the date had any relevance?
18	MR. KING: I'll be brief. The only reason I	18	A. Yeah. I mean there are certainly cases of fraud.
19	ask is there was a gratuitous comment, and I don't mean	19	I think, you know, the Election Code is clear on, you know,
20	that in a bad way. It was just a gratuitous comment about	20	the situation where a voter is deceased before Election
21	dating.	21	Day. Even if that voter legally cast a ballot, if the
22	BY MR. KING:	22	voter is deceased before Election Day, there's direction in
23	Q. So with respect to the dating and I think you did	23	the law to the county boards of election that they should
24	say it the first time, too, you couldn't think of any good	24	not count that ballot.
25	administrative reason for it, correct?	25	I don't know that the date on the envelope,
1	A. Correct.	1	Page 102 though, is the relevant piece of information. It's the
2	Q. You can think of reasons why about it might need	2	date when the person is deceased.
3	to these right mail-in ballots might need to be dated,	3	O. Well, in McCormick
3	to these right mair in barrots might need to be dated,	1 2 1	Q. WCII, IN MCCOIMICM
1 4	though whether administrative or otherwise. There are		A It's the date of the election that is relevant
4	though, whether administrative or otherwise. There are	4	A. It's the date of the election that is relevant.
5	reasons why they would need to be dated, correct?	5	Q. Yes. In the McCormick case, people argued to
5 6	reasons why they would need to be dated, correct? A. You know, I suppose there are reasons I guess.	5	Q. Yes. In the McCormick case, people argued to Judge Cohn Jubelirer about this whether it was important or
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1	Page 103	П	Page 105
	JUDGE COHN JUBELIRER: Okay. Well, if he	1	A. I recall it. You know, whether I can recall all
2	can answer the question with specificity and based on his	2	the details or not, I don't know.
3	knowledge.	3	MR. FISCHER: Your Honor, I'm going to
4	THE WITNESS: I'm not familiar with all the	4	object. This is way outside the scope of the offer of
5	details of the case, but I can certainly understand why	5	proof that Mr. King offered. It's also way outside the
6	that piece of information may be relevant if you're a	6	scope of direct, and I don't see what this has to with
7	district attorney who's looking into an allegation of	7	MR. KING: It's not direct, Your Honor.
8	fraud.	8	It's cross-examination related to the witness's statement
9	BY MR. KING:	9	about the fact that he couldn't think of any good
10	Q. Hypothetically, I'll ask you a hypothetical	10	administrative reason for dating.
11	then. Hypothetically Mary Jones and her mother Sally Jones	11	JUDGE COHN JUBELIRER: Okay. We are getting
12	live in a house together, and Sally Jones cast a vote. And	12	it's already after noon and
13	Sally Jones died on October the 28th, but the vote was cast	13	MR. KING: Sorry about that.
14	on October the 29th or the 30th. Is that hypothetically	14	JUDGE COHN JUBELIRER: No, that's okay. I
15	evidence of fraud?	15	want to make sure off the record.
16	A. I don't like hypotheticals. I'll go off the line	16	(Brief discussion held off the record at
17	with that, but yes.	17	12:10 p.m.)
18	Q. I have to ask it that way because otherwise I'm	18	JUDGE COHN JUBELIRER: What I'd like to do
19	going to get an objection.	19	is first find out how much longer you have for this
20	A. Hypothetically the date inserted in that case	20	witness?
21	might be relevant provided there isn't some other	21	MR. KING: I just have a few questions, and
22	explanation for it.	22	I'll try to condense those during the break.
23	Q. I get it. But that's an example of why of how	23	JUDGE COHN JUBELIRER: Should we just
24	the dating of the ballot would be significant with respect	24	complete it now or would you
25	to fraud, correct?	25	MR. KING: I would think if we take a break,
1	Page 104 A. I'll accept that argument that it may be relevant	1	Page 106 I'll try to condense this and get through it and not spend
2	in that narrow circumstance.	2	everyone's time.
1 5 1	 I want to ask you about a case called Parnell. 	3	
3 4		3	JUDGE COHN JUBELIRER: I don't want to
4	Do you remember the Parnell case? It's a case in Allegheny	4	JUDGE COHN JUBELIRER: I don't want to short-circuit, but I want to be mindful of everyone's
4 5	Do you remember the Parnell case? It's a case in Allegheny County. It was in federal court in the Western District.	4	JUDGE COHN JUBELIRER: I don't want to short-circuit, but I want to be mindful of everyone's comfort. Then we also have other witnesses that you want
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1	Page 107 Their offer of proof was, you know,	1	Page 109 Petitioner's Exhibits Numbers 1 and 2,
2	relatively straightforward and condensed. I don't want to	2	Berks - Lancaster's Exhibits Numbers 1
3	give him a time limit, but I'd suggest, you know, probably	3	through 5, and Fayette's Exhibits
4	a half hour at the most for each of those witnesses.	4	Numbers A through E were received in
5	JUDGE COHN JUBELIRER: Okay.	5	evidence.)
6	MR. FISCHER: Your Honor, I don't expect it	6	MR. KING: Thank you very much. Your Honor,
7	will take that long. I mean it depends on the scope of	7	I have three questions. I'll try to shorten this up.
8	cross again. I mean we can't	8	JUDGE COHN JUBELIRER: Give me one second.
9	JUDGE COHN JUBELIRER: Right.	9	I dropped a
10	MR. KING: This is one place I agree with	10	MR. KING: Certainly.
11	Mr. Fischer. I don't think it'll take a half an hour. I	11	JUDGE COHN JUBELIRER: Okay.
12	think five minutes would be plenty, and I think we've	12	MR. KING: That's usually what I'm doing.
13	already covered what they would be testifying about anyway.	13	JUDGE COHN JUBELIRER: Proceed.
14	JUDGE COHN JUBELIRER: Okay. So you think	14	BY MR. KING:
15	maybe with the three of them no more than an hour or hour	15	Q. Mr. Marks, you're still under examination and
16	and a half or hour and a half to two hours?	16	under oath, so I'm going to ask you three things, generally
17	MR. FISCHER: That would be our goal, Your	17	three things. So the first thing I want to ask you about,
18	Honor.	18	as the Deputy Secretary, are you aware of whether any of
19	JUDGE COHN JUBELIRER: Okay. And then we'll	19	these undated ballots you know the totals from the three
20	have the legal arguments which I think will be substantial.	20	counties generally speaking. I'm not going to ask you the
21	MR. KING: Yes, ma'am, hopefully.	21	numbers, but
22	JUDGE COHN JUBELIRER: So it's 12:15.	22	A. Generally speaking, yes,
23	Should we take a lunch break now and then come back?	23	Q they're in the record here. There's a few
24	MR. KING: That makes sense.	24	hundred in one place, and there's as few as six republican
25	JUDGE COHN JUBELIRER: And then we'll have	25	undated ballots in Fayette County. Could you tell the
1	Page 108 45 minutes. Let's be back at one o'clock and see if we can	1	Page 110 Court whether you're aware of whether any of these undated
2	proceed apace. Okay. Thank you very much.	2	ballots if counted or uncounted make any difference
3	(Whereupon, a recess taken from 12:15 p.m.	3	whatsoever in any election that you're aware of?
4	to 1:00 p.m.)	4	A. Not that I'm aware of, certainly not in any
5	JUDGE COHN JUBELIRER: So we are back and,	5	state-level election. Those elections certified to the
6	counsel, you were	6	Secretary.
7	MR. KING: Yes, ma'am.		Q. So it's not going to affect Oz or McCormick.
8	JUDGE COHN JUBELIRER: going to finish	7 8	It's not going to make a difference in the Oz-McCormick or
9	your cross-examination.	9	the Shapiro-Mastriano elections, right?
10	MR. KING: Yes, Your Honor, and I think I	10	A. I'm not aware of any state-level race where these
11	can report at this point, too, that counsel would all agree	11	ballots will affect the outcome.
12	that the exhibits that were submitted in this case should	12	Q. Okay. Even the State House, State Senate,
13	be admitted with the Court's permission without objection	13	nothing like that?
14	from any of the parties.	14	A. Correct.
15	MR. FISCHER: No objection.	15	Q. Thank you. Also you spoke earlier about
16	JUDGE COHN JUBELIRER: Then hearing no	16	something called partial certification and also incomplete
17	objections, then all of the exhibits are admitted into	17	certification. Are those two terms to your knowledge
18	evidence.	18	contained is there such a definition, is there a
19	(Whereupon, the documents were marked as	19	definition of, quote, partial certification within the, end
20	Joint Exhibit Number 4, Petitioner's	20	of quote, within the Election Code?
	Exhibits Numbers 1 and 2, Berks -	ll	A. There is not.
21	Lancaster's Exhibits Numbers 1 through 5,	21	Q. Is there a definition of something that you
22	and Fayette's Exhibits Numbers 1 through 5,	22	mentioned which was, quote, incomplete certification, end
23	and E for identification; and Joint	23	mentioned which was, quote, incomplete certification, end of quote?
24		24	
25	Exhibits Numbers 1 through 14,	25	A. It's not defined in the Election Code. I think

П	Page 111	П	Page 113
1	it's a term of art that I would use when a certification is	1	and deliver it that way. But, you know, typically if
2	not complete.	2	there's a disagreement, I usually want to talk through it
3	Q. It's a vernacular. It's not something that's in	3	and explain the Department's position before taking any
4	the statute, right?	4	other steps.
5	A. Correct.	5	Q. And you've been asked a lot about the
6	Q. All right. I want to lastly ask you whether	6	correspondence with some of the counties here dating
7	you're aware as the Deputy Secretary and based on all your	7	roughly from the beginning of June through early July.
8	credentials which are extensive, are you aware of any	8	During that time period were you also talking to certain
9	provision in the Election Code that specifically or	9	counties over the phone?
10	expressly authorizes the Secretary of the Commonwealth to	10	A. I was. I wasn't the only one. You know, there
11	reject a county's certification of election results? Is	11	were a number of counties initially. So I was having some
12	there some section that says that?	12	of those conversations. Other staff for the Department was
13	A. I'm not aware of anything that gives the	13	also reaching out to counties and having those
14	Secretary of the Commonwealth unilateral authority to	14	conversations.
15	reject the certification from a county.	15	Q. What was your goal with those conversations?
16	MR. KING: Thank you very much, Mr. Marks.	16	A. Our goal really was to explain the Department's
17	Appreciate it.	17	reasoning why we made the request; and it was our hope
18	I'm finished, Your Honor. Thank you.	18	that, you know, all 67 counties would comply with our
19	JUDGE COHN JUBELIRER: Thank you very much,	19	request.
20	counsel.	20	Q. How many did in the end?
21	MR. FISCHER: Thank you, Your Honor.	21	A. Sixty-four.
22	JUDGE COHN JUBELIRER: Redirect.	22	Q. Was that the case as of June 17th that all 64 had
23	REDIRECT EXAMINATION	23	complied?
24	BY MR. FISCHER:	24	A. No. As of June 17th I believe there were still
25	Q. Mr. Marks, has the Department tried to	25	I couldn't give you the exact number but still a number
H	Page 112	H	Page 114
1	unilaterally force these three counties to include undated	1	of counties who had not yet done that.
2	ballots in their certified totals?	2	Q. Did some counties change their position with
3	A. No, I don't believe so.	3	respect to including undated ballots during that time
4	Q. The Department, in fact, has sought relief from	4	period?
5	the Court; is that correct?	5	A. Yes. Certainly, you know, before June 29th a
6	A. Correct. Yes.	6	number of counties changed their position.
7	Q. Does the Department have the power to	7	Q. Now, you were asked about the language on the
8	unilaterally force these three counties to include undated	8	outer envelope stating that undated if the date is
9	ballots in their totals?	9	omitted, the ballot will not be counted; do you recall
10	A. I don't believe so, no.	10	that?
11	Q. In your position do you work with all 67 county	11	A. I do, yes.
12	boards?	12	Q. Was that language consistent with the
13	A. I do, yes.	13	Department's guidance as of May, 2022?
14	Q. Do you try to maintain cordial relationships with	14	A. As of the May primary, yes.
15	all of them?	15	Q. You also were asked a lot about the Department's
16	A. I do, yes.	16	process with respect to certification, and I believe you
17	Q. At the first hint of a disagreement with a county	17	testified that the Department sometimes identifies obvious
18	board, is your response to immediately file a lawsuit?	18	errors in a county's certification; is that correct?
19	A. No, it's not.	19	A. That's correct. Yes.
20	Q. What do you typically do when there's an area of	20	Q. What happens at that point when the Department
21	disagreement with a county board?	21	identifies an obvious error in the county certification?
22	A. You know, I'm old school so I typically if I can	22	A. You know, typically, you know, we would contact
23	I pick up the phone and I try to talk through it. You	23	the county to get clarification. So we would identify a
43			
24	know, certainly, you know, when we're sending guidance out	24	potential error, ask the county to double-check their

1	Page 115 correct or if it was a clerical error.	1	Page 117 ballot was counted, would that ballot count?
2	Q. So do you believe it is your responsibility or	2	A. Pursuant to the Election Code, no. If the voter
3	JUDGE COHN JUBELIRER: Could you put the	3	casts a ballot and then dies before Election Day, the
4	microphone	4	county Boards of Elections are directed to set that ballot
5	MR. FISCHER: Sorry.	5	aside.
6	JUDGE COHN JUBELIRER: Thanks.	6	Q. And if somebody else fraudulently cast that
7	BY MR. FISCHER:	7	voter's ballot and back-dated it to before the voter had
8	Q. Do you believe it is the Department's	8	died, would that ballot count?
9	responsibility to certify what a county submits no matter	9	A. It would not, no.
10	what?	10	Q. And if the voter fraudulently cast a ballot but
11	A. No. I think we do have a duty to	11	dated it on a date after the voter had died, would it
12	MR. KING: I'm going to object. This is	12	count?
13	irrelevant. This is whether his opinion is whether they	13	A. No. Again the relevant date is the date the
14	should certify it or not I beg your pardon whether	14	voter is deceased as compared to the date of the election.
15	it's his opinion that they can certify it or not. It's	15	Q. So is there any situation in which the date
16	what you said to me earlier, Your Honor. It's what the law	16	written on the envelope would be relevant to whether that
17	provides for.	17	vote is counted?
18	MR. FISCHER: I was going to ask about that	18	A. I don't believe so, no.
19	process. I'm not asking for his legal opinion.	19	Q. Now, I'd like to ask you a little bit about some
20	JUDGE COHN JUBELIRER: Yes. I think I	20	of the dates involved here. So do you have Joint Exhibit
21	allowed you considerable latitude to ask him about his	21	6? Maybe I can hand you another copy. This involves your
22	opinion or let me say his	22	chronology.
23	MR. KING: Knowledge.	23	(Document handed to the witness.)
24	JUDGE COHN JUBELIRER: Knowledge, right.	24	THE WITNESS: I have it.
25	Thank you.	25	BY MR. FISCHER:
Ħ	Page 116	+	Page 118
1	his knowledge of the process. And so to	1	Q. Do you recall Mr. King asking you about the dates
2	the extent that this would call for any kind of legal	2	that the three counties involved in this litigation
3	conclusion, thank you for the objection; and I will clarify	3	submitted their certifications to the Department?
4	that whatever the witness answers is not at all a legal	4	A. I do, yes.
5	conclusion. Obviously questions of law, issues of law are	5	Q. And I believe he said they were on July 6th, 7th,
6	for the Court to decide; but this is just his experience,	6	and 8th; is that correct?
7	within his experience.	7	A. I agreed that those dates sounded correct. I
8	MR. FISCHER: I'll rephrase the question to	8	believe those are the dates that Mr. King provided, but
9	make that clear.	9	those sounded correct based on my recollection.
10	JUDGE COHN JUBELIRER: Yeah.	10	Q. And that was stipulated to, in fact?
11	BY MR. FISCHER:	11	A. Correct.
12	Q. Mr. Marks, does the Department tabulate and	12	Q. So looking at your chronology, when did this
13	certify the statewide results using the certification	13	Court issue its opinion in the McCormick case?
14	submitted by the counties no matter what?	14	A. On June 2nd.
15	A. No. There are occasions when we identify an	15	Q. June 2nd. So before those certifications were
16	error or what we believe to be an error or an omission as	16	submitted.
17	the case may be, and we'll contact the county to get	17	A. Correct.
18	clarification.	18	Q. And do you recall Mr. King asking you whether the
19		19	McCormick case was voluntarily dismissed?
	Q. Thank you. You were asked about a hypothetical		
20	involving a voter who died before Election Day; do you	20	A. I don't recall. I think he just asked whether
20 21	involving a voter who died before Election Day; do you recall those questions?	21	the case was dismissed.
20 21 22	involving a voter who died before Election Day; do you recall those questions? A. I do, yes.	21 22	the case was dismissed. Q. Thank you. I appreciate that clarification.
20 21 22 23	involving a voter who died before Election Day; do you recall those questions? A. I do, yes. Q. And let me just ask you about certain different	21 22 23	the case was dismissed. Q. Thank you. I appreciate that clarification. Could you please look at Plaintiff's Exhibit 2 which I'm
20 21 22	involving a voter who died before Election Day; do you recall those questions? A. I do, yes.	21 22	the case was dismissed. Q. Thank you. I appreciate that clarification.

П	Page 119		Page 121
1	that this is an order entered by this Court?	1	boils down to what, you know, we outlined or our counsel
2	A. It is, yes.	2	outlined in the June 29th letter why we believe the
3	Q. And let me read it to you. It says, now, June	3	counties are required to certify vote totals that include
4	10th, 2022, upon consideration of the Application for	4	undated ballots based on rulings from the Courts.
5	Relief in the Nature of Voluntary Discontinuance or,	5	BY MR. BUKOWSKI:
6	Alternatively, a Dismissal for Mootness, parentheses,	6	Q. In the McCormick case, do you know what the
7	Application for Discontinuance, filed by Dave McCormick for	7	Department's position was regarding the voluntary
8	U.S. Senate and David H. McCormick, and the answers thereto	8	discontinuance of the case?
9	filed by the Leigh M. Chapman as Acting Secretary of the	9	A. I don't recall what the Department's position
10	Commonwealth, parentheses, Secretary, Intervenors Dr. Oz	10	was, no.
11	for Senate and Dr. Mehmet Oz, parentheses, Oz Intervenors,	11	Q. Or what the Department's position was on vacating
12	and Republican National Committee and Republican Party of	12	the June 2nd order or not?
13	Pennsylvania, Republican Intervenors, the Application for	13	A. I don't recall, no.
14	Discontinuance is granted. Do you see that?	14	MR. BUKOWSKI: Nothing further, Your Honor.
15	A. I do, yes.	15	RECROSS-EXAMINATION
16	Q. And then the next two sentences say, the	16	BY MR. KING:
17	Prothonotary shall mark this matter closed. In addition,	17	Q. Mr. Marks, would you tell the Court is there a
18	upon consideration of the Application to Vacate Memorandum	18	difference between the term because these things are
19	Opinion and Order of June 2nd, 2022, Application to Vacate	19	defined in the Election Code? I think we agreed to that
20	filed by Oz Intervenors in which Republican Intervenors	20	earlier. Is there a difference between the terms canvass
21	joined, and the answer filed by the Secretary, the	21	and certify?
22	Application to Vacate is denied. Did I read that	22	A. You know, my layman's understanding, there is.
23	correctly?	23	You know, I believe the certification is basically the
24	A. You did, yes.	24	memorialization of the results of the canvass where they
25	Q. And again what is the date of this order?	25	complete the canvass and then they certify the results of
H	Page 120	\vdash	Page 122
1	A. This order is dated June 10th of 2022.	1	that canvass.
2	MR. FISCHER: Your Honor, I have no further	2	Q. Two different things, right?
3	questions.	3	A. You can make an argument that they're two
4	JUDGE COHN JUBELIRER: Thank you.	4	different things or the certification is an extension or
5	Any recross?	5	the last step of the canvass.
6			
7	MR. BUKOWSKI: Very briefly, Your Honor.	6	Q. It either is or it isn't. So the canvass,
	RECROSS-EXAMINATION	7	there's a definition of canvass in the Election Code,
8	RECROSS-EXAMINATION BY MR. BUKOWSKI:	7 8	there's a definition of canvass in the Election Code, right?
8	RECROSS-EXAMINATION BY MR. BUKOWSKI: Q. During your counsel's questioning, he asked you	7 8 9	there's a definition of canvass in the Election Code, right? A. There is a definition in the Election Code of
8	RECROSS-EXAMINATION BY MR. BUKOWSKI: Q. During your counsel's questioning, he asked you about the 64 counties who had	7 8	there's a definition of canvass in the Election Code, right? A. There is a definition in the Election Code of canvass, yes.
8	RECROSS-EXAMINATION BY MR. BUKOWSKI: Q. During your counsel's questioning, he asked you about the 64 counties who had JUDGE COHN JUBELIRER: Do you want to come	7 8 9	there's a definition of canvass in the Election Code, right? A. There is a definition in the Election Code of
8 9 10	RECROSS-EXAMINATION BY MR. BUKOWSKI: Q. During your counsel's questioning, he asked you about the 64 counties who had	7 8 9 10	there's a definition of canvass in the Election Code, right? A. There is a definition in the Election Code of canvass, yes.
8 9 10	RECROSS-EXAMINATION BY MR. BUKOWSKI: Q. During your counsel's questioning, he asked you about the 64 counties who had JUDGE COHN JUBELIRER: Do you want to come	7 8 9 10	there's a definition of canvass in the Election Code, right? A. There is a definition in the Election Code of canvass, yes. Q. And there is a definition of certification?
8 9 10 11 12	RECROSS-EXAMINATION BY MR. BUKOWSKI: Q. During your counsel's questioning, he asked you about the 64 counties who had JUDGE COHN JUBELIRER: Do you want to come to a microphone?	7 8 9 10 11	there's a definition of canvass in the Election Code, right? A. There is a definition in the Election Code of canvass, yes. Q. And there is a definition of certification? A. Correct.
8 9 10 11 12 13	RECROSS-EXAMINATION BY MR. BUKOWSKI: Q. During your counsel's questioning, he asked you about the 64 counties who had JUDGE COHN JUBELIRER: Do you want to come to a microphone? BY MR. BUKOWSKI:	7 8 9 10 11 12	there's a definition of canvass in the Election Code, right? A. There is a definition in the Election Code of canvass, yes. Q. And there is a definition of certification? A. Correct. Q. Those are two different things?
8 9 10 11 12 13	RECROSS-EXAMINATION BY MR. BUKOWSKI: Q. During your counsel's questioning, he asked you about the 64 counties who had JUDGE COHN JUBELIRER: Do you want to come to a microphone? BY MR. BUKOWSKI: Q the 64 counties who had complied and you used	7 8 9 10 11 12 13	there's a definition of canvass in the Election Code, right? A. There is a definition in the Election Code of canvass, yes. Q. And there is a definition of certification? A. Correct. Q. Those are two different things? A. They are but one comes obviously after completion
8 9 10 11 12 13 14	RECROSS-EXAMINATION BY MR. BUKOWSKI: Q. During your counsel's questioning, he asked you about the 64 counties who had JUDGE COHN JUBELIRER: Do you want to come to a microphone? BY MR. BUKOWSKI: Q the 64 counties who had complied and you used the word complied, they complied. What were they complying	7 8 9 10 11 12 13 14	there's a definition of canvass in the Election Code, right? A. There is a definition in the Election Code of canvass, yes. Q. And there is a definition of certification? A. Correct. Q. Those are two different things? A. They are but one comes obviously after completion of the other.
8 9 10 11 12 13 14 15	RECROSS-EXAMINATION BY MR. BUKOWSKI: Q. During your counsel's questioning, he asked you about the 64 counties who had JUDGE COHN JUBELIRER: Do you want to come to a microphone? BY MR. BUKOWSKI: Q the 64 counties who had complied and you used the word complied, they complied. What were they complying with?	7 8 9 10 11 12 13 14 15	there's a definition of canvass in the Election Code, right? A. There is a definition in the Election Code of canvass, yes. Q. And there is a definition of certification? A. Correct. Q. Those are two different things? A. They are but one comes obviously after completion of the other. Q. I understand the chicken and the egg story, but
8 9 10 11 12 13 14 15 16	RECROSS-EXAMINATION BY MR. BUKOWSKI: Q. During your counsel's questioning, he asked you about the 64 counties who had JUDGE COHN JUBELIRER: Do you want to come to a microphone? BY MR. BUKOWSKI: Q the 64 counties who had complied and you used the word complied, they complied. What were they complying with? A. Well, our request to certify vote totals and	7 8 9 10 11 12 13 14 15 16 17	there's a definition of canvass in the Election Code, right? A. There is a definition in the Election Code of canvass, yes. Q. And there is a definition of certification? A. Correct. Q. Those are two different things? A. They are but one comes obviously after completion of the other. Q. I understand the chicken and the egg story, but they're two different things?
8 9 10 11 12 13 14 15 16 17 18	RECROSS-EXAMINATION BY MR. BUKOWSKI: Q. During your counsel's questioning, he asked you about the 64 counties who had JUDGE COHN JUBELIRER: Do you want to come to a microphone? BY MR. BUKOWSKI: Q the 64 counties who had complied and you used the word complied, they complied. What were they complying with? A. Well, our request to certify vote totals and include undated ballots.	7 8 9 10 11 12 13 14 15 16 17	there's a definition of canvass in the Election Code, right? A. There is a definition in the Election Code of canvass, yes. Q. And there is a definition of certification? A. Correct. Q. Those are two different things? A. They are but one comes obviously after completion of the other. Q. I understand the chicken and the egg story, but they're two different things? A. They are. They're two different actions.
8 9 10 11 12 13 14 15 16 17 18	RECROSS-EXAMINATION BY MR. BUKOWSKI: Q. During your counsel's questioning, he asked you about the 64 counties who had JUDGE COHN JUBELIRER: Do you want to come to a microphone? BY MR. BUKOWSKI: Q the 64 counties who had complied and you used the word complied, they complied. What were they complying with? A. Well, our request to certify vote totals and include undated ballots. Q. I mean the word comply to me means they were	7 8 9 10 11 12 13 14 15 16 17 18	there's a definition of canvass in the Election Code, right? A. There is a definition in the Election Code of canvass, yes. Q. And there is a definition of certification? A. Correct. Q. Those are two different things? A. They are but one comes obviously after completion of the other. Q. I understand the chicken and the egg story, but they're two different things? A. They are. They're two different actions. Q. All right. Did you see in the opinion that you
8 9 10 11 12 13 14 15 16 17 18 19 20	RECROSS-EXAMINATION BY MR. BUKOWSKI: Q. During your counsel's questioning, he asked you about the 64 counties who had JUDGE COHN JUBELIRER: Do you want to come to a microphone? BY MR. BUKOWSKI: Q the 64 counties who had complied and you used the word complied, they complied. What were they complying with? A. Well, our request to certify vote totals and include undated ballots. Q. I mean the word comply to me means they were required to, and you can't point to anything and have not	7 8 9 10 11 12 13 14 15 16 17 18 19 20	there's a definition of canvass in the Election Code, right? A. There is a definition in the Election Code of canvass, yes. Q. And there is a definition of certification? A. Correct. Q. Those are two different things? A. They are but one comes obviously after completion of the other. Q. I understand the chicken and the egg story, but they're two different things? A. They are. They're two different actions. Q. All right. Did you see in the opinion that you were asked that Her Honor wrote, did you see anything that
8 9 10 11 12 13 14 15 16 17 18 19 20 21	RECROSS-EXAMINATION BY MR. BUKOWSKI: Q. During your counsel's questioning, he asked you about the 64 counties who had JUDGE COHN JUBELIRER: Do you want to come to a microphone? BY MR. BUKOWSKI: Q the 64 counties who had complied and you used the word complied, they complied. What were they complying with? A. Well, our request to certify vote totals and include undated ballots. Q. I mean the word comply to me means they were required to, and you can't point to anything and have not pointed to anything in response to Attorney King's question	7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	there's a definition of canvass in the Election Code, right? A. There is a definition in the Election Code of canvass, yes. Q. And there is a definition of certification? A. Correct. Q. Those are two different things? A. They are but one comes obviously after completion of the other. Q. I understand the chicken and the egg story, but they're two different things? A. They are. They're two different actions. Q. All right. Did you see in the opinion that you were asked that Her Honor wrote, did you see anything that mentioned the word certification or certify?
8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	RECROSS-EXAMINATION BY MR. BUKOWSKI: Q. During your counsel's questioning, he asked you about the 64 counties who had JUDGE COHN JUBELIRER: Do you want to come to a microphone? BY MR. BUKOWSKI: Q the 64 counties who had complied and you used the word complied, they complied. What were they complying with? A. Well, our request to certify vote totals and include undated ballots. Q. I mean the word comply to me means they were required to, and you can't point to anything and have not pointed to anything in response to Attorney King's question that, you know, requires them to follow the Secretary's	7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	there's a definition of canvass in the Election Code, right? A. There is a definition in the Election Code of canvass, yes. Q. And there is a definition of certification? A. Correct. Q. Those are two different things? A. They are but one comes obviously after completion of the other. Q. I understand the chicken and the egg story, but they're two different things? A. They are. They're two different actions. Q. All right. Did you see in the opinion that you were asked that Her Honor wrote, did you see anything that mentioned the word certification or certify? A. If you're referring to the June 2nd order of the

	Page 123		Page 125
1	Q. Did not appear?	1	A. Correct. Yes.
2	A. Correct.	2	Q. All right.
3	MR. KING: I believe that's all. Thank you	3	MR. KING: I think that's all, Your Honor.
4	very much.	4	Thank you very much.
5	THE WITNESS: Thank you.	5	JUDGE COHN JUBELIRER: Thank you.
6	MR. FISCHER: Thank you, Mr. Marks.	6	You are free to depart. Thank you very much.
7	JUDGE COHN JUBELIRER. Thank you very much, Mr. Marks, for your testimony today.	7	THE WITNESS: Thank you, Your Honor.
8	MR. KING: Judge, could I ask one more	8	(Witness excused.)
9	question?	9	MR. FISCHER: Your Honor, at this time we
10	JUDGE COHN JUBELIRER: Quick. Of this	10	would call Scott Dunn of the Fayette Board of
12	witness?	12	Commissioners, and we're calling Mr. Dunn as if on cross.
13	MR. KING: Yes, ma'am. And the reason I say	13	JUDGE COHN JUBELIRER: Okay.
14	that is we were going to call him as on cross-examination;	14	MR. HOLLAND: Please raise your right hand.
15	but I would be willing to say that that's not necessary,	15	Whereupon,
16	that whatever testimony he produced here he would have	16	SCOTT DUNN,
17	produced as on cross. So we'll save the Court's time and	17	having been duly sworn, testified as follows.
18	our own time with that respect, but if I could ask him I	18	MR. HOLLAND: Please be seated.
19	guess one more question I would appreciate it.	19	DIRECT EXAMINATION (as on Cross)
20	JUDGE COHN JUBELIRER: Okay.	20	BY MR. FISCHER:
21	Is there any objection to that?	21	Q. Good afternoon, Mr. Dunn.
22	MR. FISCHER: No objection.	22	A. Hi.
23	JUDGE COHN JUBELIRER: Okay.	23	Q. You are a member of the Fayette Board of
24	MR. KING: Now I can't remember.	24	Commissioners; is that correct?
25	BY MR. KING:	25	A. That is correct.
1	Page 124 Q. So, Mr. Marks, with respect to this question of	1	Q. And as a result of that position, do you have
2	certification versus canvass, would you just tell us when	2	certain responsibilities with respect to the management of
3	the counties canvass the ballots, what is the process?	3	elections in Fayette County?
4	What do they do?	4	A. Yes. I serve on the Board of Elections, and we
5	A. Well, the counties I went into a little bit	5	as Commissioners oversee the Election Bureau.
6	earlier in my testimony but the counties will receive	6	Q. And do you have any specific role on the Board of
7	the precinct-level results on election night; and when the	7	Elections?
8	official canvass begins on Friday, they'll review all of	8	A. As far as?
9	those results, compile those results. They also add to	9	Q. Chair? Vice-chair?
10	those the results from the precanvass and the canvass of	10	A. I think I'm the Secretary.
11	absentee and mail-in ballots.	11	Q. Okay. Thank you. And could you briefly explain
12	The canvass also includes the adjudication of	12	the boards's role in the administration of elections in
13	provisional ballots and also a second canvass where they	13	Fayette County?
14	canvass military and overseas ballots, so that entire	14	A. We're an overseer of the department. We have a
15	process where the county is reviewing and either reviewing	15	department head. Our Election Director, Marybeth Kuznik,
16	returns submitted by precinct election officials or	16	and she oversees all facets of the election including the
17	reviewing the tabulation that they've done centrally of	17	applications for mail-in ballots, sending out the mail-in
18	absentee and mail-in ballots as well as provisional	18	ballots, receiving the mail-in ballots, training poll
19	ballots.	19	workers for the day-of operations.
20	Q And then the certification requires the calling	20	Making sure that all of the equipment is prepared
21	of a public meeting and then there's a vote to certify,	21	and certified to go out to our 77 precincts, making sure
22	correct?	22	that all the equipment is delivered in a timely fashion,
23	A. Correct. Yes.	23	set up, ready to go, and that the ballots are prepared in
24	Q. All right. So and we were talking earlier of the	24	such a way that they will there's a logic testing that
25	two separate things that occur?	25	they make sure all the ballots are prepared that will be

	Page 127		Page 129
1	able to be read by the scanners.	1	A. That is correct.
2	Q. So is it fair to say as a result of your role,	2	Q. So if a voter drops it in the mail at 7:00 p.m.
3	you are very familiar with how elections in Fayette County	3	on Election Day, it's probably not going to be
4	are administered?	4	A. It's not going to be at the Election Bureau in
5	A. Yeah. You could say, yeah, but I rely on the	5	time.
6	Election Director to make sure that all that happens.	6	Q. Now, were you on the board in 2020?
7	Q. You don't have day-to-day responsibility?	7	A. Yes.
8	A. I do not.	8	Q. And you would agree with Mr. Marks that the
9	Q. But you understand the processes	9	deadline was extended for three days in that race?
10	A. Correct.	10	A. Yes.
11	Q generally? Thank you. And does the Board of	11	Q. But that has not happened in any subsequent
12	Elections ever make decisions about whether a specific vote	12	election?
13	is or is not counted?	13	A. Correct.
14	A. We do have a meeting one week after the election	14	Q. And you take or Fayette County takes certain
15	to decide on provisional ballots, and I believe we've never	15	steps to verify that their ballots are received on a timely
16	had this under my this is my fifth election as	16	basis, correct?
17	Commissioner. I believe that if there were to be	17	A. Yes. As the ballots are received, there is a
18	questionable ballots where there were challenges, then we	18	time and date stamp, and so the outer ballot envelope will
19	would be in charge of that as well; but at this point I've	19	be stamped with that time and date.
20	never had that happen, just the provisional aspect.	20	Q. And do you also enter information about the
21	Q. And if there is a challenge to a provisional	21	ballots I'm sorry. Let me withdraw that. Do the
22	ballot, the board resolves those in the first instance;	22	election administers, do they enter information about the
23	isn't that correct?	23	ballot in the SURE system when they receive it?
24	A. If there's a challenge to a provisional ballot,	24	A. Yes. Once received there is a scanning.
25	then we decide that in the provisional ballot meeting.	25	Actually we call it binking for some reason I'm not
1	$ \hbox{Q.} \qquad \hbox{And typically you decide that by a vote of the} $	1	Page 130 exactly sure why but it is scanned as received.
2	members of the board, correct?	2	Q. And you don't use the date written on the outer
3	A. Correct.	3	envelope to determine when the ballot was received,
4	Q. And the board's decisions with respect to	4	correct?
5	inclusion of any ballots are subject to review by Courts;	5	A. That is correct.
6	is that correct?	6	Q. And you don't use that date written, assuming
7	A. I'll leave that up to the Court. I'm not sure.	7	there is a date, to exclude ballots?
8	If you can re-ask that question another way, I'm not sure	8	A. We do not.
9	exactly what you're asking.	9	Q. Now, I'd like to focus specifically on what we're
10	Q. If you vote to include or not to include a	10	referring to as undated ballots which are ballots, mail-in
11	particular ballot and I'm not asking for your legal	11	or absentee ballots, where the voter has omitted the date
12	assessment but is it your understanding that parties can	12	on the outer envelope but otherwise signed and otherwise
13	challenge that decision?	13	complied with the Election Code as far as
14	A. Yes.	14	MR. FISCHER: Can I use that phrase?
15	Q. And the board tries to comply with all relevant	15	MR. KING: That's fine.
16	orders issued by Courts, correct?	16	BY MR. FISCHER:
17	A. Yes.	17	Q Fayette County did not include undated ballots
18	Q. So I'd like to just focus on absentee and mail-in	18	in the totals it submitted to the Secretary as its
19	ballots. Do you agree with Mr. Marks that the deadline to	19	certification, correct?
20	submit an absentee ballot is 8:00 p.m. on Election Day?	20	A. That is correct.
21	A. The deadline for an absentee ballot is $8:00 \text{ p.m.}$	21	Q. And, in fact, Fayette County did not even open
22	on Election Day. That's correct.	22	undated ballots, correct?
23	Q. Thank you. And just to clarify, that's the	23	A. That is correct.
24	deadline that the ballot must be received by the county,	24	Q. And are you familiar with the litigation brought
25	correct?	25	by Mr. McCormick relating to the republican primary for

	Page 131		Page 133
1	senate and the counting of undated ballots?	1	that's where it started. So actually it started before the
2	A. I was aware there was litigation, yes.	2	June 2nd date. It started May 24th with this guidance that
3	Q. Fayette County was actually respondent in that	3	said, you know, submit and we will tell you the next steps.
4	litigation, correct?	4	Q. At that meeting you just discussed, did the board
5	A. I believe so. I'm not a legal. We start using	5	take a vote on this question?
6	words like respondent, I'm not exactly sure what you're	6	A. We did not. The meeting was adjourned, and we
7	saying. So	7	never reconvened a meeting of the board of election to take
8	Q. Well, so the McCormick campaign sued the	8	up this matter.
9	Secretary and a number of counties.	9	Q. So even after this Court issued its order on June
10	A. I believe all the counties.	10	2nd, you did not reconvene the board to address its
11	Q. It didn't sue all the counties	11	implications?
12	A. All the counties were included as I understand	12	A. No. Our opinion
13	it.	13	MR. KING: Your Honor, this is beyond the
14	Q. I believe some were omitted, but Fayette County	14	proffer. The proffer is pretty simple what the Attorney
15	was not one that was omitted.	15	General said they were going to ask this witness about.
16	A. Okay.	16	And because I was granted great latitude, I've let this go
17	Q. Are you aware that on June 2nd this Court entered	17	somewhat.
18	an order ordering counties to canvass undated ballots and	18	But at page 2 of the proffer the county
19	submit two sets of totals to the Secretary, one with the	19	commissioner witnesses will be questioned about the
20	undated ballots included and one without?	20	Respondent board's practices for the 2022 general primary
21	A. I have to go back in my notes to actually look.	21	election with respect to determining the timeliness of an
22	Am I allowed to look at an exhibit? There was at one point	22	absentee or mail-in ballot with respect to recording the
23	the directive that we took was from the Department of State	23	date that absentee and mail-in ballots are received and
24	saying to count the ballots, tabulate the ballots, send the	24	with respect to assessing the sufficiency of the
25	Department of State the tabulation, and then they would	25	declaration on a ballot return envelope.
1	decide how to proceed from there.	1	Page 134 These questions are beyond the proffer that
1 2	decide how to proceed from there. Q. But Fayette County did not count the ballots; is		$$\operatorname{\textsc{Page}}\ 134$$ These questions are beyond the proffer that was made in this case.
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2	decide how to proceed from there. Q. But Fayette County did not count the ballots; is	2	These questions are beyond the proffer that was made in this case.
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2 3 4	decide how to proceed from there. Q. But Fayette County did not count the ballots; is that correct? A. That is correct.	1 2 3 4	These questions are beyond the proffer that was made in this case. MR. FISCHER: Your Honor, I think this really goes to the sufficiency of the evidence about
2 3 4 5	decide how to proceed from there. Q. But Fayette County did not count the ballots; is that correct? A. That is correct. Q. Okay. So you chose not to comply with the order	1 2 3 4 5	These questions are beyond the proffer that was made in this case. MR. FISCHER: Your Honor, I think this really goes to the sufficiency of the evidence about timeliness and particularly since we're talking about
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	Page 135	П	Page 137
1	of the declaration. That's what this witness was prepared	1	confusion and the ambiguousness if that's a word
2	to come here today to testify about.	2	THE WITNESS: Sorry if you have to type
3	MR. FISCHER: And, Your Honor, if I may just	3	that.
4	briefly respond, the last phrase, with respect to assessing	4	So it comes into play here where, you know,
5	the sufficiency of the declaration on a ballot return	5	you have different people telling you different things, and
6	envelope, what I understand this witness to be saying is	6	then you have the Department of State saying hey, just
7	that if a ballot did not include the date, they assessed	7	count them and we'll decide what to do. And so that's
8	that that declaration was insufficient and did not count	8	where in my mind that's where I stopped, and I said the law
9	it. So this is squarely within what we	9	was the law on May 17th. That's what I'm following.
10	MR. KING: He's testified to that. We're	10	As a Commissioner I put my hand on my
11	now into did he intentionally violate some Court order?	11	daddy's bible, put my hand in the air and I swore to defend
12	Well, that's not part of this.	12	the Constitution of the state of Pennsylvania and the laws
13	JUDGE COHN JUBELIRER: Okay. Why don't we	13	of the state of Pennsylvania, and that's what I'm doing.
14	get the exact question that was asked because I do think	14	BY MR. FISCHER:
15	that in broad terms how the board approached assessing the	15	Q. So you chose not to follow this Court's order as
16	sufficiency of the declaration in this primary given all of	16	a result?
17	the various guidances and information is within that broad	17	A. Yes.
18	scope of that particular statement.	18	MR. FISCHER: Excuse me, Your Honor.
19	But to the extent that you are making an	19	JUDGE COHN JUBELIRER: Sure.
20	objection as well about whether he's being asked for, you	20	MR. FISCHER: Just one minute to consult.
21	know, a legal opinion or an opinion on the law, that	21	(Discussion between counsel.)
22	obviously is something that I would sustain.	22	MR. FISCHER: Your Honor, I have nothing
23	So if we could maybe hear the question or if	23	further for this witness.
24	you want to ask the question again for the witness?	24	MR. BUKOWSKI: I have nothing.
25	MR. FISCHER: Certainly. I'll ask the	25	MR. KING: Your Honor?
	Page 136		Page 138
1	question again.	1	JUDGE COHN JUBELIRER: Yes.
2	question again. BY MR. FISCHER:	2	JUDGE COHN JUBELIRER: Yes. CROSS-EXAMINATION (as on Redirect)
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1	Q. Do you have a legitimate disagreement with	1	Page 141 MR. HOLLAND: Please raise your right hand.
2	perhaps the people on the other side of the aisle from us	2	Whereupon,
3	with respect to whether undated ballots ought to be counted	3	RAY D'AGOSTINO,
4	or not?	4	having been duly sworn, testified as follows.
5	A. Yes.	5	MR. HOLLAND: Please be seated.
6	Q. Okay. You still think they should not be	6	DIRECT EXAMINATION (as on Cross)
7	counted?	7	BY MR. FISCHER:
8	A. I believe they should not be counted.	8	Q. Good afternoon, Mr. D'Agostino.
9	Q. All right. And if so, if you're ordered to	9	A. Good afternoon. And sorry, I don't know your
10	convene a meeting of your board and you're asked to vote on	10	name.
11	that, you understand that you're going to be asked to vote	11	Q. Mr. Fischer with the Attorney General's office,
12	on whether to certify an election counting undated ballots?	12	Michael Fischer.
13	A. I know that we will more than likely be asked	13	A. Mr. Fischer, good afternoon.
14	that, yes.	14	Q. Thank you. You currently serve on the Lancaster
15	Q. All right. And I want to put on the	15	County Board of Commissioners; is that correct?
16	MR. KING: I want to make sure this is in	16	A. That is correct.
17	the record, Your Honor, from the stipulated facts.	17	Q. And as a result you have certain responsibilities
18	BY MR. KING:	18	with respect to elections in Lancaster County?
19	Q. Fayette County's election results were certified	19	A. That is correct.
20	on June 7th?	20	Q. And did you hear all of Mr. Dunn's testimony
21	A. That is correct.	21	earlier?
22	Q. So I'm not sure whether I think Berks was 6	22	A. I did.
23	and Fayette was 7 and Lancaster was 8. Of course, I have	23	Q. Would you agree that his description of how
24	them reversed.	24	Fayette County administers elections at least as to your
25	MR. KING: Since I'm only Fayette, I know	25	responsibilities is roughly similar to how Lancaster County
1	we're in the middle. Your Honor.		administers them?
1 2	we're in the middle, Your Honor. BY MR. KING:	1 2	administers them?
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П	Page 143	П	Page 145
1	whether a ballot is timely received?	1	Q. Explain to me the circumstances of that voter
2	A. We do use that as one method.	2	fraud case.
3	Q. And if a ballot is received at the Board of	3	A. Sure. So we received mail ballots or absentee
4	Elections at 8:01 on Election Day, would that ballot be	4	ballots. When I say mail ballots, I mean absentee and no
5	counted?	5	excuse mail ballots. We receive them. They are
6	A. No.	6	date-stamped and then they are scanned to go into the SURE
7	Q. Would it matter when that ballot had been filled	7	system.
8	out to the decision whether to count it?	8	In this one case it happened to be our Chief
9	A. Repeat the question.	9	Clerk of the Board of Elections that scanned this
10	Q. Certainly. If a ballot is received at 8:01,	10	particular ballot that came in the outer envelope, the
11	would it matter when the voter filled it out in determining	11	declaration; and the SURE system popped up and said that
12	whether to count it?	12	the person was deceased. Our Chief Clerk put that aside to
13	A. Potentially, yes.	13	then look at later; and when the Chief Clerk looked at it
14	Q. And how so?	14	again, realized that the date that someone put on that
15	A. Well, there is the provision that the declaration	15	declaration was a date after the person had died.
16	has to be dated and signed. The date which is the date	16	And so at that point she did more research and
17	that's put on there by presumably the voter could make a	17	actually pulled up the obituary and found out that person
18	difference in whether that ballot is actually counted or	18	was deceased, referred it to our District Attorney's
19	not.	19	office. Our District Attorney's office is now prosecuting
20	Q. So there are circumstances under which a ballot	20	that person and that person has admitted to voter fraud.
21	received after the $8:00\ p.m.$ deadline would nonetheless be	21	Q. So in that case it led to a criminal
22	counted because of what that voter wrote?	22	investigation, correct?
23	A. No. That was by accident what you asked me.	23	A. That is correct.
24	Q. Okay. So just to clarify, in determining whether	24	Q. But it did not affect whether you counted that
25	a ballot was received by the deadline, you use the time	25	ballot, correct?
1	Page 144 stamp on the envelope, correct?	1	Page 146 A. Not that one but there can be instances where it
2	A. We time-stamp them, yes.	2	could be. So, for instance, if it was a person who moved
3	Q. And do you also enter information about the	3	and is alive, we may not count that ballot because we've
4	ballot into the SURE system?	4	determined that the date is different than the date they
5	A. Yes.	5	may have moved out. So it is material to us, and we do
6	Q. Now, with respect to the date on the outer	6	treat it as such.
7	envelope, in the May, 2022 election, did Lancaster County		The plain language of the law says that obviously
8	refuse to count any ballots that had dates based on what	8	if I say obviously that if there's no date, you set
9	the date was?	9	them aside. We treat those that have dates as potentially
10	A. There were there was one occasion where the	10	ones that can be processed; but depending on the date
11	date we do check the date. We do believe that the date	11	that's put in there, it may not be.
12	is material, that it could go to the validity and	12	Q. So just so I understand, Lancaster County
13	authenticity of the ballot received. And so depending on	13	election officials review every date on every mail-in
14	the date, it may be set aside for further research and	14	ballot that you receive?
15	determination whether it should go forward and count or	15	A. There's instances where it depends on whether the
16	not.	16	date looks to be something that makes sense like within the
17	Q. So in May, I'm just asking about the May, 2022	17	time period of the election. It might cause our staff to
18	primary	18	then take another look.
19	A. Yes.	ΙI	Q. But just to clarify my question was, you look at
17		19 20	every date on every mail-in ballot; is that correct?
	O did you decline to count any hallote based on		every date on every mail in pariot, to that correct:
20	Q did you decline to count any ballots based on the date that was written?	ΙI	A I'm not the one that does it but I understand
20 21	the date that was written?	21	A. I'm not the one that does it, but I understand
20 21 22	the date that was written? A. Based on the date, we are aware of a voter fraud	21 22	the staff does take it seriously. It does look at the
20 21 22 23	the date that was written? A. Based on the date, we are aware of a voter fraud case that we did not count the ballot because of the date.	21 22 23	the staff does take it seriously. It does look at the dates, but I can't say for certain whether every single
20 21 22	the date that was written? A. Based on the date, we are aware of a voter fraud	21 22	the staff does take it seriously. It does look at the

Page 147		Page 149
understanding that a vote cast by a voter who moves before	1	A. I believe it's on June the 6th.
Election Day can nonetheless still be counted? Moves from	2	Q. And those certified returns did not include
the Commonwealth.	3	totals from undated ballots?
A. Say that again. I'm sorry.	4	A. Certified results did not, but we did submit
Q. If a voter moves before Election Day having sent	5	separately in accordance with the Court order the results
in a mail-in ballot, is it your understanding that that	6	of the undated ballots. We did do what the Court order
ballot can be counted?	7	said.
A. I can't say unless I look at the situation and	8	Q. So you complied with this Court's June 2nd order
the law itself. I can't say.	9	directing
Q. Have there been any specific situations in which	10	A. Yes.
Lancaster has used the date written to exclude a ballot	11	Q canvass of those ballots, and you counted them
cast by a voter who moved?	12	and submitted two sets of returns?
A. I'm sorry. Say the question again.	13	A. That is correct.
Q. So you testified that a voter could move before	14	Q. And just so we're clear, when we're talking about
Election Day, and you could use the date to determine	15	undated ballots, these are all ballots cast by legal voters
whether the ballot was filled out before or after the voter	16	with no other deficiencies, correct?
had moved; do you recall that?	17	A. Maybe. Again it depends on the case. I mean as
A. Yes.	18	I said, the person wasn't legally allowed to cast that
Q. Has that ever presented itself?	19	ballot, so I can't say that.
A. I'm not aware. It doesn't mean it didn't happen.	20	Q. So if for instance the voter omitted the
I'm not aware of it, though.	21	signature and date, there's no dispute that ballot wouldn't
Q. But it is your understanding that if a voter	22	be counted?
fills out a ballot, sends it in, and then moves from the	23	A. That's correct.
Commonwealth before Election Day, that vote should be	24	Q. Okay. And if a voter omitted the date and also
counted?	25	didn't use the secrecy envelope, that ballot would not be
A. Again I'm not sure.	1	Page 150 counted, correct?
Q. So let me just get back to my earlier question.	1 1	A. Correct.
Are you aware of any instance in the May, 2022 primary	1 1	Q. No dispute about that?
where the date written on the ballot was used to exclude	1 1	A. Correct.
that ballot from being counted? On the envelope, sorry.	1 1	Q. So we're not talking about those types of ballots
A. To exclude it based on the date itself other than	1 1	in this case. Can we agree on that?
the case I mentioned, no.		A. Sure.
Q. Other than the fraud case?	8	Q. Okay. We're talking about ballots where the only
A. Other than the fraud case.	1 1	deficiency identified is the omission of the date?
Q. And you would agree that ballot should not have	1 1	A. If the date is omitted, it will not count.
counted regardless of the date?	11	Q. Okay. And Lancaster was a party to the McCormick
A. That is correct.	12	case, correct?
Q. Because if a voter dies before Election Day, we	1 1	A. Correct.
can agree their ballot doesn't count?	14	Q. Okay. And as you testified, you complied with
A. Right. But our mantra in Lancaster County is our	15	the Court's order and submitted two sets of returns to the
election should be having integrity, veracity, and	16	Secretary?
transparency. And so to us that date does fit into	17	A. Correct.
integrity, veracity, and transparency of our elections	18	MR. FISCHER: Nothing further, Your Honor.
which is of utmost importance.	19	CROSS-EXAMINATION (as on Redirect)
Q. And this person was referred for prosecution,	20	BY MR. BUKOWSKI:
correct?	21	Q. Good afternoon, Mr. D'Agostino. The case of the
0011000.	ı İ	
A. That is correct.	22	voter fraud that you were referring to, is that the case
	22	voter fraud that you were referring to, is that the case that's now pending, Commonwealth of Pennsylvania versus
A. That is correct.	1 1	
-	understanding that a vote cast by a voter who moves before Election Day can nonetheless still be counted? Moves from the Commonwealth. A. Say that again. I'm sorry. Q. If a voter moves before Election Day having sent in a mail-in ballot, is it your understanding that that ballot can be counted? A. I can't say unless I look at the situation and the law itself. I can't say. Q. Have there been any specific situations in which Lancaster has used the date written to exclude a ballot cast by a voter who moved? A. I'm sorry. Say the question again. Q. So you testified that a voter could move before Election Day, and you could use the date to determine whether the ballot was filled out before or after the voter had moved; do you recall that? A. Yes. Q. Has that ever presented itself? A. I'm not aware it doesn't mean it didn't happen. I'm not aware of it, though. Q. But it is your understanding that if a voter fills out a ballot, sends it in, and then moves from the Commonwealth before Election Day, that vote should be counted? A. Again I'm not sure. Q. So let me just get back to my earlier question. Are you aware of any instance in the May, 2022 primary where the date written on the ballot was used to exclude that ballot from being counted? On the envelope, sorry. A. To exclude it based on the date itself other than the case I mentioned, no. Q. Other than the fraud case? A. That is correct. Q. Because if a voter dies before Election Day, we can agree their ballot doesn't count? A. Right. But our mantra in Lancaster County is our election should be having integrity, veracity, and transparency. And so to us that date does fit into integrity, veracity, and transparency of our elections which is of utmost importance.	understanding that a vote cast by a voter who moves before Election Day can nonetheless still be counted? Moves from the Commonwealth. A. Say that again. I'm sorry. Q. If a voter moves before Election Day having sent in a mail-in ballot, is it your understanding that that ballot can be counted? A. I can't say unless I look at the situation and the law itself. I can't say. Q. Have there been any specific situations in which Lancaster has used the date written to exclude a ballot cast by a voter who moved? A. I'm sorry. Say the question again. Q. So you testified that a voter could move before the selection Day, and you could use the date to determine whether the ballot was filled out before or after the voter had moved; do you recall that? A. Yes. Q. Has that ever presented itself? A. I'm not aware. It doesn't mean it didn't happen. I'm not aware of it, though. Q. But it is your understanding that if a voter fills out a ballot, sends it in, and then moves from the commonwealth before Election Day, that vote should be counted? A. Again I'm not sure. Page 148 1 Q. So let me just get back to my earlier question. Are you aware of any instance in the May, 2022 primary where the date written on the ballot was used to exclude that ballot from being counted? On the envelope, sorry. A. To exclude it based on the date itself other than the case I mentioned, no. Q. Other than the fraud case? A. Other than the fraud case? A. Other than the fraud case? A. Other than the fraud case. Q. And you would agree that ballot should not have counted regardless of the date? A. That is correct. Q. Because if a voter dies before Election Day, we election should be having integrity, veracity, and transparency. And so to us that date does fit into integrity, veracity, and transparency of our elections which is of utmost importance.

1			
1 -1	Page 151 MR. BUKOWSKI: I have the police criminal	1	you recall that?
2	complaint, Your Honor, and the Magisterial District Judge	2	A. Yes.
3	docket. I'd like to add that and admit it as an exhibit	3	Q. And how does Lancaster County handle incorrectly
4	for the record since it came up during Mr. D'Agostino's	4	dated ballots or ballots that where the date might be in
5	testimony. I don't need to spend time with this witness on	5	question?
6	it if they agree to its admission.	6	A. They're set aside and then there's more research
7	MR. FISCHER: Your Honor, this is the first	7	done; and if it can be determined that there is more
8	we've seen this, so I haven't had time to review it. I	8	follow-up to be done, that can be done. I would also note
9	can't say it's admissible certainly. We exchanged exhibits	9	that there's a potential of a challenge to ballots that
10	yesterday, and this was never mentioned.	10	come in. So that's something we take notice of as well.
11	MR. KING: I have no objections, Your Honor.	11	Q. Yeah. And that was going to my next question.
12	MR. BUKOWSKI: And we just learned of it	12	Are those incorrectly dated ballots or ballots that have
13	actually, you know, after we had submitted our exhibits,	13	dates that may or may not be correct, those are subject to
14	Your Honor. We think the Court can take judicial notice of	14	challenge by voters and candidates; is that correct?
15	it anyway. I think for completeness of the record we ought	15	A. That is correct.
16	to include this and we move to admit it.	16	Q. Are you aware of any instance in which a voter or
17	MR. FISCHER: We would reserve the right to	17	candidate in the 2022 May election did challenge the date
18	object just based on the fact that we haven't reviewed it	18	on a ballot because it had a date that was incorrect?
19	and can't really assess relevance or anything.	19	A. No.
20	JUDGE COHN JUBELIRER: Okay. I'll tell you	20	Q. Okay. And in that instance when there is no
21	what. I will wait to rule on your request to admit it and	21	challenge, then what happens in Lancaster County?
22	give counsel the opportunity. Do you have any objection?	22	A. If there's a date, the plain reading of the
23	Were you going to ask him any questions about it?	23	language of the Code is that we'll count that ballot.
24	MR. BUKOWSKI: I'm actually not, Your Honor,	24	Q. Okay. And is that consistent with guidance sent
25	because I think the testimony covered it. I just wanted	25	to the county Boards of Elections by the Department of
	Page 152		Page 154
	the Court to have the benefit of some of the details for its record.	1	State? A. Yes.
2	JUDGE COHN JUBELIRER: Sure.	2	
3	OUDGE COM OUDELIRER. Suie.	3	Q. And I think you said that the dates the
1 4	MD DIMONERI: And frankly	,	
4	MR. BUKOWSKI: And frankly	4	undated ballots are not counted; is that right?
5	JUDGE COHN JUBELIRER: As a judicial record	5	undated ballots are not counted; is that right? A. That is correct.
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that my opinion on how that is one vote of three. BY MR. BUKOWSKI: A. And you're guided by a solicitor; is that right? A. That is correct. Q. And in your role as a member of the Lancaster County Board of Elections, do you believe you have the discretion to ignore what you understand to be the plain language of the Election Code? A. No. MR. BUKOWSKI: I have nothing further, Your MR. BUKOWSKI: I have nothing further, Your Honor. MR. KING: Very briefly, Your Honor. MR. KING: Very briefly, Your Honor. MR. FISCHER: I thought Mr. King had no MR. BUKOWSKI: That was me. CROSS-EXAMINATION (as on Redirect) MR. BY MR. KING: MR. Well, I told in the solution of the country of the co	Page 157 If have to look at it obviously but Thank you. HER: Thank you. Just a few more We do not object to the admission It necessarily concede that they're Object to their admission at this HIN JUBELIRER: Okay. Cuments were marked as Exhibit Number 6 for received in evidence.) AMINATION (as on Recross) board or when the county receives a Lot, do you confirm that it was
BY MR. BUKOWSKI: 4 Q. And you're guided by a solicitor; is that right? 5 A. That is correct. 6 Q. And in your role as a member of the Lancaster 7 County Board of Elections, do you believe you have the 8 discretion to ignore what you understand to be the plain 9 language of the Election Code? 10 A. No. 10 (Whereupon, the do.) 11 MR. BUKOWSKI: I have nothing further, Your 12 Honor. 13 MR. KING: Very briefly, Your Honor. 14 BY MR. FISCHER: 15 questions. 16 MR. BUKOWSKI: That was me. 17 CROSS-EXAMINATION (as on Redirect) 18 BY MR. KING: 19 Q. Commissioner, do you know how many democratic and 20 republican undated ballots there were in Lancaster? I can 20 processed from there.	We do not object to the admission of the necessarily concede that they're object to their admission at this on JUBELIRER: Okay. cuments were marked as exhibit Number 6 for received in evidence.) on MINATION (as on Recross) board or when the county receives a
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MR. KING: Very briefly, Your Honor. MR. FISCHER: I thought Mr. King had no questions. 15 Q. Sir, when the MR. BUKOWSKI: That was me. 16 mail-in or absentee bal 17 CROSS-EXAMINATION (as on Redirect) 18 BY MR. KING: 19 Q. Commissioner, do you know how many democratic and 19 it's scanned. It goes a 20 republican undated ballots there were in Lancaster? I can 20 processed from there.	MMINATION (as on Recross) board or when the county receives a
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questions. 15 Q. Sir, when the mail-in or absentee ball processed from there. 18 BY MR. KING: 19 Q. Commissioner, do you know how many democratic and processed from there.	-
16 MR. BUKOWSKI: That was me. 16 mail-in or absentee ball 17 CROSS-EXAMINATION (as on Redirect) 18 BY MR. KING: 19 Q. Commissioner, do you know how many democratic and 20 republican undated ballots there were in Lancaster? I can 20 processed from there.	-
17 CROSS-EXAMINATION (as on Redirect) 18 BY MR. KING: 19 Q. Commissioner, do you know how many democratic and 20 republican undated ballots there were in Lancaster? I can 20 processed from there.	lot, do you confirm that it was
18 BY MR. KING: 19 Q. Commissioner, do you know how many democratic and 20 republican undated ballots there were in Lancaster? I can 20 processed from there.	
19 Q. Commissioner, do you know how many democratic and 19 it's scanned. It goes 20 republican undated ballots there were in Lancaster? I can 20 processed from there.	
20 republican undated ballots there were in Lancaster? I can 20 processed from there.	ou we do. It comes in and then
	into the SURE system, and then it's
21 give you the numbers. 21 Q. And if a vote:	
	was not on the rolls, would the
22 A. I don't know the breakdown. I'm pretty sure it 22 SURE system reflect that	fact?
23 was 82 total, but I don't remember the breakdown. 23 A. If they were	not on the rolls?
Q. I think it was 50-some and 40-some if I'm not 24 Q. Yes.	
25 mistaken but somewhere in that neighborhood. 25 A. Well, sure.	They wouldn't show up.
Page 156 1 Q. They wouldn't	Page 158 show up, okay. Now, could you look
	complaint? Do you have a copy of
3 know whether if you had to go back and recertify this 3 that?	
	a copy of that.
5 that were on the ballot? 5 (Documents handed	
6 A. All the positions on the ballot? 6 BY MR. FISCHER:	
	ou to page 4 which is the Affidavit
	ou to page 4 which is the Affidavit
	oa see that:
9 A. Well, sure. 9 A. Yes.	. Jack at many 1, 22
10 0 0000000000000000000000000000000000	a look at paragraph 2?
11 A. Those are all on the ballot so we have to 11 A. Yes.	
11 A. Those are all on the ballot so we have to 11 A. Yes. 12 recertify. 12 Q. It says Chris	a Miller stated she received a
11 A. Those are all on the ballot so we have to 11 A. Yes. 12 recertify. 13 Q. Do you know whether if you were ordered to 13 mail-in ballot from Term	esa J. Mihaliak signed and dated
11 A. Those are all on the ballot so we have to 11 A. Yes. 12 recertify. 13 Q. Do you know whether if you were ordered to 14 recertify this election, do you know whether that would 15 A. Yes. 16 Q. It says Christ mail-in ballot from Ter. 17 April 26th, 2022, corrections.	esa J. Mihaliak signed and dated
11 A. Those are all on the ballot so we have to 11 A. Yes. 12 recertify. 13 Q. Do you know whether if you were ordered to 13 mail-in ballot from Term	esa J. Mihaliak signed and dated
11 A. Those are all on the ballot so we have to 11 A. Yes. 12 recertify. 13 Q. Do you know whether if you were ordered to 14 recertify this election, do you know whether that would 15 make any difference potentially in the down-ballot races, 16 A. Correct.	esa J. Mihaliak signed and dated
11 A. Those are all on the ballot so we have to 11 A. Yes. 12 recertify. 13 Q. Do you know whether if you were ordered to 14 recertify this election, do you know whether that would 15 make any difference potentially in the down-ballot races, 16 committee posts? Were some of them decided by a vote or 16 Q. And then it so	esa J. Mihaliak signed and dated
11 A. Those are all on the ballot so we have to 11 A. Yes. 12 recertify. 13 Q. Do you know whether if you were ordered to 14 recertify this election, do you know whether that would 15 make any difference potentially in the down-ballot races, 16 committee posts? Were some of them decided by a vote or 16 Q. And then it so	esa J. Mihaliak signed and dated st?
11 A. Those are all on the ballot so we have to 11 A. Yes. 12 recertify. 13 Q. Do you know whether if you were ordered to 14 recertify this election, do you know whether that would 15 make any difference potentially in the down-ballot races, 16 committee posts? Were some of them decided by a vote or 17 two? 18 A. It could. I don't know for sure but it could. 19 A. Yes. 10 Q. It says Chris 11 A. Yes. 12 Q. It says Chris 13 mail-in ballot from Term 14 April 26th, 2022, correct 15 A. Correct. 16 Q. And then it so 17 primary was received on 18 A. It could. I don't know for sure but it could.	esa J. Mihaliak signed and dated st?
11 A. Those are all on the ballot so we have to 11 A. Yes. 12 recertify. 13 Q. Do you know whether if you were ordered to 14 recertify this election, do you know whether that would 15 make any difference potentially in the down-ballot races, 16 committee posts? Were some of them decided by a vote or 17 two? 18 A. It could. I don't know for sure but it could. 19 Q. What about the House races or the Senate races or 19 Q. And then it so	esa J. Mihaliak signed and dated et? ays the ballot for the democrat April 28th, 2022, by her office?
11 A. Those are all on the ballot so we have to 11 A. Yes. 12 recertify. 13 Q. Do you know whether if you were ordered to 14 recertify this election, do you know whether that would 15 make any difference potentially in the down-ballot races, 16 committee posts? Were some of them decided by a vote or 17 two? 18 A. It could. I don't know for sure but it could. 19 Q. What about the House races or the Senate races or 19 Q. And then it so	esa J. Mihaliak signed and dated out? Mays the ballot for the democrat April 28th, 2022, by her office? Mays, however, Christa Miller
11 A. Those are all on the ballot so we have to 11 A. Yes. 12 recertify. 13 Q. Do you know whether if you were ordered to 14 recertify this election, do you know whether that would 15 make any difference potentially in the down-ballot races, 16 committee posts? Were some of them decided by a vote or 16 Q. And then it s. 17 two? 18 A. It could. I don't know for sure but it could. 19 Q. What about the House races or the Senate races or 20 reported that Teresa J.	esa J. Mihaliak signed and dated out? Mays the ballot for the democrat April 28th, 2022, by her office? Mays, however, Christa Miller
11 A. Those are all on the ballot so we have to 11 A. Yes. 12 recertify. 13 Q. Do you know whether if you were ordered to 14 recertify this election, do you know whether that would 15 make any difference potentially in the down-ballot races, 16 committee posts? Were some of them decided by a vote or 17 two? 18 A. It could. I don't know for sure but it could. 19 Q. What about the House races or the Senate races or 20 the 21 A. No. 21 14th, 2022, correct? 22 Q other races? 23 A. Correct. 24 Correct. 25 A. Correct. 26 Correct. 27 A. Correct. 28 Correct. 29 Correct. 20 A. Correct. 20 Correct.	esa J. Mihaliak signed and dated out? Mays the ballot for the democrat April 28th, 2022, by her office? Mays, however, Christa Miller
11 A. Those are all on the ballot so we have to 11 A. Yes. 12 recertify. 13 Q. Do you know whether if you were ordered to 14 recertify this election, do you know whether that would 15 make any difference potentially in the down-ballot races, 16 committee posts? Were some of them decided by a vote or 17 two? 18 A. It could. I don't know for sure but it could. 19 Q. What about the House races or the Senate races or 20 the 21 A. No. 21 14th, 2022, correct? 22 Q other races? 23 A. Correct. 24 A. Correct. 25 A. Correct. 26 Correct. 27 Correct. 28 A. Correct. 29 C. And then it so reported that Teresa J. 20 Tether races? 20 A. Correct. 21 A. No. 22 A. Correct.	esa J. Mihaliak signed and dated of: Ays the ballot for the democrat April 28th, 2022, by her office? Ays, however, Christa Miller Mihaliak was deceased on April

1 U. Official Allower security of the parameter of security and a construction of the parameter of security and a construction of the parameter of security and a security of the parameter of security and a security of the parameter of security and a security of the parameter of	П	Page 159	П	Page 161
asid Teress J. Ministak was removed from the voter rolls on A. Paris correct A. No. FIGURES A. That's correct B. No. FIGURES Bouldary States outler, Your Bonce. B. No. FIGURES Bouldary I just have one brief President hawed on mr. tings a generic which was no. President hawed on mr. tings a generic which was no. President hawed on mr. tings a generic which was no. President hawed on mr. tings a generic which was no. President hawed on mr. tings a generic which was no. President hawed on mr. tings a generic which was no. President have one brief Recommendation of a destruction of a destruction of the destruction of a destruction of a destruction of the state of the stat			1 1	
April 35th. 2027 is that correct? A. That's correct. B. FIRICAGE Stating Turther, Your Monor. The Maintenance of the Mainten	2		2	A. No more than any other Commissioner.
That's correct. Mr. Figuration Social Stating Further, Your Essen. Mr. MINDORS: 1 just have one brief solitor based on Mr. Kingle question which was Mr. D'Apostino because I wan't cure if your insert included D'Apostino because I wan't cure if your insert included D'Apostino because I wan't cure if your insert include you be additionable to the cure if your insert included D'Apostino because I wan't cure if your insert included D'Apostino because I wan't cure if your insert include you be additionable to the cure if your insert include your flower included D'Apostino because I wan't cure if your insert include your flower include you be add the testinony from the pater your flower include you be add the testinony from the pater your insert you will be pater you have an include your flower include your you don't have day-to-day I wanted the statused station results that include your knew an include you have an including a may of the undered the entering of any of those elections that the amounting of any of the undered the entering of any of the undered the entering of any of the undered the entering in the include your of any of those include your wanted to your include and your your don't have day-to-day D'Apostino for any of the undered the your your include any of the undered the your your include your your your your your your your your			3	
NR. FIRCHER: Nothing further, Your Emoor. 6			1 1	
The process of the chair of the control of the cont		A. That's correct.	5	we serve as the Board of Elections.
the administration of elections? Projection becomes I wasn't sure it your answer included 10			1 1	Q. Actually I meant to ask as a Commissioner as
D'Agestine because I vann't sure if your answer included 10 this. 10 O. Gary. And have you beard the testimony from the 11 prior Commissioners about their roles with respect to 12 prior. No. DUROMOKII 13 O. As you know, the Secretary has refused to certify 14 the attacedus elections results that include vece iron 15 berks, lancester, and Psycite Counties. Do you have an 16 understanding of wacher any of these elections touch be 17 affected - the actome of any of those elections would be 18 Secretary has to certify would be from the counting or not 19 counting of any of the undated absentes or mail-in ballots 19 counting of any of the undated absentes or mail-in ballots 10 A. Relatively the seme? 10 A. Relatively dislar. 11 a seminary of the undated absentes or mail-in ballots 12 a freeted. 13 The not aware of any of those cases that would be 14 A. I'm not aware of any of those cases that would be 15 A. I'm not aware of any of these cases that would be 16 A. Paddidicate issues as they are brought to us 17 affected. 18 SURDERY: That's all I have. 29 A. Relatively dislar. 20 A. Relatively dislar. 20 A. Relatively dislar. 21 A. Relatively dislar. 22 affected. 23 A. I'm not aware of any of those cases that would be 24 A. Relatively dislar. 25 CUICE COBN JUBILIEES: Thank you. 26 A. Relatively dislar or elections, but you do have 27 a serve the first decident or exception. 28 A. Relatively dislar. 29 A. Relatively dislar. 20 A. Relatively dislar. 20 A. Relatively dislar. 21 A. Relatively dislar. 22 A. Relatively dislar. 23 A. Relatively dislar. 24 A. Relatively dislar. 25 CUICE COBN JUBILIEES: Thank you. 26 The first decident developer, for example, about whether certain ballots entered in the second mail-in paliets, and the first ballots and what in election and the decident and the first ballots. 26 A. Relatively dislar. 27 A. Relatively dislar. 28 A. Relatively dislar. 29 A. Yes, I does. 20 A. Relatively dislar. 21 A. Relatively dislar. 21 A. Relatively dislar. 22 A		MR. BUKOWSKI: I just have one brief	7	
this. 10			1 1	
Prior Commissioners about their roles with respect to	9	D'Agostino because I wasn't sure if your answer included	9	A. Yes, I do.
12 NV MB. NUMCORNET: 13 O. As you know, the Secretary has refused to certify 14 the catacadae laction results that include votes from 14 the catacadae laction results that include votes from 14 the catacadae laction results that include votes from 14 the catacadae laction results that include votes from 14 the catacadae laction results that include votes from 15 lbs. 16 Mere Relatively similar. 17 affected - the outcome of any of those elections would be 16 lbs. 18 Secretary has to centry would be from the counting or not 18 lbs. 19 counting of any of the undated absentee or mail-in ballots 19 counting of any of the undated absentee or mail-in ballots 20 in question? 20 in question? 21 A. I'm not aware or any of those races that would be 21 lbs. Not BONONEST: That's all l have. 22 affected. 23 MS. BUKONEST: That's all l have. 24 NOT. FINCHEST: Nothing further. Your Monor. 25 JUGGE CORN JUBBLIESEN: Thank you. 26 spucciate your time today and your testimony. 27 THE WITHERS: Thank you. 28 Not WITHERS: Thank you. 39 THE WITHERS: Thank you. Your Monor. We're 20 going to call Mr. Christian Leinbach as I'm corosa. 30 UNDER CORN JUBBLIESEN: Gary, Thank you. 30 Not WITHERS: Thank you. 31 Not WITHERS: Thank you. 32 Not WITHERS: Thank you. 33 THE WITHERS: Thank you. Your Monor. We're 30 JUBBLIESEN: Gary, Thank you. 34 Not WITHERS: Thank you. 35 Not WITHERS: Thank you. 36 Not WITHERS: Thank you. 37 Not WITHERS: Thank you. 38 Not WITHERS: Thank you. 39 Whereupon. 30 Whereupon. 31 DIRECT EXAMINATION (as on Cross) 31 Not WITHERS: Thank you. 31 Not WITHERS: Thank you. 32 Not WITHERS: Thank you. 33 Not WITHERS: Thank you. 34 Not WITHERS: Thank you. 35 Not WITHERS: Thank you. 36 Not With your your labelless. 37 Not WITHERS: Thank you. 38 Not WITHERS: Thank you. 39 Whereupon. 40 Whereupon. 51 Not WITHERS: Thank you. 52 Not WITHERS: Thank you. 53 Not WITHERS: Thank you. 54 Not WITHERS: Thank you. 55 Not WITHERS: Thank you. 56 Not WITHERS: Thank you. 57 Not WITHERS: Thank you. 58 Not WITHERS: Thank you. 59 Not WITHERS: Thank you.	10	this.	10	Q. Okay. And have you heard the testimony from the
0. As you know, the Secretary has retueed to certify 13 14 the statewide election results that include votes from 15 15 Berks, Lancaster, and Rayste Counties. Do you have an 15 16 understanding of whether any of those elections would be 16 17 affected the outcome of any of those elections that the 17 18 Secretary has to certify would be from the counting or not 18 19 counting of any of the undated absence or mail-in ballots 19 10 counting of any of the undated absence or mail-in ballots 19 11 A. I'm not aware of any of those races that would be 21 12 affected. 13	11	RECROSS-EXAMINATION (as on Further Redirect)	11	prior Commissioners about their roles with respect to
14 the statewide election results that include votes from 15 Berks, Lancaster, and Payette Counciles. Do you have an 16 understanding of whether any of those elections that the 17 affected the outcome of any of those elections that the 18 Secretary has to certify would be from the counting or not 19 counting of any of the undeted absentee or mail-in ballots 20 in question? 21 A. I'm not aware of any of those races that would be 22 affected. 23 MS. MINGMENT: That's all I have. 24 MS. FISCHEM: Suching further, Your Monor. 25 JUDGE COMM JUBELIEUR: Thank you. 26 Superciate your time today and your testimony. 27 Superciate your time today and your testimony. 28 MS. BOTHER: Thank you. 29 Ging to call Mr. Christian Leinbach as if on cross. 30 JUDGE COMM JUBELIEUR: Only Find and Superciate your right hand. 31 MR. BOLIAND: Raise your right hand. 32 MR. BOLIAND: Raise your right hand. 33 MR. BOLIAND: Raise your right hand. 44 MR. BOLIAND: Raise your right hand. 45 MR. BOLIAND: Please be seated. 46 MR. BOLIAND: Please be seated. 47 JUDGE COMM JUBELIEUR () Thank you. 48 MR. BOLIAND: Raise your right hand. 49 MR. BOLIAND: Raise your right hand. 40 MR. BOLIAND: Please be seated. 41 DI MR. BOLIAND: Please be seated. 42 G. Good afternoon, Mr. Leinbach. 43 DI MR. BOLIAND: Please be seated. 44 DI MR. BOLIAND: Please be seated. 45 G. Good afternoon, Mr. Leinbach. 46 G. Good afternoon, Mr. Leinbach. 47 DI MR. BOLIAND: Please be seated. 48 DI MR. BOLIAND: Please be seated. 49 MR. BOLIAND: Please he seated. 50 Good afternoon, Mr. Leinbach. 51 G. Good afternoon, Mr. Leinbach. 52 G. Good afternoon, Mr. Leinbach. 53 G. Good afternoon, Mr. Leinbach. 54 A. Good afternoon, Mr. Leinbach. 55 G. Good afternoon, Mr. Leinbach. 66 Grieve of Actorney Geneval and vepresent the Department of Ballots and their familian, will the county board receive to be counted in an election play with the exception of military members or the state. 56 G. Good afternoon, Mr. Leinbach. 57 G. Good afternoon, Mr. Leinbach. 58 G. Good afternoon, Mr. Leinbach. 59 G	12	BY MR. BUKOWSKI:	12	elections?
15 Berke, Lancaster, and Payette Counties. Do you have an 15 relatively the same? 16 understanding of whether any of those elections would be 16 A. Relatively isailar. 17 affected — the outcome of any of those elections that the 17 Q. Which is to say you don't have day-to-day management responsibilities over elections, but you do have 20 counting of any of the undated absentee or mail-in ballots 19 a say in the final decisions, for example, about whether 20 cartain ballots absolute or should not be counted? 10 A. T'm not aware of any of those races that would be 21 A. We adjudicate issues as they are brought to us 4 faceted. 22 affected. 23 MR. RIKOMEKI: That's all I have. 23 Q. Okay. And that includes adjudication about whether canvasing for example? 24 Thank you very much, Mr. D'Agostino. We 25 Valence of the statutory requirements for canvasaing for example? 25 Thank you very much, Mr. D'Agostino. We 26 Q. Okay. I'd like to turn to what we've been 27 C. Okay. I'd like to turn to what we've been 28 Geing to call Mr. Christian Leinbach as if on cross. 3 JUDGE CORN JUBELIBER: Okay. Thank you. 3 date written on the return envelope. If I use undated 3 ballots, that's what I'm referring to if that makes sense? 3 MR. MOLLABU: Raise your right hand. 4 Baving been duly sworn. Leatified as follows. 10 Q. Okay. Do you know the deadline by which absentee and mail-in ballots must be received by the county in order 19 MR. BOLLABU: Raise your right hand. 10 Q. Okay. Do you know the deadline by which absentee and mail-in ballots must be received by the county in order 19 MR. BOLLABU: Raise your right hand. 10 Q. Okay. Do you know the deadline by which absentee and mail-in ballots must be received by the county in order 19 MR. BOLLABU: Raise be seated. 10 Q. Okay. Do you know the deadline by which absentee and mail-in ballots must be received by the county in order 19 MR. BOLLABU: Raise be seated. 11 A. Son Driese be seated. 12 C. Okay. Do you know the deadline by which absentee and mail-in ballots must be received by the co	13	Q. As you know, the Secretary has refused to certify	13	A. I have.
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22 affected. 23 MR. BUKOMSKI: That's all I have. 24 MR. FISCHER: Nothing further, Your Honor. 25 JUDGE COHN JUBELIRER: Thank you. 26 Thank you very much, Mr. D'Agostino. 27 Wage 160 28 appreciate your time today and your testimony. 29 JUDGE COHN JUBELIRER: Thank you. 20 A. Yes, it does. 20 JUDGE COHN JUBELIRER: Thank you. 21 A. Yes, it does. 22 A was a speciate your time today and your testimony. 23 JUDGE COHN JUBELIRER: Only Your Honor. 24 Wes, it does. 25 JUDGE COHN JUBELIRER: Only Your Honor. 26 Judge COHN JUBELIRER: Only Your Honor. 27 JUDGE COHN JUBELIRER: Only Your Honor. 28 MR. BOYER: Thank you. 29 JUDGE COHN JUBELIRER: Only Your Honor. 29 MR. BOYER: Thank you. Your Honor. We're going to call Mr. Christian Leinbach as if on cross. 30 JUDGE COHN JUBELIRER: Only Your Honor. 31 MR. HOLLAND: Raise your right hand. 32 MR. BOYER: Thank you. 33 A. Yes, it does. 34 JUDGE COHN JUBELIRER: Only Your Honor. 35 JUDGE COHN JUBELIRER: Only Your Honor. 36 MR. HOLLAND: Raise your right hand. 37 JUDGE COHN JUBELIRER: Only You Honor the return envelope. If I use undated ballots, that's what I'm referring to if that makes sense? 39 Whereupon, 30 JUDGE COHN JUBELIRER: Only You Honor the return envelope. If I use undated ballots, that's what I'm referring to if that makes sense? 39 MR. HOLLAND: Please be seated. 30 JUDGE COHN JUBELIRER: Only You Honor the return envelope. If I use undated ballots, that's what I'm referring to if that makes sense? 39 A. Yes, it does. 30 JUDGE COHN JUBELIRER: Only You Honor the return envelope. If I use undated ballots, that's what I'm referring to if that makes sense? 30 JUDGE COHN JUBELIRER: Only You Honor the return envelope. If I use undated ballots, that's what I'm referring to if that makes sense? 30 JUDGE COHN JUBELIRER: Only You Honor the return envelope. If I use undated ballots, that's what I'm referring to if that makes sense? 31 A. Yes, it does. 32 JUDGE COHN JUBELIRER: Only You Honor the return envelope. If I use undated what I mean is a later. 36 JUDGE COHN JUBELIRER: Only You Hon	20	in question?	20	certain ballots should or should not be counted?
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25 Commissioners, do you have certain responsibilities for the 25 A. If they are received after 8:00 p.m. on Election	1 2 3 4 4 5 6 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24	Thank you very much, Mr. D'Agostino. We appreciate your time today and your testimony. (Witness excused.) MR. BOYER: Thank you, Your Honor. We're going to call Mr. Christian Leinbach as if on cross. JUDGE COHN JUBELIRER: Okay. Thank you. MR. HOLLAND: Raise your right hand. Whereupon, CHRISTIAN LEINBACH, having been duly sworn, testified as follows. MR. HOLLAND: Please be seated. DIRECT EXAMINATION (as on Cross) BY MR. BOYER: Q. Good afternoon, Mr. Leinbach. A. Good afternoon. Q. My name is Jacob Boyer. I'm an attorney with the Office of Attorney General and represent the Department of State and the Acting Secretary in this matter. Are you a member of the Berks County Commissioners? A. Yes, I am. Q. And what's your role on that commission? A. I chair the Board of Commissioners. Q. Okay. As the Chair of the Board of	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24	A. Yes, it does. Q. Okay. I'd like to turn to what we've been talking about which is absentee and mail-in ballots, and I may refer to undated ballots and what I mean is ballots that are returned by the 8:00 p.m. deadline that have no irregularities other than the fact that they don't have a date written on the return envelope. If I use undated ballots, that's what I'm referring to if that makes sense? A. Yes, it does. Q. Okay. Do you know the deadline by which absentee and mail-in ballots must be received by the county in order to be counted in an election? A. 8:00 p.m. on Election Day with the exception of military and civilian overseas ballots which are later. Q. Thank you for that correction, yes. I'll put those ballots aside and refer only to ballots that are not cast by military members or their families. If a ballot is received anytime after 8:00 p.m., again excluding military members and their families, will the county board receive it or excuse me, count it? A. Excluding. Q. Excluding those ballots. A. I think you said including. Q. Forgive me. I meant to say excluding.

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1	Day, they will not be counted.	1	A. There are two ways that it can be determined
2	Q. Okay. And that's true even if the date written	2	relative to date. One is the outer envelope of the ballot
3	on the return envelope is sometime before Election Day; is	3	has a unique bar code unique to the election and unique to
4	that correct?	4	Berks County. If someone uses some other or an older outer
5	A. That is correct.	5	envelope, it will not be accepted. That is the first test
6	Q. Okay. Now, if the date written on the return	6	of timeliness. It only relates to that election.
7	envelope is sometime before Election Day so, for example,	7	When it's received in the office, whether from a
8	let's say it said May 10th for the 2022 primary, what does	8	drop box, from the mail, or by the voters themselves, it is
9	that date mean to you? What do you assume the voter meant	9	dated and time-stamped upon receipt.
10	by writing May 10th?	10	Q. Sorry. I want to make sure I understand the
11	A. Let me answer that by explaining how we receive	11	first part of your answer. With respect to the scanning,
12	the ballots if that's appropriate.	12	is what you're saying the bar code that appears on the
13	Q. I'd rather you	13	return envelope is scanned upon the county's receipt of the
14	A. As it relates to the date	14	envelope?
15	Q. I'll ask a different question	15	A. It is and it is unique to that specific election
16	A. Okay.	16	and to Berks County.
17	Q then instead. If a voter writes May 10th on	17	Q. Okay. And what is scanning the envelope's bar
18	the ballot for let's say a May 17th election, would you	18	code, what does that do? If you scan that into SURE, does
19	disqualify that ballot based on the date that's written?	19	that generate some information into the SURE system?
20	A. Absolutely not.	20	A. It does and it also generates information to the
21	Q. Okay. Would you investigate what the voter meant	21	voter. So when it is scanned in, it notifies the system
22	by May 10th meaning, for example, would you have any means	22	that the absentee and/or mail-in ballot has been received;
23	to determine if the voter who wrote May 10th, in fact,	23	and a notification goes to the voter letting them know it
24	signed the ballot on May 10th?	24	has been received. If it is undated, a notification goes
25	A. That would only be investigated if there were	25	to the voter that it's been received but it is not dated or
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1	other circumstances that caused us to look at that date.	1	if it's not signed that it's not signed letting them know
2	Q. Okay. So absent external circumstances, when you	2	that that is the case.
3	receive and review a ballot that says May 10th, for	3	Q. Okay. And is one of the pieces of information
4	example, you're not conducting any investigation of whether	4	that appears after the envelope is scanned the date on
5	the voter, for example, actually signed the ballot on May	5	which the ballot was received?
6	10th?	6	A. Please repeat that question.
7	A. When Berks County receives a properly timely	7	Q. Certainly. Yes. You said that scanning the
8	presented absentee or mail-in ballot, we look to see if it	8	ballot or, excuse me, scanning the return envelope, the
9	is dated and signed.	9	unique bar code on the return envelope generates certain
10	Q. Okay. But you don't conduct an investigation to	10	information. Is one piece of information generated by
11	determine if the date that's written on the ballot	11	A. It does not gener that is a manual process.
12	A. We simply determine is the ballot dated and is it	12	So when the ballots are received in the election office,
13	signed.	13	the first thing that happens is they're viewed. If there's
14	Q. Okay. So for all you know, if someone wrote May	14	a missing date or a missing signature, they are set aside.
15	10th, they could have signed the ballot on May 9th?	15	If everything is there, they are immediately scanned. The
16	A. We simply determine is it dated or signed?	16	ones that are missing into SURE. The ones that are
17	Q. Okay. If a voter returns a ballot that, for	17	and I might add when they're scanned into SURE, they look
18	example, has no birth date on it, would you exclude that	18	again. So that's a second look to make sure they're signed
19	ballot on the basis of the date?	19	and dated. If they are signed and dated, they go into the
20	A. We simply determine is the ballot dated or	20	SURE system.
21	signed.	21	If for some reason, there's a third check
22	Q. Okay. I don't believe I asked you. When Berks	22	and that's precanvassing that begins on 7:00 a.m. on
23	receives absentee or mail-in ballots, does it date-stamp	23	Election Day. As part of the precanvassing process in
24	the outer envelope to indicate when that ballot was	24	Berks County, before they are opened they're determined
25	received?	25	again is there a missing date or signature. In the rare

$\overline{}$			
1	Page 167 case that that would happen, in that case they're set aside	1	missing a signature or a date?
2	and the information in the SURE system would be reversed	2	A. A voter has the opportunity to come in to the
3	indicating that it lacked either a signature or a date.	3	election department and voluntarily fill in their signature
4	Q. Understood. And I believe for the 2022 primary	4	or the date prior to the election.
5	election Berks had sent to the Acting Secretary a	5	Q. Do you know whether that happened in the May,
6	certification of results; is that correct?	6	2022 primary election?
7	A. That is correct.	7	A. I cannot say with certainty.
8	Q. Okay. And what date was that?	8	Q. Okay. For ballots that had the date, for
9	A. Actually I believe two dates. I'm not going to	9	example, May 10th, I don't think there's any issue that
10	stipulate exactly, but I believe the second date which	10	that would look odd, a May 10th signature or a ballot dated
11	included the provisionals I believe was June 8th.	11	May 10th. But if there's a ballot that had an incorrect
12	Q. Okay. But that did not include any ballot for	12	date, you know, I think counsel pointed out you don't know
13	which the voter had omitted a date on the return envelope;	13	whether the person signed it on May 9th and dated it May
14	is that correct?	14	10th or vice versa. Why are those ballots if there's a
15	A. It did not.	15	belief that there's an incorrect date on the ballot, how
16	Q. Okay.	16	does Berks County process that?
17	MR. BOYER: Nothing further, Your Honor.	17	A. If there's something that would cause us to
18	CROSS-EXAMINATION (as on Redirect)	18	believe there is an irregularity and it involves the date
19	BY MR. BUKOWSKI:	19	or involves the signature or both, we would set that aside.
20	Q. Good afternoon, Mr. Leinbach.	20	And in setting it aside initially the Director of Elections
21	A. Good afternoon.	21	would look at it to see if she is able to make a
22	Q. Why does Berks County and the Berks County Board	22	determination, and if not that would come before the Board
23	of Elections require that absentee and mail-in ballots be	23	of Elections to adjudicate.
24	both signed and dated in order to be canvassed and counted?	24	Q. And in the May, 2022 primary election, were any
25	A. Because we believe the statute is quite clear in	25	absentee or mail-in ballots submitted to the Board of
45		25	
1	Page 168 requiring that the outer envelope must be or shall be	1	Page 170 Elections of Berks County to be adjudicated where the date
2	signed and dated. And we act on the clear direction of the	2	was where the question to be adjudicated was the
3	statute as well as the prior direction of the Secretary of	3	accuracy of the date?
4	the Commonwealth.	4	A. I'm not aware of any.
5	MR. BOYER: Objection, just to the extent as	5	Q. Okay. Do you feel in your role as a member of
6	all previous objections. This is just his opinion of the	6	the Berks County Board of Elections you can ignore the
7	law.	7	language of the Election Code that states that the
8	JUDGE COHN JUBELIRER: Thank you.	8	declaration of a voter shall be signed and dated?
9	THE WITNESS: It's my clear reading of the	9	A. No. And I stated to that fact when the McCormick
10	law.	10	and Oz campaign came before the Board of Commissioners, one
11	BY MR. BUKOWSKI:	11	calling for us not to count undated ballots, the other
12	Q. Okay. As of Election Day for the May, 2022	12	calling for the board to count undated ballots; and I made
13	primary election, what was the guidance from the Department	13	it very clear that I don't have the leeway or discretion to
14	of State on counting undated ballots?	14	determine what I think the law should say.
15	A. The guidance was undated ballots should not be	15	I don't have the discretion to determine whether
16	counted.	16	or not a date is material or immaterial. I simply am
17	Q. And is that what Berks County did when it	17	obligated to follow the clear and plain language of the law
18	processed mail-in and absentee ballots for the May, 2022	18	that says undated and/or unsigned ballots shall not be
19	primary?	19	counted.
20	A. That is correct. We did not count undated	20	Q. And did the McCormick campaign appeal any
21	ballots.	21	determination by the Berks County Board of Elections with
22	Q. You had mentioned information going into the SURE	22	respect to handling either of the issues adjudicated by the
23	system and then notifications being sent to voters about	23	board?
24	how their mail-in or absentee ballot was being processed.	24	A. They did.
25	Does a voter have an opportunity to cure a ballot if it's	25	Q. What did the McCormick campaign appeal?
23	144 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1	<u> </u>	

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1	A. They appealed our decision to not count the	1	Q. Do you have those over there or not?
2	undated ballots.	2	A. I have them in front of me now.
3	Q. And was that the case that came up to the	3	Q. Okay. Would you refer to the June 27th, 2022
4	Commonwealth Court?	4	e-mail from Mr. Marks?
5	A. Yes, it was.	5	A. Yes.
6	Q. Okay. And Berks County was a party, a respondent	6	Q. I believe it's probably part of Joint Exhibit 10
7	in that action?	7	because that's the one
8	A. Yes, we were.	8	A. It was.
9	Q. Okay. And as we've heard testimony, this Court	9	Q where you responded?
10	issued a June 2nd, 2022 order in that case. You're	10	A. Yes.
11	familiar with that order?	11	Q. So just describe again for the Court what Joint
12	A. Yes, I am.	12	Exhibit 10 is.
13	Q. Did Berks County comply with that order?	13	A. So Joint Exhibit 10 is directed to Dear County
14	A. Yes, we did. I will stipulate that we asked our	14	Election Official. I received it along with a number of
15	counsel to clarify exactly what the order directed. It was	15	others, and it is clearly directed to a group of counties
16	clear to us that this was an interim directive that	16	who have either not yet certified vote totals from undated
17	anticipated a more complete decision at a future date, and	17	ballots or have not provided the Department with
18	we believed it was appropriate. We were not asked to	18	information about when we will be able to do so. It
19	certify. We were simply asked to provide the numbers and	19	directs us to send those certified vote totals by a certain
20	separated dated and undated ballots which we did.	20	date.
21	Q. And so is it your understanding that the June	21	And at the bottom it says, as noted in my
22	2nd, 2022 order from this Court in the McCormick case did	22	original e-mail, please send copies of your certifications
23	not require certification of certified returns to include	23	and any questions or responses to all three of the
24	votes from undated ballots?	24	following DOS staff members, one of which is Jonathan
25	A. There was no mention of certification at all.	25	Marks.
	Page 172		Page 174
1	Q. Okay. You're aware that the Third Circuit Court	1	Q. And did you respond to that e-mail?
2	of Appeals issued a decision May 20th, 2022, in the case	2	A. I did respond the following day, June the 28th.
3	captioned Migliori v. Cohen?	3	Q. And your response is what's at the top of the
4	A. I am.	4	first page of the exhibit marked Joint Exhibit 10; is that
5	Q. And are you also aware that that did not involve	5	right?
6	an election in the May, 2022 primary?	6	A. That is correct.
7	A. Yes, that is what I understood.	7	Q. And as we noted earlier in my examination of Mr.
8	Q. Okay. And after that decision was issued, did	8	Marks well, before we get to the last paragraph, what
9	Berks County receive further guidance from the Department	9	did you say in your response?
10	of State regarding the processing of undated mail-in and	10	A. It's rather brief. Jonathan, please help me
11	absentee ballots?	11	understand where the clear Court guidance is regarding
12	A. We did.	12	certification on undated ballots. I do not see it. And
13	Q. Okay. And what did that guidance say?	13	then I quoted from his letter, quote, rulings in the
14	A. There were a couple of different or possibly	14	Commonwealth Court of Pennsylvania and the U.S. Court Of
15	three different pieces of communication that I'm familiar	15	Appeals for the Third Circuit makes it clear that we will
16	with but basically directed the county to recertify the	16	have to certify vote totals that include the vote totals
17	totals including undated ballots.	17	from undated ballots, end quote.
18	Q. And are you referring to the communications that	18	I then went on to say I believe the rulings are
19	were that Mr. Marks had testified to earlier	19	anything but clear at best. The issue is not settled. I
20	A. I am.	20	look forward to your response.
21	Q in some e-mails? And, in fact, one of those	21	Q. And did you receive a response to your June 28th,
22	e-mails that was Joint Exhibit 6 was Mr. Marks's June 17th,	22	2022 e-mail to Mr. Marks?
23	2022 e-mail, and then he had also sent a June 27th, 2022	23	A. I received no further communication from Mr.
24	e-mail to the election officials; do you recall that?	24	Marks.
1 1		25	Q. And was the next communication from the

	Page 175	П	Page 177
1	Page 175 Department of State the letter from Attorney Gates dated	1	Q. I wanted to ask you, in Berks County according to
2	June 29th, 2022, addressed to the Berks County Director of	2	the stipulated facts, we show 507 democratic ballots and
3	Elections Services, Paige Riegner?	3	138 republican ballots that were undated and not counted,
4	A. That is correct.	4	correct?
5	Q. And that is what is marked as Joint Exhibit 11,	5	A. Total of 645, that is correct.
6	correct?	6	Q. And are you familiar enough with the results in
7	A. That is correct.	7	Berks County to know down-ballot whether the state
8	Q. After receiving the June 29th letter from	8	committee posts in either party, republican or democrat,
9	Attorney Gates and your exchange with Mr. Marks, did the	9	local county committee posts, if any of those might be
10	Berks County Board of Elections have another meeting?	10	affected by 507 democratic ballots and 138 republicans if
11	A. We did on July the 1st.	11	you're ordered to recertify this election?
12	Q. What happened at that meeting?	12	A. That's a fairly substantial number of undated
13	A. Well, I did my best to get additional information	13	ballots, 645. Obviously it would change the results in any
14	prior to any vote on this important decision. I did not	14	elections where votes were cast for a particular race.
15	receive a response from Jonathan Marks. The only response	15	Based on the number of races down-ballot, committee slots
16	was, as noted, from counsel for the Department of State.	16	in particular, that were ties or extremely close, I would
17	And so at that meeting I reiterated my clear reading of the	17	not be surprised to understand that it would impact the
18	current statute that ballots, outer envelopes of the	18	outcome of some of those races.
19	ballots that are either undated or not signed shall not be	19	Q. And do you know whether the Berks County
20	counted.	20	republican party, the Berks County democratic party, the
21	And I also noted that the two decisions cited,	21	Pennsylvania republican party, or the democratic party of
22	neither one of them dealt with certification. Both of them	22	Pennsylvania, do you know if they've had meetings after
23	occurred the one where we abided by the Commonwealth	23	this primary election has taken place at which people from
24	Court, this Court, we did exactly what the Court asked us	24	Berks County participated because they were certified by
25	to do. And based on the lack of clear judicial guidance	25	the County of Berks as having won the elections?
	Page 176		Page 178
1	and the plain language of the statute, I could not in good		A. That is correct. They have.
2	conscience vote to certify undated ballots.	2	Q. And some of those people would have attended
3	I also noted that this type of issue is what is	3	for example, I'm most familiar with the republican state
4	causing a lack of trust in the system. When plain language	4	committee meeting so that meeting of the republican
5	we're being told is no longer plain, no longer means what	5	state committee, were you there at the last meeting?
6	it says it means, we damage the credibility of our	6	A. I was.
'/	elections.	7	Q. It was just a week or so ago, and so the Berks
8	Q. And when Berks County sent its certified results	8	County representatives were seated and voted at that
9	to the Department of State on June 8th, 2022, do you know	9	meeting, correct?
10	whether or not the Third Circuit decision in Migliori v.	10	A. That is correct.
11	Cohen was in effect?	11	Q. And that's based on the county certification that
12	The section of the se		
	A. I do not know.	12	took place earlier?
13	Q. Okay. And was June did the Berks County Board	13	A. That is correct.
13 14	Q. Okay. And was June did the Berks County Board of Elections view its deadline to provide certified results	13 14	A. That is correct. Q. All right. Have you ever had to recertify an
13 14 15	Q. Okay. And was June did the Berks County Board of Elections view its deadline to provide certified results to the Acting Secretary of the Commonwealth as June 8th?	13 14 15	A. That is correct. Q. All right. Have you ever had to recertify an election in Berks County?
13 14 15 16	Q. Okay. And was June did the Berks County Board of Elections view its deadline to provide certified results to the Acting Secretary of the Commonwealth as June 8th? A. That is correct.	13 14 15 16	A. That is correct. Q. All right. Have you ever had to recertify an election in Berks County? A. I'm in my 15th year and I've never been requested
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13 14 15 16 17 18 19 20 21 22	Q. Okay. And was June did the Berks County Board of Elections view its deadline to provide certified results to the Acting Secretary of the Commonwealth as June 8th? A. That is correct. MR. BUKOWSKI: Nothing further, Your Honor. JUDGE COHN JUBELIRER: Thank you. MR. KING: May it please the Court. CROSS-EXAMINATION (as on Redirect) BY MR. KING: Q. Commissioner, good afternoon.	13 14 15 16 17 18 19 20 21	A. That is correct. Q. All right. Have you ever had to recertify an election in Berks County? A. I'm in my 15th year and I've never been requested to recertify. Q. Have you ever heard of the recertification of an election? A. I didn't know there was such a term. I think if you certify an election it's certified. Q. Now, you're familiar at least a little bit

1	Page 179	П	Page 181
1 1	Q. And so are you aware of whether the Secretary	1	MR. KING: Yes, ma'am.
2	herself was, in fact, a participant in that case before	2	Thank you very much, Commissioner.
3	Judge Cohn Jubelirer?	3	THE WITNESS: Thank you.
4	A. I can only speak to my experience, and the	4	MR. BOYER: Just a few follow-ups, Mr.
5	individuals that appeared before our election board were	5	Leinbach.
6	representatives of the McCormick campaign and	6	THE WITNESS: Sure.
7	representatives of the Oz campaign. I was not we had no	7	REDIRECT EXAMINATION (as on Recross)
8	one from the Secretary of the Commonwealth weigh in in our	8	BY MR. BOYER:
9	hearing or in the meeting where we made subsequent	9	Q. I believe you said in your experience you've
10	decisions.	10	never recertified election results; is that right?
11	Q. Now, of course, the Attorney General himself is	11	A. From my experience I have not been involved in
12	on the ballot this year, correct?	12	recertifying an election.
13	A. He is not.	13	Q. Okay. Have you ever updated incomplete
14	MR. BOYER: Objection to relevance.	14	certifications?
15	THE WITNESS: Yes, I take it back.	15	A. We may have. I don't recall right now.
16	JUDGE COHN JUBELIRER: He is.	16	Q. Well, what about in this election? Did you
17	THE WITNESS: Yes, not as the Attorney	17	certify certain results on July [sic] 6th to the
18	General.	18	Department?
19	JUDGE COHN JUBELIRER: Just	19	A. I've already testified that there were two
20	MR. KING: I'm sorry. The sitting Attorney	20	separate reports. The second one on June the 8th included
21	General is on the ballot running for Governor of	21	the provisional ballots.
22	Pennsylvania. I just want to know whether he filed an	1 1	Q. Okay. So you sent one certification on July 6th,
	appeal.	22	correct?
23	MR. BOYER: And my objection is to	23	A. Yeah. We did not recertify. We certified what
24	relevance, Your Honor.	24	we were able and certified the provisional ballots as I
25		25	Page 182
	Page 180		
1	JUDGE COHN JUBELIRER: He objected to	1	understand it on June the 8th.
2	JUDGE COHN JUBELIRER: He objected to relevance. Do you want to respond?		understand it on June the 8th. Q. Okay. So on June 8th you updated the
		1	understand it on June the 8th.
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П	Page 183	П	Page 185
1	raised equitable defenses.	1	first. Well, wait. Let me just clarify.
2	JUDGE COHN JUBELIRER: I know you did. I	2	The Respondents here do have some legal
3	wasn't sure if unclean hands was one of them.	3	arguments that are threshold issues. Do you want to begin
4	MR. KING: I'm not sure either.	4	with those or do you want to argue about them in the normal
5	JUDGE COHN JUBELIRER: If you did and there	5	course when you would otherwise be arguing as Respondents?
6	are factual questions that would assist you obviously in a	6	MR. KING: I think that in the interest of
7	defense that you've raised to this action, I don't want to	7	the Court's time and our time, that we just roll that all
8	preclude that.	8	in one. I think your suggestion that the Petitioners go
9	MR. KING: I appreciate that. I don't think	9	first would be fine, and we would respond in kind even
10	it's necessary at this point.	10	though some of our arguments are going to relate to
11	JUDGE COHN JUBELIRER: Okay.	11	preliminary objections which otherwise would normally be
12	MR. KING: Thank you, Your Honor.	12	heard first. So we're
13	JUDGE COHN JUBELIRER: Thank you.	13	JUDGE COHN JUBELIRER: Well, the preliminary
14	MR. BUKOWSKI: Just one last follow-up	14	objections themselves to the PFR are not technically before
15	question, Commissioner Leinbach.	15	the Court because the PFR isn't before the Court yet;
16	RECROSS-EXAMINATION (as on Further Redirect)	16	however, you did raise many of the legal arguments that are
17	BY MR. BUKOWSKI:	17	in your preliminary objections in response to this
18	Q. In response to the last question about following	18	emergency application. And so the legal issues are before
19	clear Court guidance, is it the is it your understanding	19	the Court. They have the effect of a kind of threshold
20	that the November, 2020 Pennsylvania Supreme Court decision	20	position but technically are not
21	in In Re: Canvass is clear guidance stating that undated	21	MR. KING: Per se.
22	absentee and mail-in ballots should not be counted for all	22	JUDGE COHN JUBELIRER: Right. So I think
23	elections after November, 2020?	23	then that will work well. If we start with the
24	A. It is based on my consultation with our	24	Petitioners, Respondents, you will have the opportunity to
25	solicitor, our county solicitor, our election board	25	make your arguments and then if there's any rebuttal.
1	Page 184 solicitor. Yes, we believe that is clear.	1	Page 186 MR. KING: Thank you very much.
2	MR. BUKOWSKI: Nothing further.	2	JUDGE COHN JUBELIRER: Okay. Thank you for
3	MR. KING: No, thank you, Your Honor.	3	the clarifications. And so we'll take five minutes, I
4	MR. BOYER: Nothing further, Your Honor.	4	think is that sufficient
5	JUDGE COHN JUBELIRER: Okay. Thank you	5	MR. BOYER: Thank you, Your Honor.
6	very, very much. We appreciate your testimony and your	6	JUDGE COHN JUBELIRER: in order to keep
7	time today.	7	everything moving?
8	THE WITNESS: Thank you, Your Honor.	8	MR. KING: Thank you, Your Honor.
9	(Witness excused.)	9	MR. BUKOWSKI: Yes, Your Honor.
10	JUDGE COHN JUBELIRER: Are there any further	10	JUDGE COHN JUBELIRER: Thank you very much.
11	witnesses? Let's see. You had a	11	(A recess was taken from 2:42 p.m. to 2:50 p.m.)
12	MR. BOYER: Not from the Petitioners, Your	12	MR. BOYER: Thank you, Your Honor. And
13	Honor.	13	again for the record, Jacob Boyer on behalf of the
14	JUDGE COHN JUBELIRER: Okay.	14	Department of State and the Acting Secretary.
15	MR. BUKOWSKI: Not from Berks and Lancaster	15	The three counties in this case, Your Honor,
16	Respondents, Your Honor.	16	are holding up final certification of the primary election
17	MR. KING: Nor from Fayette, Your Honor.	17	because they refuse to complete their duty to certify
18	JUDGE COHN JUBELIRER: Okay. How are we	18	results that reflect every lawfully cast ballot. Now, the
19	with time? I mean does anybody need a break?	19	counties don't meaningfully dispute that they have a duty
20	THE REPORTER: I'm good.	20	to certify results that include every lawfully cast ballot.
21	JUDGE COHN JUBELIRER: Okay.	21	Instead they say it is they and not the Secretary that
22	MR. BOYER: I think we could take a five	22	decides what constitutes a lawfully cast ballot, but that
23	JUDGE COHN JUBELIRER: I was going to say	23	misses the issues in this case.
	·	ı [
	maybe we should take a five-minute break before we begin	24	It's neither the Secretary nor the county
24	maybe we should take a five-minute break before we begin with the legal arguments. We'll proceed with Petitioners	24 25	It's neither the Secretary nor the county boards of election that ultimately decide what constitutes

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1	Page 187 a lawfully cast ballot. It's an order of this Court. It's	1	Page 189 If a ballot, for example, is undated and unsigned, we're
2	Pennsylvania law and it's federal law. And all three of	2	not contesting that. So I do
3	those in this case, Your Honor, require that the ballots at	3	JUDGE COHN JUBELIRER: Without a handwritten
4	issue here be included in final certification of the 2022	4	date?
5	primary election.	5	MR. BOYER: On the outer envelope, exactly.
6	And until the counties provide the Secretary	6	So if there is a missing date and other errors, those
7	with a certification that includes the ballots at issue	7	ballots are not at issue. We do not believe that the law
8	here, the Secretary cannot complete her own duty to finally	8	requires or permits those ballots to be counted. For
9	certify the results of the primary election.	9	example, an envelope that lacks both a date and a
10	Now, I'm going to begin discussing our	10	signature.
11	mandamus count, count one of the petition for relief on	11	The Court's order on June 2nd was quite
12	which we have sought an order, a peremptory judgment; and	12	clear that the counties here must canvass. On page 14 of
13	I'd like to begin that discussion with a bit of context	13	the Court's opinion, it was clear that by canvass it meant
14	about what is and is not at issue with this count.	14	count the ballots at issue here. And it's clear from
15	The mandamus count proceeds exclusively on	15	throughout the opinion the basis of that order was the
16	the basis of this Court's June 2nd order. It is not a	16	Court's legal conclusion that both Pennsylvania law and
17	count to enforce any guidance of the Secretary. Had there	17	federal law require those ballots be counted.
18	been complete silence between the Secretary following this	18	It was also clear at pages 6, 14, 18 of the
19	Court's order in McCormick and now, the mandamus count	19	Court's opinion that the Court understood the request to be
20	would be legally indistinguishable. It is not a count to	20	from the petitioners there a request that the Court order
21	enforce any guidance by the Secretary as the briefs on the	21	the counties to count these ballots, not to merely
22	other side would suggest and as the questioning today would	22	segregate the ballots, not merely to identify how many
23	suggest.	23	ballots there are, but to count the ballots and report the
24	And as I will get to momentarily, we readily	24	tallies on the basis of the Court's conclusion that
25	acknowledge that the Court's order does not use the word	25	Pennsylvania law and federal law likely require these
		11	
\vdash	Dage 188	\vdash	Page 190
1	Page 188 certification; but as I will describe, the consequence of	1	Page 190 ballots to be counted.
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1 2	certification; but as I will describe, the consequence of this Court's order that the counties must canvass and count	2	ballots to be counted. Now, under the Election Code there are clear
1 2 3	certification; but as I will describe, the consequence of this Court's order that the counties must canvass and count these ballots is that their exercise of discretion was told	1 2 3	ballots to be counted. Now, under the Election Code there are clear consequences of a Court order that certain ballots must be
1 2 3 4	certification; but as I will describe, the consequence of this Court's order that the counties must canvass and count these ballots is that their exercise of discretion was told they were informed or ordered by the Court how to	1 2 3 4	ballots to be counted. Now, under the Election Code there are clear consequences of a Court order that certain ballots must be canvassed and must be counted.
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1	Page 191 that a ballot is canvassed and counted, there is no further	1	Page 193 ballots must be canvassed and counted, there was no further
2	discretion on the part of the counties, on the part of the	2	discretion under the Election Code on the back end to
3	Secretary to overrule a Court's decision that ballots must	3	remove ballots that this Court ordered must be counted.
4	be canvassed.	4	For that reason, Your Honor, I think much of
5	So the relevant section of the Election Code	5	the case law in the present and, in fact, all of the case
6	here, Your Honor, is 25 P.S. 3146.8 which is the section	6	law in the present and I'll walk through some of the
7	that governs canvassing of both absentee and mail-in	7	statutes as well that my colleagues cite is actually
8	ballots. Paragraph $(g)(3)$ of that section proscribes the	8	irrelevant. There is a case cited several times, In re:
9	conditions that a ballot must meet to be canvassed. One of	9	McCracken, that speaks about the discretion county boards
10	those is that the declaration is sufficient.	10	have for canvassing and computing ballots.
11	Now, the consequences of the Court's	11	We don't dispute that. The Court ordered
12	reasoning in the Court's order was a determination that	12	them how to exercise that discretion. There is no
13	return envelopes lacking a date are sufficient. Once that	13	subsequent discretion at the certification stage.
14	determination is made and there's an order to canvass and	14	JUDGE COHN JUBELIRER: And so how do you
15	count those ballots, there is no further discretion under	15	define certification? Is there a provision in the statute?
16	the Election Code as to what happens under those ballots.	16	MR. BOYER: Yes. The most relevant
17	Under paragraph (g)(4) of that same section	17	provision is 3154 paragraph F which speaks about the
18	and I will read this directly, Your Honor, and this is	18	process of what election boards are supposed to do once
19	quoted in our brief as well.	19	they have received canvassed and computed results from
20	Paragraph $(g)(4)$, all absentee ballots which	20	their election districts. They're to receive them. They
21	have not been challenged under Section 1302.2 which	21	are to add them together.
22	prescribes some provisions and procedures for challenging	22	And I can read through that paragraph if it
23	ballots and all mail-in ballots which have not been	23	would be helpful, Your Honor, but it is 3154(f) that
24	challenged under Section 1302(d)(a)(2) which is another	24	describes that process that the county boards are to go
25	set of challenges that have been verified under	25	through during certification. And throughout the language
25	bee of enarronges enac have been vertified ander	25	enrough during ceretifoderon. That enroughout the language
	_ 100		
1	paragraph 3 paragraph 3 refers to the paragraph	1	Page 194 is directory. The ballots that have been canvassed and
1 2	paragraph 3 paragraph 3 refers to the paragraph describing the conditions for canvassing shall be		Page 194 is directory. The ballots that have been canvassed and computed shall be certified.
	paragraph 3 paragraph 3 refers to the paragraph	1	is directory. The ballots that have been canvassed and
2	paragraph 3 paragraph 3 refers to the paragraph describing the conditions for canvassing shall be	2	is directory. The ballots that have been canvassed and computed shall be certified.
2	paragraph 3 paragraph 3 refers to the paragraph describing the conditions for canvassing shall be counted and included with the returns of the applicable	2 3	is directory. The ballots that have been canvassed and computed shall be certified. Now, there's been a couple mentions about
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number was down to nine. By June 29th that number was down
to four. By July 1 that number was down to three. If the
expectation is that the Department is going to sue county
boards every time there is a disagreement, there will be a
flood of litigation. It is not a productive way and there
is no need for it, and there is nothing that requires it.

As to the specific statutes that the

counties believe required the Department to act more expeditiously, not only do they misread those statutes, but those statutes confirm exactly what I was just saying about the lack of discretion with respect to certification.

So the one that they've cited most commonly in their brief is 25 P.S. 3157 which provides two days for an aggrieved person to challenge a decision of any county board regarding the computation or canvassing of the returns. It does not permit challenges to the certification.

And the reason for that as this Court has cited and I'll get to it in a minute is quite clear. All discretion happens at the computation and the canvassing stage. There is no expectation under the Election Code that a board or that any ballot that meets the standards for computation or canvassing or even more that a Court has ordered must be canvassed and be counted can on the back end be removed at the certification stage. There is not an

Page 196 existing process for that because that is not how the Election Code works.

As this Court said in In re: 2003 Election for Jackson Township Supervisor, 3157 requires immediate resolutions of disputes that prevent certification. 3157 is to have everything resolved in advance of certification. It is not a process for challenging certification because there is no expectation under the Election Code that certification is anything other than a ministerial -- there is no expectation that ballots that had been adjudged to be eligible for computation and canvassing will be removed at the certification stage.

And counsel for Fayette asked Mr. Marks are computation, canvassing, and certification different stages and they are. 3157 is clear that it applies to computation and canvassing. 3157(d) separately refers to staying certification pending certain challenges. There is no ambiguity that when we are talking about computation and canvassing, that does not include certification.

So the statute that they have pointed to saying we should have proceeded under this, you had two days, it's plainly inapplicable and it confirms our point that once you have canvassed and computed certain ballots there is no additional --

JUDGE COHN JUBELIRER: So your point is that

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3157 specifies that it's an order or decision of any county
board regarding the computation or canvassing of the
returns or recount or recanvass thereof and that there are
different things that canvassing and computation are not
certification --

MR. BOYER: Correct.

 $\label{fig:jump} {\tt JUDGE\ COHN\ JUBELIRER:} \quad \mbox{$--$ because they're} \\$ two separate things? Okay.

MR. BOYER: Absolutely. And as it applies to absentee and mail-in ballots, the decision as to what ballots are canvassed as I mentioned earlier is controlled by 3146.8 paragraph (g)(3). You count ballots that are canvassed unless there is an error on the face of the ballot.

For example, you have multiple votes or something like that. Those ballots are canvassed. The ballot meets the standards for canvassing, meets the standards for counting. There is no dispute that ballot must be reflected in the certification of election results.

So in addition to the reading of the Election Code that I walked through between 3146.8, 3154, 3157 is even further evidence that there is no expectation of discretion that will happen at the certification stage with respect to what ballots have been canvassed and counted. If they are canvassed and counted, they must be

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I'd like to move now to our second count which is the count for declaratory and injunctive relief and walk through a bit more broadly what it is that the Election Code requires, not just this Court's June 2nd order but stepping back what it is that the Election Code requires with respect to ballots that a voter has failed to write a date on the return envelope but otherwise are timely and otherwise have no deficiencies or irregularities as Your Honor described in the June 2nd order.

Now, there's been a great deal of attention paid to Section 3146.6 which is the section that describes the process by which a voter completes an absentee. That one is specific to absentee ballots. There is a parallel section with substantively identical language for mail-in ballots, and that's the section that's been alluded to that says a voter shall date the return envelope. That section alone does not dictate whether a ballot that's missing or a return envelope that's missing a date meets the conditions for canvassing.

As I mentioned earlier, the process that describes canvassing or rather the section that describes canvassing is not 3146.6, but instead is 3146.8 and specifically paragraph (g)(3) and that section says that a declaration -- excuse me, a ballot may be canvassed if the

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declaration's return envelope is sufficient. The word is is sufficient. And to understand the consequences of these two statutes, they must be read together.

Under the Statutory Construction Act, we are

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directed to read statutes in conjunction under section 1
Pa.C.S. 1932. And I think the Supreme Court's decision in
the Pennsylvania Democratic Party versus Boockvar is
illuminative of how this interpretative methodology must

There was a question there as to whether ballots, absentee and mail-in ballots in particular, can be counted if a voter has failed to use the inner secrecy envelope, meaning they have omitted that and they have put their ballot directly in the return envelope. There just as here there is language saying a voter shall do that. A ballot needs to be in the inner envelope. The inner envelope shall be in the outer envelope, and that's the process for a voter to return.

That section alone did not dictate the Supreme Court's analysis of this question. Instead it read that section in tandem with the canvassing section which is again 3146.8 to determine what exactly the legislative intent was; and there because in the canvassing section there is specific language that says if when a county is precanvassing and they can determine who cast a ballot.

Page 200 that ballot needs to be invalidated.

So by implication the ballot is missing a secrecy envelope even though there's nothing in the canvassing section that says, you know, toss out ballots without a secrecy envelope. The clear implication of the canvassing section's direction that if you can determine who cast a ballot that it needs to be voided informed the Court's analysis of what's to happen with ballots lacking the inner secrecy envelope.

So following the exact methodology that the Supreme Court used in PDP v. Boockvar, and the cite there for reference is 238 A.3d at 378, shall date alone does not dictate the consequences. The canvassing section that binds the counties and dictates their determination of whether a ballot meets the standards for precanvassing says the declaration must be sufficient.

Now, sufficient, of course, is not the same as complete, is not the same as a ballot must perfectly comply. What sufficient means is that the declaration must be adequate for its purpose; and the statute, the Election Code, is quite clear about what the purpose of the declaration is

In 3146.4 for absentee ballots and 3150.14 for mail-in ballots, the statutes identify what the purpose of the declaration is; and that's for the voter to attest

Page 201 that they are qualified to vote, that they have not already voted. A signature alone is sufficient for that purpose, and the Election Code itself provides that answer.

25 P.S. 3553 says that someone alone -excuse me, someone who only signs the declaration envelope
if it is false, that's sufficient for prosecution for any
consequences that may follow. It is the signature, not a
signature and a date that confirms the voter is everything
that the declaration says the voter is.

So when we are determining sufficiency by the plain text of the Election Code, all of the answers for what the purpose is and what the Election Code and what the General Assembly deemed sufficient for that purpose are straight in the text of the Election Code. The shall date language that most of the county commissioners referred to as directing their discretion here is not by itself what

You know, but even, Your Honor, if reading the shall date language and the sufficiency language together, if there's a conclusion that the language isn't clear but instead there is some sort of ambiguity. Again, following the Statutory Construction Act's directions for how we approach ambiguous statutory language, we end up in the exact same place.

For example, under 1 Pa.C.S. 1922, paragraph

Page 20.

1, the Statutory Construction Act directs we are to avoid statutory interpretations that produce absurd results. As you've heard from Mr. Marks, as you heard from the County Commissioners from Berks, from Lancaster, across the board or I'll say nearly across the board, counties do not review the accuracy of the date. They do not determine if the date that the voter writes is right. In fact, they don't even have a method to do that.

If a voter writes May 10th, a county board has no way of confirming that that was, in fact, the date that the voter signed the ballot if the date of the signature is the date that the statute otherwise contemplates. It is an absurd result to think that the Election Code cares deeply about the presence of a date if it cares not what that date says.

Additionally, there are other instances if we are to rely only on shall as dictating the answer here of absurd results that would follow. For example, for those who vote in person -- and this is again in our brief -- they are directed that they shall close the door behind them. If they don't, it doesn't state what the consequence is

But under an interpretation that shall by itself dictates the answer here, if you apply that throughout the Election Code, you end up in a situation

Page 203 Page 205 where voters who don't fold their ballots right, voter vote doesn't meet the statutory criteria. Perhaps I think it would still be the case 2 don't fully close the door behind them, their votes will 2 also be invalidated. that the date doesn't matter because it is not -- it 3 3 Additionally, if there is ambiguity here, 4 doesn't make the declaration sufficient. The date is 4 the Supreme Court has said repeatedly including in really beside the point when we're determining the 5 5 6 Pennsylvania Democratic Party v. Boockvar and Your Honor 6 sufficiency of the declaration which again is the language 7 said this in the June 2nd Memorandum Opinion when there are 7 that dictates which absentee and mail-in ballots counties 8 ambiguities in the Election Code, we interpret them to are to canvass. 8 9 effectuate the statute's purpose; and that means we avoid 9 Count two, Your Honor, we've not only sought 10 disenfranchising voters for minor irregularities. And 10 declaratory and injunctive relief as a matter of what the there is no doubt that omitting a date where the content of Pennsylvania Election Code requires but, of course, is in 11 11 12 the date does not even matter to the counties is a minor 12 addition to what federal law requires. 13 irregularity. 13 I don't think I need to spend too much time 14 Now, you heard some examples of what 14 on this point, Your Honor, because the June 2nd opinion 15 function the date might serve. For example, you heard, 15 that Your Honor wrote, everything that was written there applies equally here because the definition of vote under 16 well, there may be someone who died before Election Day and 16 101(e) -- this is 52 U.S.C. 101(e) which is the federal 17 their daughter or someone else, you know, cast a ballot in 17 their name and sent it in. In that instance no matter what statute at issue -- applies to the certification process 18 18 date is on the ballot, that vote will not count. A voter given how that statute defines vote, and it specifically 19 19 20 who dies before Election Day cannot vote. Same with a 20 says the protections under the relevant statute apply all the way through the final certification of the election. 21 voter who moves out of state 21 22 Across the board voters must meet the 22 So I'll finish and I'll respond to other eligibility criteria as of Election Day. So the date, you points as needed on rebuttal, but I do want to make sort of 23 23 know, if we're trying to figure out, well, you voted on May 24 this overarching point about what this case is about. 24 24th -- May 10th and you left on May 12th, then, you know, JUDGE COHN JUBELIRER: And just before you 25 25 do that, we heard today that a recertification in some $$\operatorname{\textsc{Page}}\xspace$ $$\operatorname{\textsc{Page}}$$ 204 how do we reconcile all this? None of that matters. The 1 1 2 date is not in any way instructive as to whether the vote 2 counties, I think for example Berks, could end up changing 3 that was cast should be counted. the results that have been certified by the counties for 3 And no one, whether it was in Migliori, certain positions such as state committee people or other 4 4 5 whether it was in McCormick, whether it was today, no one elections that didn't cover the whole county. 5 6 has come up with a function for the date that is relevant Is that a concern here that an order from 6 7 to whether the vote is valid; and, of course, that is 7 this Court at this time would upset that and the 8 further confirmed by the fact that counties regularly, 8 expectations that the individuals who have been certified including the Respondents here, count ballots independent 9 as winners by the county would then find themselves not? 9 MR. BOYER: So I'll say I have not thought 10 of the accuracy of the date. And, as Your Honor mentioned 10 or wrote in the June 2nd opinion, it's hard to find that about that as much. I can provide more information as the 11 11 the date is anything more than a minor irregularity when Court wants, but I'll say two points that I think are 12 12 its accuracy is unimportant. relevant. 13 13 JUDGE COHN JUBELIRER: Do vou have a 14 14 The basis for count one, the mandamus 15 position about whether a challenge could be made to ballots 15 action, is because the Secretary under Section 3158 and that, for example, include a birth date instead of a date 3159 must receive accurate certifications of election 16 16 17 that's a possible signing date? Is that something that 17 results for the elections that she also is responsible for could be challenged by a candidate or a voter? certifying. She has no responsibility and no statutory 18 18 19 MR. BOYER: I think it could be challenged. 19 relationship to those elections. So I think there is not 20 I don't think that challenge would succeed. I don't think 20 much that she can do with respect to them. the Election Code contemplates -- you know, it says sign 21 21 Under the statute, she must receive from 22 and date. Of course it doesn't say what date. Counties 22 counties certified results for the races that she also has 23 treat that to mean any date. And I think even if there was 23 responsibility for, and she doesn't have responsibility for arguments to be made that, all right, well, it means X date those. And I think also generally, you know, 24 2.4

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and so if anyone puts a different date, you know, their

certifications, final certifications of elections are

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1	generally thought to moot election [inaudible].	1	Page 209 Unless there are further questions now, I'll
2	For example, the Migliori petition that's	2	save the rest of my points for rebuttal.
3	been mentioned a number of times and there are arguments	3	JUDGE COHN JUBELIRER: Okay.
4	being made that no matter whether the Third Circuit	4	MR. BOYER: Thank you, Your Honor.
5	decision was right or wrong and whether the Supreme Court	5	MR. BUKOWSKI: May it please the Court, Your
6	might otherwise have granted review, the candidates have	6	Honor. It's been my pleasure to represent the Berks County
7	conceded the election result was certified. The case is	7	Board of Elections and the Lancaster County Board of
8	moot.	8	Elections before Your Honor today.
9	JUDGE COHN JUBELIRER: Is the case moot?	9	We're here under circumstances where no
10	Has one of those candidates taken a position in Lehigh	10	candidate and no voter is challenging the final certified
11	County Court?	11	results timely submitted by the Berks County Board of
12	MR. BOYER: One of the candidates there did	12	Elections, the Lancaster County Board of Elections, and the
13	concede the election, yes. And I am not saying the	13	Fayette County Board of Elections; and yet Petitioners are
14	Department's position right now is the case is moot.	14	seeking a writ of mandamus and declaratory and injunctive
15	JUDGE COHN JUBELIRER: Correct.	15	relief from this Court to enforce what I understood until
16	MR. BOYER: I'm saying there is a petition	16	today to be the Petitioners' directive based on no
17	from the candidate who did concede saying this petition is	17	statutory authority.
18	moot.	18	But now I understand that Petitioners are
19	JUDGE COHN JUBELIRER: I see.	19	not trying to enforce their directives to the county Boards
20	MR. BOYER: So I'd like to conclude for now	20	of Elections but trying to enforce this Court's June 2nd,
21	with where I started which is what this case is about. As	21	2020 [sic] order in the McCormick challenge, and I'll
22	I mentioned at the outset, this is not a case where the	22	address that as we get into the elements of Petitioners'
23	Secretary believes she can order the counties to do certain	23	claim for emergency relief.
24	things. If she had that power, we would not be before Your	24	There's no dispute about the timeline, but
25	Honor asking for an order that the counties do certain	25	you would have thought from counsel's argument that the In
	Page 208	\Box	Page 210
1	things.	1	re: Canvass decision in November, 2020, never occurred. I
2	The testimony that's been elicited, the	2	didn't hear him mention that one time during his argument
3	arguments that have been made about the primacy of the	3	to this Court and that case at least on the issues before
4	counties relative to the Secretary is all beside the point.	4	the Court is binding on this Court and the county Boards of
5	The Secretary, the county, we are all subject to the	5	Elections.
6	Election Code as finally interpreted by this Court and the	6	In that case there clearly was a
7	Supreme Court of Pennsylvania and, of course, federal law	7	four-to-three majority of the Pennsylvania Supreme Court
8	ultimately as determined by the federal courts.	8	that concluded under the plain language of the Pennsylvania
9	At the same time the Secretary, even if she	9	Election Code that undated ballots, undated absentee and
10	has no independent authority to receive elections and say	10	mail-in ballots with no other defects shall not be counted
11	those ballots are null and void, she is not a rubber stamp.	11	in any election after November, 2020.
12	When the Secretary receives certifications, whether there's	12	JUDGE COHN JUBELIRER: Well, would you agree
13	clerical errors where it's clear a county has excluded	13	that it is a plurality decision?
14	certain ballots maybe inadvertently or inadvertently, the	14	MR. BUKOWSKI: Not on that issue, Your
15	Secretary returns to the counties and addresses that and	15	Honor. There was a three it's three, three, one; and if
16	raises that point.	16	you take the three Justices and the Justice Dougherty's
17	Where there is clear case law saying ballots	17	opinion
18	are being excluded that are lawful and, in fact, an order	18	JUDGE COHN JUBELIRER: Well, I understand
19	that says the very ballots at issue here must be canvassed	19	but what you're doing I mean, and my question let's take
20	and there is no further discretion under the Election Code,	20	it in steps.
21	the Secretary simply has not received from the counties the	21	MR. BUKOWSKI: Sure.
22	certifications that they are required to provide to her	22	JUDGE COHN JUBELIRER: It is a do you
23	under 3154 and the following statutes and in turn she	23	disagree that in the opinion announcing the judgment of the
24	cannot complete her own statutory duties to certify the	24	Court in that case it states, we conclude the dating, the
25	accurate election results.	25	declaration is a directory rather than a mandatory

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1	$$\operatorname{\textsc{Page}}\xspace 211$$ instruction, and thus the inadvertent failure to comply	1	Page 213 I'm only talking the narrow issue on whether the statute
2	does not require that ballots lacking a date be excluded	2	says whether the statute requires that an undated ballot
3	from counting?	3	be rejected.
4	MR. BUKOWSKI: I agree that that opinion	4	There is a sliver of light certainly on the
5	announcing the judgment of the Court says that.	5	federal statute question that In Re: Canvass left open;
6	JUDGE COHN JUBELIRER: Okay.	6	and the opinions, you know, Justice Wecht's opinion, you
7	MR. BUKOWSKI: And that was signed on by	7	know, mentioned it but said I'm not going to step into that
8	three Justices. Justice Wecht signed on to that opinion	8	without the benefit of full advocacy and I think that was
9	for the limited purpose of applying	9	wise. But I didn't hear really any thorough analysis or
10	JUDGE COHN JUBELIRER: Right.	10	argument from opposing counsel on that point.
11	MR. BUKOWSKI: it to that election.	11	But so on that narrow issue I do and
12	JUDGE COHN JUBELIRER: But that doesn't	12	ironically I guess the opinion in Ritter, the unreported,
13	change then that it was a plurality opinion that then I	13	unpublished opinion in Ritter by Judge McCullough was
14	mean I think it at least is and I believe that there's been	14	January of 2022. It involved the same election as Migliori
15	some comments that the it's, well, a bit confusing.	15	which was the federal court case which reached a different
16	MR. BUKOWSKI: I think it's not confusing,	16	result, and I will address briefly what's before the
17	Your Honor, if you look at if you look at Justice	17	Supreme Court now because I think the timeline is pretty
18	Wecht's opinion, his opinion concurring in the result where	18	clear though that we established through the record today
19	he says, I agree this election I agree but going forward	19	and the stipulated facts.
20	and I'll quote from that.	20	You know, the guidance from the Department
21	JUDGE COHN JUBELIRER: Yes. And I mean	21	all the way up through Election Day was don't count undated
22	that's fine and Justice Dougherty, I've read, of course,	22	ballots. You know, the timing being what it is, May 20th
23	all of their opinions. But there is also case law that	23	was three days after Election Day, the Migliori Third
24	sort of cautions if you will against overly interpreting	24	Circuit opinion comes out. That mandate never takes
	should I say the effect of plurality opinions that they	25	effect. The Supreme Court stay took effect on May 31st
25		25	
1	Page 212 to the extent that we interpret them to establish binding	1	page 214 before the mandate became effective. The stay was lifted
H	Page 212	H	Page 214
1	Page 212 to the extent that we interpret them to establish binding	1	Page 214 before the mandate became effective. The stay was lifted
1 2	Page 212 to the extent that we interpret them to establish binding precedent going forward. I think we have to proceed with	1 2	Page 214 before the mandate became effective. The stay was lifted
1 2 3	Page 212 to the extent that we interpret them to establish binding precedent going forward. I think we have to proceed with caution.	1 2 3	Page 214 before the mandate became effective. The stay was lifted June 9th. Meanwhile these county Boards of Elections
1 2 3 4	Page 212 to the extent that we interpret them to establish binding precedent going forward. I think we have to proceed with caution. MR. BUKOWSKI: I don't	1 2 3 4	Page 214 before the mandate became effective. The stay was lifted June 9th. Meanwhile these county Boards of Elections are facing deadlines trying to timely certify the results
1 2 3 4 5	Page 212 to the extent that we interpret them to establish binding precedent going forward. I think we have to proceed with caution. MR. BUKOWSKI: I don't JUDGE COHN JUBELIRER: That's all I would	1 2 3 4 5	Page 214 before the mandate became effective. The stay was lifted June 9th. Meanwhile these county Boards of Elections are facing deadlines trying to timely certify the results of this election which Migliori really doesn't address
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П	Page 215	П	Page 217
1	let's say that certainty	1	the same oath or at least an oath that the county board
2	MR. BUKOWSKI: Sure.	2	officials take to protect, obey, and defend the
3	JUDGE COHN JUBELIRER: that opinions that	3	Constitution and the laws. So as she's certifying her
4	can be read, understood, and applied in the future so that	4	results, she has as well a duty arguably, or we can see if
5	all of these hardworking people who are trying to make	5	you disagree.
6	decisions now how to apply the statutes and the law when	6	But anyway the concern about uniformity and
7	they're counting votes and so the voters know what's	7	whether there's a concern if in three counties or five
8	required of them is really important.	8	counties or ten counties certain ballots are not counted
9	And so to that end, I wonder why or if you	9	and in the remaining counties those ballots are counted and
10	would agree that having a decision on the merits in a case	10	does that create an issue either under the Election Code or
11	like this where probably with any decisions in our original	11	the Constitution?
12	jurisdiction here appealed as of right to our Supreme Court	12	MR. BUKOWSKI: I think my answer to that is
13	might provide a decision that could be then applied with	13	this Court should not take on and issue a declaratory
14	more certainty in these upcoming elections?	14	judgment. This is an advisory opinion that there's no
15	MR. BUKOWSKI: I was hoping you didn't ask	15	candidate challenging, there's no voter challenging.
16	that question because thinking about coming in here today,	16	JUDGE COHN JUBELIRER: Are candidates and
17	but I knew you would. And let me answer it to say	17	voters the only parties that can challenge?
18	certainly, certainly if this Court issued a decision on the	18	MR. BUKOWSKI: I don't believe that's the
19	merits in this case which is subject obviously to appeal as	19	language in the statute says an aggrieved person. I don't
20	of right to the Supreme Court, as the Court indicated would	20	know whether
21	provide some clarity and at least a means by which Boards	21	JUDGE COHN JUBELIRER: The language in which
22	of Elections could, you know, hopefully sooner rather than	22	statute?
23	later get clearer guidance on all the relevant issues.	23	MR. BUKOWSKI: In the statute that allows
24	What my response to your question, however,	24	for appeals from let me get it appeals from the
25	is, we're not here unfortunately I think probably the	25	decisions of Boards of Elections. I have it here.
1	Page 216 best chance for that decision on the merits to have been	1	Page 218
2	made was the McCormick case because it was a real challenge	2	looking at 3146.8 which refers to canvassing.
3	by a real voter, a real candidate who there's no issue	3	MR. BUKOWSKI: I think 3157 is what I was
4	on timeliness. All the Boards of Elections were parties.	4	JUDGE COHN JUBELIRER: 3157, yes, and it was
5	The Acting Secretary was a party.	5	from decisions of the county board. But it still says
6	And I understand what happened and the	6	regarding the computation or canvassing of the returns.
7	voluntary discontinuance, but so therefore I believe this	7	MR. BUKOWSKI: I agree.
8	is not an actual case or controversy. It's I'll use the	8	JUDGE COHN JUBELIRER: How would you read
9	vernacular a ginned up case or controversy, and I don't		that? Maybe I should ask your colleague because I think he
10	mean that in a pejorative way. I'll assume good faith on	10	made a very clear distinction when questioning Mr. Marks
11	the part of the Acting Secretary that she's trying to, you	11	about the distinction between canvassing and certification.
12	know, provide some clarity, too.	12	MR. BUKOWSKI: I think canvassing, you know,
13	If I were bringing the action, I would have	13	counting votes, whether or not to count votes as part of
14	teed it up a little differently and said maybe for	14	the canvass is a decision. So the decision not to count
15	declaratory judgment and said, you know, 64 counties ruled	15	the undated ballots in my view is a decision by the Board
16	one way, three ruled another way. We need clarity.	16	of Elections with respect to canvassing. That decision,
17	JUDGE COHN JUBELIRER: Well, then I was	17	you know, the statute provides there's two days for any
+ /	CODE COM CODEDINE. WEIL, CHELL I WAS	18	aggrieved person to challenge that decision.
10	going to ask because there is a request for declaratory		apprinted person to charrenge that accepton.
18	going to ask because there is a request for declaratory	1 1	T argue that June 6 7th and 8th
19	relief and one of the requirements in the Election Code	19	I argue that June 6, 7th, and 8th,
19 20	relief and one of the requirements in the Election Code or let me just ask how you interpret in the Section 2642,	19 20	respectively, were the dates when those decisions were made
19 20 21	relief and one of the requirements in the Election Code or let me just ask how you interpret in the Section 2642, Powers and Duties of County Boards, it says, you know, to	19 20 21	respectively, were the dates when those decisions were made final when these county Boards of Elections submitted their
19 20 21 22	relief and one of the requirements in the Election Code or let me just ask how you interpret in the Section 2642, Powers and Duties of County Boards, it says, you know, to the end that primaries and elections may be honestly,	19 20 21 22	respectively, were the dates when those decisions were made final when these county Boards of Elections submitted their certified results to the Secretary and that, within two
19 20 21 22 23	relief and one of the requirements in the Election Code or let me just ask how you interpret in the Section 2642, Powers and Duties of County Boards, it says, you know, to the end that primaries and elections may be honestly, efficiently, and uniformly conducted and whether you	19 20 21 22 23	respectively, were the dates when those decisions were made final when these county Boards of Elections submitted their certified results to the Secretary and that, within two days if somebody was going to challenge that including the
19 20 21 22	relief and one of the requirements in the Election Code or let me just ask how you interpret in the Section 2642, Powers and Duties of County Boards, it says, you know, to the end that primaries and elections may be honestly,	19 20 21 22	respectively, were the dates when those decisions were made final when these county Boards of Elections submitted their certified results to the Secretary and that, within two

	Page 219	П	Page 221
1	statute.	1	received the certified results from these county Boards of
2	But assuming that to be true, then by June	2	Elections, the Secretary had an option at that point,
3	10th then she would have had to have filed an action to	3	certify; or if she believes what she's asserting now,
4	this Court because this Court's May 27th administrative	4	appeal to this Court within two days not a month and a week
5	order said because there is a statewide recount now all	5	or so after those results were received.
6	appeals, even though it's original jurisdiction, all	6	So it's not timely and it's not an actual
7	appeals will come to this Court.	7	case or controversy because there's no I still think
8	I guess I alternatively argue that the	8	there has to be a candidate or, you know, some outcome that
9	appropriate date would have been the date on which the July	9	would be hanging in the balance for this.
10	1st date on which I mean you could argue serially the	10	JUDGE COHN JUBELIRER: Did all of the
11	first time Berks County said we're not going to do it, you	11	counties do what Berks County did and notify the people who
12	know, because it didn't need to be committed to writing or	12	voted by mail or absentee that their ballot was received
13	the first time Lancaster or Fayette County said we're not	13	but without a signature or date so that they had an
14	going to recertify, that would have been a decision of the	14	opportunity to cure?
15	respective boards from which such an appeal would have been	15	MR. BUKOWSKI: I believe what Commissioner
16	required to be filed within two days.	16	Leinbach was testifying to was that when
17	And lastly I think at least as to Lancaster	17	JUDGE COHN JUBELIRER: Oh, was it
18	and Berks they sent correspondence July 1st for Berks, July	18	MR. BUKOWSKI: It was Berks.
19	5th each from one of the solicitor in Lancaster was July	19	JUDGE COHN JUBELIRER: It was Berks, okay.
20	5th, the first assistant deputy in Berks was July 1st. And	20	MR. BUKOWSKI: It was Berks. But when the
21	even if you extended grace to those dates I think	21	SURE system itself puts, sends the notices when those are
22	Fayette's might have been earlier but even if you said	22	scanned in, then that will
23	okay, two days from those dates, you know, we're at July	23	JUDGE COHN JUBELIRER: So the SURE system.
24	11th and it's not timely.	24	MR. BUKOWSKI: Notifies voters as to what
25	So even a lot of assumptions in favor of the	25	the status it will send an e-mail if they included an
			
1	Page 220	1	Page 222
1	Acting Secretary and Department make this case untimely	1	e-mail address.
2	Acting Secretary and Department make this case untimely filed, but I think it also has the hallmarks of that we've	2	e-mail address. JUDGE COHN JUBELIRER: Correct.
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1	Page 223 2nd preliminary injunction order because I will come back	1	Page 225 And I think it's helpful to read the rest of
2	to that.	2	that sentence because Your Honor said, because they have,
3	But on the mandamus piece, I think, you	3	quote, demonstrated that substantial legal questions must
4	know, the canvassing and counting of ballots is clearly an	4	be resolved to determine the rights of the party, end
5	act of discretion and whether to count ballots or set aside	5	quote; and then there's the cite to the SEIU case and then
6	undated ballots also is an act of discretion. And I think	6	going on is and their claim is, quote, more than merely
7	what their argument is, is no it's not because the Court	7	viable or plausible, end quote. And so that was the
8	told you to do this.	8	Court's preliminary assessment of the arguments.
9	But we cited Appeal of McCracken which is a	9	And I don't think any of the counties I
10	1952 Pennsylvania Supreme Court case that says canvassing	10	know Berks and Lancaster had no issue with the preliminary
11	and computing necessarily embrace acts of discretion, and	11	order to say okay, let's segregate and count these and
12	then it cites the older case which we also quoted Boord v.	12	submit two tallies. I don't think but I think I understood
13	Maurer which was I think 1941 or so Pennsylvania Supreme	13	what the Secretary is arguing now is by saying the magic
14	Court.	14	words canvass, that the Court ordered these counties to
15	And based on that alone and then the	15	certify because they were required as part of this Court's
16	requirement that mandamus is improper when there's	16	order in Canvass to count.
17	discretion, that should result in the denial/dismissal of	17	And once they've counted them, the genie is
18	count one of their petition.	18	out of the bottle and they've got to then certify those
19	JUDGE COHN JUBELIRER: Okay. And that's	19	counted votes; and they have no discretion despite the fact
20	based on the idea that the canvassing and counting is	20	that this Court at the very end of Your Honor's opinion the
21	included in the certification?	21	concluding paragraph states thus when a final decision on
22	MR. BUKOWSKI: Correct.	22	the merits of whether the ballots that lacked a dated
23	JUDGE COHN JUBELIRER: Okay. So those are	23	exterior envelope must be counted or not, the Acting
24	different	24	Secretary will have the necessary reports from the county
25	MR. BUKOWSKI: Although I guess you only	25	boards.
\Box	Page 224	\vdash	Page 226
1	Page 224 certify once you canvass and count; and so once your	1	Page 226 And then Your Honor went on in the order to
1 2			Page 226 And then Your Honor went on in the order to say what it says, and it does say if they're not already do
1 1	certify once you canvass and count; and so once your	1	And then Your Honor went on in the order to
2	certify once you canvass and count; and so once your canvassing and counting is done, then you certify. So the	2	And then Your Honor went on in the order to say what it says, and it does say if they're not already do
2	certify once you canvass and count; and so once your canvassing and counting is done, then you certify. So the discretionary and what they're complaining about is the	2 3	And then Your Honor went on in the order to say what it says, and it does say if they're not already do so. Doing so segregate the ballots that lack a dated
2 3 4	certify once you canvass and count; and so once your canvassing and counting is done, then you certify. So the discretionary and what they're complaining about is the not counting these votes. So I know they're saying and	1 2 3 4	And then Your Honor went on in the order to say what it says, and it does say if they're not already do so. Doing so segregate the ballots that lack a dated exterior envelope, canvass those ballots. Assuming there
2 3 4 5	certify once you canvass and count; and so once your canvassing and counting is done, then you certify. So the discretionary and what they're complaining about is the not counting these votes. So I know they're saying and then you certified votes without counting them, but you	1 2 3 4 5	And then Your Honor went on in the order to say what it says, and it does say if they're not already do so. Doing so segregate the ballots that lack a dated exterior envelope, canvass those ballots. Assuming there are no deficiencies or irregularities that would require
2 3 4 5	certify once you canvass and count; and so once your canvassing and counting is done, then you certify. So the discretionary and what they're complaining about is the not counting these votes. So I know they're saying and then you certified votes without counting them, but you can't get around the fact that the complaint is that these	1 2 3 4 5	And then Your Honor went on in the order to say what it says, and it does say if they're not already do so. Doing so segregate the ballots that lack a dated exterior envelope, canvass those ballots. Assuming there are no deficiencies or irregularities that would require otherwise, report the two vote tallies to the Acting
2 3 4 5 6	certify once you canvass and count; and so once your canvassing and counting is done, then you certify. So the discretionary and what they're complaining about is the not counting these votes. So I know they're saying and then you certified votes without counting them, but you can't get around the fact that the complaint is that these counties did not count undated absentee and mail-in	1 2 3 4 5 6	And then Your Honor went on in the order to say what it says, and it does say if they're not already do so. Doing so segregate the ballots that lack a dated exterior envelope, canvass those ballots. Assuming there are no deficiencies or irregularities that would require otherwise, report the two vote tallies to the Acting Secretary, include votes with from dated and undated.
2 3 4 5 6 7 8	certify once you canvass and count; and so once your canvassing and counting is done, then you certify. So the discretionary and what they're complaining about is the not counting these votes. So I know they're saying and then you certified votes without counting them, but you can't get around the fact that the complaint is that these counties did not count undated absentee and mail-in ballots.	1 2 3 4 5 6 7 8	And then Your Honor went on in the order to say what it says, and it does say if they're not already do so. Doing so segregate the ballots that lack a dated exterior envelope, canvass those ballots. Assuming there are no deficiencies or irregularities that would require otherwise, report the two vote tallies to the Acting Secretary, include votes with from dated and undated. And based on all the other language and it's
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1	stand by my opinion and order of course.	1	Page 229 in McCormick as it contemplates where it will come down on
2	MR. BUKOWSKI: Of course. And I think	2	that because I think if it does so the analysis is such
3	clarity in this case as to what that meant	3	that it becomes clear that the federal statute does not
4	JUDGE COHN JUBELIRER: Well, every opinion	4	apply to abrogate the dating requirement on those absentee
5	and order of a Court in a sense takes on a life of its own	5	ballots.
6	as it is interpreted and applied in the future.	6	JUDGE COHN JUBELIRER: Well, I'm not sure
7	MR. BUKOWSKI: Right.	7	that anything required the abrogation. It's an
8	JUDGE COHN JUBELIRER: And	8	interpretation if you will of the statutory requirement and
9	MR. BUKOWSKI: And I do think it's helpful	9	whether it's, you know well, we can
10	that it was a preliminary order only because	10	MR. BUKOWSKI: That's right. It was a
11	JUDGE COHN JUBELIRER: Although it was an	11	suggestion that that was not material to the qualification,
12	extensive analysis of the likelihood of success on the	12	and what Justice Alito points out and I agree and urge the
13	merits.	13	Court to consider and agree as well is that that dating
14	MR. BUKOWSKI: It was. It was. And what I	14	requirement doesn't go to the qualification to vote. It
15	would say is at that point in time, again June 2nd, the	15	goes to whether the vote that was cast will be counted.
16	Court did not have the benefit of Justice Alito's	16	It's not disenfranchising.
17	dissenting opinion in the	17	It's not saying the voter, you know, was not
18	JUDGE COHN JUBELIRER: Although isn't his	18	qualified to vote; and, therefore, it doesn't have the
19	dissenting opinion also qualified with the fact that it was	19	effect let me just say that it doesn't have the
20	preliminary, that he was essentially relying on the request	20	effect that the Third Circuit concluded it does. And,
21	for stay that had been given which expressed what	21	therefore, the result is that that statute should not
22	Pennsylvania law was at the time and he was relying on that	22	result in county Boards of Elections being required to
23	interpretation?	23	count undated ballots.
24	MR. BUKOWSKI: I do think what he and I	24	I guess I'll leave conclude really with
25	looked at it very closely. I read that dissenting opinion	25	and obviously we've filed extensive papers, but I think I'd
1	Page 228 and compared it to the Third Circuit's opinion. It's	1	Page 230 like to conclude with what I think is the key language in
2	certainly I was shocked when I reread preparing for	2	the In re: Canvass decision from Justice Wecht's opinion.
3	today how little the Third Circuit opinion breaks down the	3	And he goes back time and time again to the Court's
4	elements of the statute in question the way Justice Alito	4	decision in the PDP case.
5	did in, you know, the elements one through five. There's	5	JUDGE COHN JUBELIRER: Before you conclude
6	no discussion like that at all in the Third Circuit	6	just one final question and that is the difference between
7	opinion.	7	and we can call them, you know, wrongly dated ballots or I
8	And so I do think for having it a few days	8	hate to let's say ballots that contain handwritten dates
9	even Justice Alito's preliminary analysis and I think he	9	on the envelopes that are incorrect
10	left some room there, but I think he's spot on when it	10	MR. BUKOWSKI: Okay.
11	comes to analyzing elements I think it's two and five of	11	JUDGE COHN JUBELIRER: or wrong
12	the federal statute in describing that you can't possibly	12	MR. BUKOWSKI: Sure.
13	that statute does not really go to the qualifications of	13	JUDGE COHN JUBELIRER: and ballots that
14	a voter to vote.	14	do not contain handwritten dates on them on the outside
15	It is the or this statute the dating	15	envelope.
16	requirement is the act of voting itself and doesn't affect	16	MR. BUKOWSKI: Understood.
17	the qualifications of the voter to vote, and therefore it's	17	JUDGE COHN JUBELIRER: Is that what you
18	kind of a circular argument that the Appellant in Migliori	18	believe the Legislature intended in the dating requirement
19	and the Third Circuit adopted. And I think the concurring	19	and, if so, how is that helpful?
20	opinion in Migliori I think was quite candid in pointing	20	For example, let's say the Lancaster County
21	out that Ritter conceded a couple points that he didn't	21	case and if the person there, if the daughter had put her
22	argue that really left no room.	22	birth date, her mother's birth date on there, that wouldn't
23	But I think the statutory analysis that	23	have helped; but it wouldn't have been let me just say
24	Justice Alito did applies here, and this Court should take	24	this it wouldn't have been found not to be counted,
25	that into account and revisit its preliminary analysis of	25	right? But it would not have enabled anybody to determine
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1	Page 231 whether it had been cast prior to her mother's death.	1	Page 233 Lancaster, but I've seen them both. They both have
2	MR. BUKOWSKI: I believe that's absolutely	2	detailed instructions that say when you're voting, it's got
3	right, and she probably would not be facing criminal	3	to be signed and dated or it will not count.
4	charges.	4	JUDGE COHN JUBELIRER: Okay. Well, you've
5	JUDGE COHN JUBELIRER: Right. So how does	5	answered my question. Thank you.
6	the dating requirement assist county boards in any way if	6	MR. BUKOWSKI: Yeah. Okay. And it really
7	it's only those people who for whatever reason, and $\ensuremath{\text{I}}\xspace$ 'm	7	does come down to where I was going to conclude anyway
8	guessing inadvertently, forget to put a date down? Because	8	because the language, this language from near the end of
9	if people go to all the effort of doing everything else	9	Justice Wecht's opinion it's on page star 1088 of the
10	correctly to vote, this is inadvertent, or inadvertently	10	Westlaw version, so it seems to be the second from the last
11	write their birth date on the envelope, why should one be	11	paragraph in his opinion before Justice Dougherty's
12	counted versus one not; is that the legislative intent?	12	opinion.
13	MR. BUKOWSKI: Right. And that's the	13	And it says, quote, I've returned throughout
14	question that keeps coming up because time and time again	14	this opinion to our decision in PDP and I do so once more.
15	the Courts come back to that question and say, you know, if	15	I maintained in that case that the Election Code should be
16	you're counting incorrect dates, why aren't you why	16	interpreted with unstinting fidelity to its terms and that
17	should we not just say, you know, the date requirement is	17	election officials should disqualify ballots that do not
18	immaterial and count them all?	18	comply with unambiguous statutory requirements when
19	Two answers I guess. One, the plain	19	determining noncompliance requires no exercise of
20	language of the statute says it shall be filled out,	20	subjective judgment by election officials.
21	signed, and dated. Maybe that's not the answer the Court	21	The date requirement here presents such a
22	would like to hear, but it's clear language	22	case, and that is really and to me that's where you can
23	JUDGE COHN JUBELIRER: No. That's	23	that distinguishes the undated from the incorrectly
24	MR. BUKOWSKI: and it's mandatory	24	dated ballots because it does not require any subjective
25	language. And as you did hear uniformly I think from all	25	judgment by an election official to conclude this ballot is
1	Page 232 the Commissioners, you know, all those ballots that are	1	Page 234 missing a date and as opposed to trying to interpret
2	incorrectly dated as they're processed they're subject to	2	whether the date is correct.
3	challenge.	3	So I do believe those incorrectly dated
4	And I'm going to make a prediction here I	4	ballots are subject to challenge, and we try and twist
5	guess maybe that's dangerous but because the Courts	5	ourselves in knots to come up with hypotheticals. And
6	keep saying, you know, that we, that counting the undated	6	Justice Wecht, you know, said the open-ended inquiry into
7	ballots somehow means we should count or counting the	7	instead of applying the statute as written and, you know,
8	incorrectly dated ballots means we shouldn't, you know,	8	shall in the same sentence having two meanings, one for the
9	enforce the date requirement that's plainly written in the	9	signature and one for the date, you know, we're twisting
10	statute, I suggest that's probably the next set of cases	10	ourselves in knots trying to come up with materiality, you
11	that candidates are going to start challenging ballots that	11	know, immaterial, minor, you know, discrepancy and words to
12	have incorrect dates.	12	that effect.
13	And then we're going to have hearings at	13	JUDGE COHN JUBELIRER: So it's your position
14	county Boards of Elections on that issue because I don't	14	because you see it in Justice Wecht in the final sentence
15	think that's what the Legislature intended, and I think	15	of his last footnote says it is inconsistent with
16	what it intended is that it would be the date that the	16	protecting the right to vote to insert more impediments to
17	ballot was signed. The instructions say that. The ballot	17	its exercise than considerations of fraud, election
18	itself says today's date trying to comply with Justice	18	security, and voter qualifications require and that in your
19	Wecht's concern or satisfy his concern that there be clear	19	opinion, although that may be correct under the way we've
20	language so the voter knows what's required and what the	20	interpreted the Election Code, that is up to the General
21	consequences of not complying are.	21	Assembly?
22	And I think that ballot that's Joint Exhibit	22	MR. BUKOWSKI: It is and he's calling on and
23	1 does that. The instructions, we stipulated the	23	has called for clarification, and I think that's a good
24	instructions are not in dispute here, that those do that.	24	idea. But the way it's written right now, it's got to be
25	I'm more familiar with the Berks instructions than	25	enforced.
20		1 [

Page 235 Page 237 And because again I come back to where will be somebody there soon with respect to this issue 2 Boards of Election were by June 8th was Migliori's not in This case is not the case, respectfully, 2 effect. They're facing a deadline to certify. This that should go up because this case in particular has other 3 3 problems with it. It has problems with respect to the fact 4 Court's opinion in my view did not intend to require 4 certification of the undated ballots. It never reached a 5 5 that Your Honor entered an order that didn't say to final decision on the merits -- and maybe Your Honor would 6 6 certify. And so now what we have is we have a month and a 7 have gotten there eventually -- but by then we would have 7 half later, almost two months later we have an action here 8 had some other arguments to make about the statutory that is nothing more than a thinly veiled attempt to ask 8 9 interpretation. you to modify your order beyond the Judicial Code's 9 provisions for the modification of an order. 10 And as I said previously, that's the case 10 that really was best teed up for this Court to make a So that case was discontinued. The case was 11 11 nonadvisory declaratory judgment. This is not the case. 12 12 no longer pending. No one came back in that case. In the 13 Even though it might provide the clarity and get the issue 13 McCormick Oz case, no one came back in that case and said 14 before the Supreme Court sooner rather than later, I urge 14 to Your Honor, Your Honor, would you please modify this and 15 the Court to exercise restraint in not taking on that job 15 require the certification of these results. 16 in this case. 16 And so when you look at, for example, 17 JUDGE COHN JUBELIRER: And so essentially 17 there's a recent case in the Pennsylvania Superior Court you would ask us to issue an order dismissing -which I understand is not binding but it's illustrative and 18 18 MR. BUKOWSKI: Correct. also by Judge King in that Court that talks about this 19 19 JUDGE COHN JUBELIRER: -- the action? 20 20 30-day requirement. It had to do -- you've probably seen 21 MR BIIKOWSKI: Correct 21 it. It's a recent decision. It's published. It has to do 22 JUDGE COHN JUBELIRER: Okay. Thank you very 22 with someone asking for counsel fees after the conclusion much. of a case, and it cites correctly the 30-day requirement, 23 23 MR. BUKOWSKI: And then I guess I would also the 30-day provision even though counsel fees seem to be 24 24 clarify that in doing so I would ask that the Secretary be 25 25 whether they're directly related to the case or not. $$\operatorname{\textsc{Page}}\xspace$ 236 ordered to, you know, certify the results of the election. Page 238 And that's exactly what's happening here. 1 1 JUDGE COHN JUBELIRER: Thank you. 2 2 This is an attempt by the Secretary, and she was the named 3 MR. BUKOWSKI: Thank you, Your Honor. Respondent in the McCormick case. It's McCormick versus 3 MR. KING: May it please the Court. I'll Chapman, and then we have all these other, you know, Boards 4 4 5 try not to repeat the excellent argument that my colleague 5 of Elections. But she had every opportunity in that case 6 just made. I will say that with respect to this action, we to do exactly what she's trying to do here. She could have 6 7 join in the request that this action be terminated, be 7 asked you to modify your order. She could have said order 8 dismissed. 8 them to certify it. She could have done all those things. I think it's pretty clear what this action She didn't do that. 9 9 10 is, Your Honor. It's simply an attempt to ask this Court 10 And in the absence of doing it, what she's to modify the order that you entered in McCormick. The doing is she's doing it here; and this isn't the place to 11 11 order in McCormick did not and certainly Your Honor could do it. And this case has the great potential to expand the 12 12 have included an order to certify those results. Had Your powers of the Secretary of the Commonwealth beyond that 13 13 Honor ordered the certification of those results, I would contemplated by the Legislature or even that addressed by 14 14 15 suggest respectfully that there would have been -- that the 15 the Courts. So in this Court we've addressed in the past, appeal that was taken and later discontinued and other in the Fulton County case we've addressed the Secretary's 16 16 17 appeals would have been taken and that that matter with 17 exercising powers that are beyond those granted by the respect to certification would have been in front of the Legislature; and that's exactly what this is an attempt to 18 18 19 Court. 19 do. 20 I would also suggest that the Secretary has The Secretary's duties are -- and this is 20 21 every ability -- she has done it on numerous occasions as 21 the reason why we asked that this matter be dismissed among 22 this Court knows -- she has every ability to file a King's 22 others. The Secretary's duties are much like in my hockey 23 Bench action in front of the Supreme Court to get this 23 analogy which didn't get too far earlier, but I'll try it issue in front of them. She could do that tomorrow if she again. She is much like in a hockey game. She is the 24 24

wanted to. And I would suggest that it's likely that there

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scorekeeper. She is not the referee. She is not an

aggrieved party. She is the Commonwealth. Ment she comes here and I'm telling the Court something that you know better than I. When the Secretary comes here as the Acting Secretary, she comes as the Commonwealth. She doesn't come as Leigh Chapman. She comes as the Monorable Leigh Chapman, the Secretary of the Commonwealth, which means ash's invoking the Commonwealth. She's not an aggrieved person. There is no case or controversy here. This is aaking for modify your opinion. It's asking even worse to seek to modify your opinion in the Motorable case which I would modify your opinion in the Motorable case which I would modify your opinion in the Motorable case which I would modify your opinion in the Motorable case which I would controversy over all these counties. Home to modify your opinion in the Motorable case which I would modify your opinion in the Motorable case which I would controversy over all these counties. Home to modify your opinion in the Motorable case which I would controversy over all these counties. Home to controversy over all these counties. The hall and allow people from political partie and bring people in to try to cure the ballots of the Sounties certified results that are not consistent with the last nor whatever reason and nobody, you know, there was no challenge but left out a manicipality. Or i seem i'm the last nor whatever reason and nobody, you know, there was no discretion, the must certify that or would she be able to in that case the a mandamus saying no, you have to certify, you have to include in your totals what is required under the lay? Mr. KING: The state to the sounties certified resulting that the provisionally	s no
3 Court seaching that you know better than I. When the 4 Secretary comes here as the Acting Secretary, she comes as 5 the Commonwealth. She domen't come an Leigh Chapman. She 6 comes as the Memorable Leigh Chapman, the Secretary of the 7 Commonwealth, which means she's invoking the Commonwealth. 8 She's not an apprieved person. 9 There is no case or controversy here. This is asking for 11 an advisory opinion. It's asking even worse to seek to 12 modify your opinion in the McComsick case which I would 13 suggest at this point is res judicata with respect to this 14 matter and certainly is the rule or law of the case, and no 15 one asked in that case to modify it to include 16 certification. It never happened. 17 JUDGE CONN JUBLIERER: But let me give you 18 just a hypothetical. 19 MR. RING: Yes, ma'em. 20 JUDGE CONN JUBLIERER: Assume that one of 21 the counties certified results that are not consistent with 22 the law for whatever reason and nobody, you know, there was 3 no challenge but left out a municipality. Or I mean I'm 25 Secretary and it would be clear that what they've done is 26 certify, you have to combine the law? 27 MR. RING: I mour opinion, she must certify that or would she be able 28 to in that case file a mandamma saying no, you have to 29 certify, you have to include in your totals what is 29 inconsistent. They was a smaller she with are 20 pinion, she is already certifying results which are 21 in our opinion, she is already certifying results which are 22 in our opinion, she is already certifying results which are 23 in our opinion, she is already certifying results which are 24 in our opinion, she is already certifying results which are 25 inconsistent. They was a smaller she case. And no 26 certify, you have to include in your totals what is 27 captify you have to include in your totals what is 28 certify, you have to include in your totals what is 29 inconsistent. They was a small results which are 29 inconsistent. They was a small results which are 29 inconsistent. They was a provisionally	
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And so I would also suggest, Your Honor, 17 MR. KING: You asked.	
since you asked me, I would also suggest that this is 18 JUDGE COHN JUBELIRER: that we have a support of the support of t	vasn't
happening as we sit here, as we stand here because what's 19 presented. Yes. And thank you. I appreciate	your answer
20 happening with respect you asked about the SURE system 20 but	
and the signatures and the curing. That's commonly 21 MR. KING: I was getting back to	your
referred to as curing. Somebody sends it in and it needs 22 question.	
23 to be fixed. 23 JUDGE COHN JUBELIRER: Yes.	
24 And so there is a great debate in this	your
24 And so there is a great debate in this 24 MR. KING: I was getting back to	tary do if

П	Page 243	П	Page 245
1	she saw that counties	1	unfounded. So it's a preliminary review
2	JUDGE COHN JUBELIRER: Well, I was just	2	MR. KING: Yes.
3	asking about limits of discretion, and you seem to be	3	JUDGE COHN JUBELIRER: without benefit of
4	arguing that there are that she has absolutely no	4	argument. But then so we still do have a Third Circuit
5	discretion.	5	opinion that is in effect.
6	MR. KING: That's what the statute says.	6	MR. KING: Yes, except it's also on appeal.
7	She is a member of the executive branch. She is that's	7	So I would also add these things because I
8	the executive branch's role. The Legislature set up the	8	know we've taken up a lot of your time, and we appreciate
9	Election Code, set up the methods. They've set up the	9	it very much. I would add these. There is no emergency in
10	rules of who did what, and the statute I'm not going to	10	this matter. This is an emergency petition before you.
11	read it again but it's crystal clear. It says exactly	11	The party who comes here created the emergency by not
12	what the Secretary is to do. She is to tabulate. She is	12	performing her duties. She didn't certify the election,
13	to receive. She is to tabulate, and she is to announce the	13	and she didn't perform her
14	results.	14	You heard the testimony from the Deputy
15	And here we are in Pennsylvania we're in	15	Secretary, and he's a real gentleman. And I want to say
16	July, almost August and to the surprise of lots of people	16	that we work with him all the time. He is just a terrific
17	out there, whoever's watching this on YouTube or elsewhere,	17	person to have in government, and he's a truthful witness.
18	that the Governor's race isn't certified yet and the United	18	And he said, our duties are ministerial. That's exactly
19	States Senate race isn't certified, Congressional races	19	what their duties are.
20	aren't certified, House races aren't certified, and Senate	20	They're not supposed to and this Court
21	races aren't certified in these three counties. And across	21	should not, I say respectfully, should not vest the
22	the state the Governor's race isn't certified or the U.S.	22	Secretary with the power to start to investigate how these
23	Senate race.	23	certifications took place because, for example I won't
24	So we do have she does have the and	24	go off on a tangent for example, with respect to this
25	this is why and I'll just go through these quickly as to	25	thing about curing, the next Secretary of the Commonwealth
1	Page 244 why we say that this case is inappropriate. But she does	1	Page 246
2	have the mandatory obligation to tally these results from	2	fall and the next Secretary of the Commonwealth says that
3	the counties. There's nothing that the counties have done	3	curing's not permitted, will that Secretary of the
4	here which is incorrect or inaccurate. And I say that	4	Commonwealth be in here saying to you that these counties
5	because Your Honor's order did not say to certify.	5	like Allegheny and Philadelphia and so forth now have to
6	And also I say this because the Migliori	6	recertify their results because they allowed curing?
7	case which was once the Ritter case and became Migliori is	7	And I will tell you, curing is a very real
8	pending on certiorari before the United States Supreme	8	issue that's likely to be before this Court and that Court
9	Court. So if this Court were to enter an order today,	9	soon, and the Supreme Court soon. So there is no emergency
10	tomorrow, the next day, next week and all of a sudden the	10	other than that created by the party that's here before you
11	Supreme Court of the United States grants certiorari and	11	asking to get emergency relief.
12	will hear the argument of whether it's correct or not, then	12	There is also no case or controversy. This
13	Your Honor has read Mr. Justice Alito's opinion that he	13	action is merely, this merely masquerades as a request for
14	says that in almost in these words that he thinks the Third	14	an advisory opinion at best. At worst it's an attempt to
15	Circuit likely got it wrong.	15	circumvent the system by attempting to get you, Your Honor,
16	And I agree with my colleague that when you	16	to modify and that's the exact word to modify your
17	look at Justice Alito's opinion, his dissent on the grant	17	prior order which did not include the term certify. Had
18	of an emergency order and we know that these emergency	18	Your Honor wanted to say that everybody should certify,
19	orders are currently disfavored by the Court because they	19	then you could have said that and I suggest you would have
20		20	said it if you wanted to.
21	JUDGE COHN JUBELIRER: Well, and he also	21	I would also say that the Petitioners here
22	said that it's based on the review that he's been able to	22	have taken opposite and contrary positions in their
23	conduct in the time allowed and that he doesn't rule out	23	guidance and in their briefs and pleadings. I will also
24	the possibility that further briefing and argument, you	24	say that with respect to this issue of the undated ballots
25	know, might convince him that his current view is	25	and the wrong dated ballots, part of the problem created in
ш			

	7/20/		
1	Page 247 this Commonwealth is from the guidance issued by the	1	Page 249 a different case than the case in which the order arose.
2	Secretary of the Commonwealth telling these county boards	2	And so nobody did it in McCormick; and, therefore, nobody
3	that they must count the wrong dated ballots.	3	appealed it in McCormick because it wasn't there.
4	And I would suggest to you and I agree with	4	The parties who were in McCormick, only some
5	in the question that you posed to Mr. Bukowski I want to	5	of them are here today. The rest of the parties in
6	join in his answer. I think it's entirely correct to	6	McCormick which is what they're asking you to do is
7	challenge the dates that, for example, predate the issuance	7	modify the order from that case all the rest of those
8	of the ballots. I think that's entirely correct. I think	8	parties aren't here. There's a whole bunch of other county
9	that people who put dates on here that would perhaps go	9	boards who were parties and would be entitled to be here.
10	past the eight o'clock receipt date, I think that if you	10	I would also suggest that as I said earlier
11	put dates like that that they could be challenged.	11	McCormick does not require, your opinion in McCormick does
12	So I think that that guidance that was	12	not require the result that's sought here. And for all of
13	issued was incorrect. And so we have the Secretary who	13	these reasons and for the reason that expanding the
14	issued the incorrect guidance now suggesting that because	14	Secretary's powers would not be something that we would
15	people have counted ballots with other dates on them, that	15	expect the Commonwealth Court of Pennsylvania to
16	now we have to count them all. I just don't think that's	16	countenance, this would expand her power to investigate as
17	right.	17	opposed to perform the ministerial function of calculating
18	I would also say, of course, I've said this	18	the tallies of the votes.
19	the Ritter case is still pending in the Supreme Court. The	19	And it would give her the ability this
20	Petitioners come I did say and I'm really proud to have	20	case for the first time I think you heard the witness say,
21	found this, Your Honor, because you asked me earlier and I	21	Mr. Marks, the Deputy Secretary, say he's never heard of
22	got a little nervous. You asked me if I raised unclean	22	this happening before. I've never heard of it happening
23	hands. So I'm proud to tell you that I found it, and I did	23	before, but certainly the Court would have more experience
24	raise unclean hands.	24	than we would. I've not ever heard of this happening
25	JUDGE COHN JUBELIRER: In the papers in the	25	before, and I don't think it has happened before.
1	Page 248		Page 250
1 -1	•	1 1	It's a ministerial function, and these
2	MR. KING: In my response.	2	boards by the way on the opposite side of that coin,
1 1		ll	
2	MR. KING: In my response.	2	boards by the way on the opposite side of that coin,
2	MR. KING: In my response. JUDGE COHN JUBELIRER: In your response.	2	boards by the way on the opposite side of that coin, these boards perform a quasi-judicial function. So it's
2 3 4	MR. KING: In my response. JUDGE COHN JUBELIRER: In your response. MR. KING: Yes, Your Honor.	2 3 4	boards by the way on the opposite side of that coin, these boards perform a quasi-judicial function. So it's not the question of whether the ballot is to be counted.
2 3 4 5	MR. KING: In my response. JUDGE COHN JUBELIRER: In your response. MR. KING: Yes, Your Honor. JUDGE COHN JUBELIRER: Okay.	2 3 4 5	boards by the way on the opposite side of that coin, these boards perform a quasi-judicial function. So it's not the question of whether the ballot is to be counted. It's whether these people make the decision of whether to
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2 3 4 5 6 7 8 9	MR. KING: In my response. JUDGE COHN JUBELIRER: In your response. MR. KING: Yes, Your Honor. JUDGE COHN JUBELIRER: Okay. MR. KING: And so what we said is the Petitioners have come before this Court with unclean hands and having failed to comply with statutory limitations and having failed to comply with statutory obligations to certify the election. We said they have unclean hands	2 3 4 5 6 7 8 9	boards by the way on the opposite side of that coin, these boards perform a quasi-judicial function. So it's not the question of whether the ballot is to be counted. It's whether these people make the decision of whether to count it or not, right? That's the discretion that they're exercising is whether to count the ballot that has the signature or the date missing on it and that's a discretionary and that's exactly the discretion that they exercised here or all three of them wouldn't be here.
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2 3 4 4 5 6 6 7 8 8 9 10 11 12 13 14 15 16 17 18 19 20	MR. KING: In my response. JUDGE COHN JUBELIRER: In your response. MR. KING: Yes, Your Honor. JUDGE COHN JUBELIRER: Okay. MR. KING: And so what we said is the Petitioners have come before this Court with unclean hands and having failed to comply with statutory limitations and having failed to comply with statutory obligations to certify the election. We said they have unclean hands because she has this affirmative duty to do this. And, you know, the unfortunate part about mandamus is that, as the Court well knows, you can't file a counterclaim. So it's not possible to do that in a mandamus case. Had it been possible, I would have filed; and Mr. Bukowski pointed that out to me right away the first time we spoke, you can't do that. And so I said well, that's too bad. I'd like to do it. So had I been able to do it, I would file a counterclaim here and say you need to certify this election.	2 3 4 4 5 6 6 7 8 8 9 10 11 12 13 14 15 16 17 18 19 20	boards by the way on the opposite side of that coin, these boards perform a quasi-judicial function. So it's not the question of whether the ballot is to be counted. It's whether these people make the decision of whether to count it or not, right? That's the discretion that they're exercising is whether to count the ballot that has the signature or the date missing on it and that's a discretionary and that's exactly the discretion that they exercised here or all three of them wouldn't be here. So when people exercise discretionary functions like that, then certainly mandamus does not lie; and this is clearly a case where mandamus should not lie. If anything were to survive today's proceeding, the declaratory judgment action at best would survive. But again with respect and the mandamus action just simply cannot survive. With all due respect, Judge, the mandamus cannot for all the reasons we've all said, there's no way in the world this is a mandamus case. Secondly, there's no way in the world this
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2 3 4 4 5 6 7 8 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	MR. KING: In my response. JUDGE COHN JUBELIRER: In your response. MR. KING: Yes, Your Honor. JUDGE COHN JUBELIRER: Okay. MR. KING: And so what we said is the Petitioners have come before this Court with unclean hands and having failed to comply with statutory limitations and having failed to comply with statutory obligations to certify the election. We said they have unclean hands because she has this affirmative duty to do this. And, you know, the unfortunate part about mandamus is that, as the Court well knows, you can't file a counterclaim. So it's not possible to do that in a mandamus case. Had it been possible, I would have filed; and Mr. Bukowski pointed that out to me right away the first time we spoke, you can't do that. And so I said well, that's too bad. I'd like to do it. So had I been able to do it, I would file a counterclaim here and say you need to certify this election. And as the Court understood and heard, there are consequences to this. The consequences to this are	2 3 4 4 5 6 7 8 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	boards by the way on the opposite side of that coin, these boards perform a quasi-judicial function. So it's not the question of whether the ballot is to be counted. It's whether these people make the decision of whether to count it or not, right? That's the discretion that they're exercising is whether to count the ballot that has the signature or the date missing on it and that's a discretionary and that's exactly the discretion that they exercised here or all three of them wouldn't be here. So when people exercise discretionary functions like that, then certainly mandamus does not lie; and this is clearly a case where mandamus should not lie. If anything were to survive today's proceeding, the declaratory judgment action at best would survive. But again with respect and the mandamus action just simply cannot survive. With all due respect, Judge, the mandamus cannot for all the reasons we've all said, there's no way in the world this is a mandamus case. Secondly, there's no way in the world this is a proper dec action case. It's not a proper dec action case because there is no aggrieved party, and they've

already been entered and to do so in an untimely manner in

There is no election in question. This is simply an

1 advisory opi	nion that they seek. Page 251	1	JUDGE COHN JUBELIRER: I know.
2	And by the way, if they want such an	2	MR. BOYER: but I will slow down.
3 opinion, who	n you read the King's Bench rules which I	3	JUDGE COHN JUBELIRER: Thank you.
4 know Your Ho	nor has read many times when you read the	4	MR. BOYER: We have made our points on
5 King's Bench	rules, you can likely take that issue up with	5	McCormick clear. I'll add a few additional ones. I
6 the Supreme	Court and you'll likely get some decision on	6	recognize that it was a preliminary injunction, but the
7 it. And so	that would be the appropriate place for them to	7	order is the order and it says what it says.
8 take this, r	oot by using this vehicle.	8	And we have laid out our belief of the
9	There are so many you know, we filed	9	consequences of what follows from that order and our
10 preliminary	objections. I'm not going to go into all those	10	understanding of, you know, the direction to separately
11 details. I	think we've raised all the things I talked	11	tally ballots that excuse me, votes that separately
12 about. We i	ncorporated them into our response here, but	12	tally a count that excludes undated ballots was to preserve
13 there are so	many issues. This is not a great case to	13	the opportunity for a different decision and final judgment
14 ultimately o	lecide this issue, and they have other means to	14	on appeal. Of course that never same.
15 do it.		15	JUDGE COHN JUBELIRER: So what is the effect
16	So thank you very much for your time, Your	16	of that? Did the order to separately tally the ballots the
	to answer any other questions if you have any.	17	way it was written you think then what happened convert to
18	JUDGE COHN JUBELIRER: I don't believe I	18	a final order of certification or
	er. You've answered them all.	19	MR. BOYER: It didn't convert to a final
20	MR. KING: Thank you very much. It's my	20	order of certification. I think the clear consequence of
21 honor to be	here.	21	the Court's legal analysis and ultimately its order was
22	JUDGE COHN JUBELIRER: Thank you.	22	that these ballots at issue which are the same ballots
23	MR. BOYER: Thank you, Your Honor. I know	23	we're here talking about today were lawfully cast. That
	long day, so I will endeavor to keep this brief	24	order was never it wasn't vacated. It wasn't
	te a few what I believe to be important points.	25	contravened by a final judgment by Your Honor.
	Page 252	Н	Page 254
1	Number one, this is exactly the right action	1	JUDGE COHN JUBELIRER: So if the case hadn't
1 -1	rcumstances. There's no statute that	2	been dismissed and there had been further arguments and
	what the counties are doing here which is	3	orders, in that case what would have happened to this
1 1	include from their certifications lawfully cast	4	order?
5 and canvasse	d ballots. Under 3158 and 3159 of the Election	5	MR. BOYER: I think it depends on what order
1 1	sing to do that, they are interfering with the	6	Your Honor ultimately entered. If Your Honor entered an
1 1	statutory obligation to receive those	7	order saying much like the order granting preliminary
8 accurately o	completed certifications and then perform her	8	injunction these are lawful ballots, they must be
9 own certific	ations of those results.	9	canvassed, they must be canvassed excuse me, canvassed,
10	You heard allusions to this may not be the	10	counted, we'd be in the exact same position.
11 right time,	that Mr. Marks has made clear what the	11	JUDGE COHN JUBELIRER: So it really in your
12 Department v	vas doing. It was communicating with the	12	mind the effect of the order not vacating the opinion and
13 counties and	l was prevailing upon the counties, it was	13	order is somehow influencing your argument here?
	the counties successfully in those back and	14	MR. BOYER: I think it's one, the existence
14 convincing t			
	I do not think we want the precedent to be the	15	of the order; two, Your Honor's decision not to vacate it;
15 forths; and	I do not think we want the precedent to be the	15 16	of the order; two, Your Honor's decision not to vacate it; and three, no other order whether from a final judgment
15 forths; and	nust sue a county immediately if there's a hint	1 1	
forths; and Department	nust sue a county immediately if there's a hint	16	and three, no other order whether from a final judgment
15 forths; and 16 Department of disagreen 18	ust sue a county immediately if there's a hint ment.	16 17	and three, no other order whether from a final judgment from Your Honor or on appeal. There's only been one order.
15 forths; and 16 Department m 17 of disagreem 18	ust sue a county immediately if there's a hint ment. There's been a lot of talk including from us gnificance of Your Honor's decision in	16 17 18	and three, no other order whether from a final judgment from Your Honor or on appeal. There's only been one order. It's to canvass these ballots. It said separately exclude
forths; and le Department m of disagreem about the si	ust sue a county immediately if there's a hint ment. There's been a lot of talk including from us gnificance of Your Honor's decision in	16 17 18 19	and three, no other order whether from a final judgment from Your Honor or on appeal. There's only been one order. It's to canvass these ballots. It said separately exclude ballots in case there's a different decision. That
forths; and head of disagreer for disagreer head of disagreer head	ust sue a county immediately if there's a hint ment. There's been a lot of talk including from us gnificance of Your Honor's decision in I think	16 17 18 19 20	and three, no other order whether from a final judgment from Your Honor or on appeal. There's only been one order. It's to canvass these ballots. It said separately exclude ballots in case there's a different decision. That theoretical possibility never arrived.
forths; and head of disagreer for disagreer head of disagreer head	There's been a lot of talk including from us sgnificance of Your Honor's decision in I think JUDGE COHN JUBELIRER: Listen, if you could	16 17 18 19 20 21	and three, no other order whether from a final judgment from Your Honor or on appeal. There's only been one order. It's to canvass these ballots. It said separately exclude ballots in case there's a different decision. That theoretical possibility never arrived. JUDGE COHN JUBELIRER: Okay.
forths; and left pepartment means of disagreement means about the si means mea	There's been a lot of talk including from us sgnificance of Your Honor's decision in I think JUDGE COHN JUBELIRER: Listen, if you could	16 17 18 19 20 21	and three, no other order whether from a final judgment from Your Honor or on appeal. There's only been one order. It's to canvass these ballots. It said separately exclude ballots in case there's a different decision. That theoretical possibility never arrived. JUDGE COHN JUBELIRER: Okay. MR. BOYER: I'd like to move quickly to In

$\overline{}$			
1	$$\operatorname{\textsc{Page}}$\ 255$$ an unprecedential decision from this Court in Ritter	1	Page 257 how expedited the review was and the narrowest briefing was
2	reaching a contrary conclusion; but respectfully, the case	2	mostly on the emergency petitions anyway, the arguments are
3	law cited there doesn't support what the Court did. In	3	not as fully developed as they are now as you acknowledge,
4	Pennsylvania we follow the Marks rule which means the	4	as Your Honor acknowledged in McCormick.
5	narrowest rationale in support of a judgment is	5	So, number one, under Pennsylvania precedent
6	precedential.	6	there's nothing there that's precedential; and number two,
7	So no matter what the narrowest rationale	7	the circumstances are particularly compelling to sort of
8	is, the judgment was that the ballots be counted; and the	8	consider this issue freshly.
9	only precedent that can follow is a rationale in support of	9	I'd like to make just two final points.
10	counting those votes.	10	Number one, counsel referred to some of the inconsistencies
11	JUDGE COHN JUBELIRER: When you say the	11	about the Secretary's authority and the positions she has
12	narrowest and again you're speeding up	12	taken and made specific mention and also questioned Mr.
13	MR. BOYER: I'm sorry.	13	Marks about the Ziccarelli matter but without giving any
14	JUDGE COHN JUBELIRER: But the narrowest	14	context for what the request from the plaintiffs was there.
15	interpretation in support of the judgment in your mind,	15	After the In Re: Canvass decision in which
16	that would be the judgment of the Court which was to count	16	the Supreme Court of Pennsylvania told Allegheny County it
17	the ballots?	17	can count undated ballots, the plaintiffs then sued the
18	MR. BOYER: Yes. The judgment of the Court	18	Secretary in federal court for refusing to follow the
19	was unequivocally to count the ballots. Under the Marks	19	Supreme Court's order. And in that context she said she
20	principle which Pennsylvania follows and the Supreme Court	20	has no authority to overrule a Court to say if a Court says
21	said that as recently as in 2020 in a decision called	21	these ballots may be counted, I, the Secretary, have no
22	Commonwealth v. Alexander, and I'm looking for the	22	authority to overrule a Court.
23	citation.	23	And if you look at page 8 of Fayette
24	JUDGE COHN JUBELIRER: That was in your	24	County's Exhibit D, it's quite clear what the context of
25	brief?	25	that brief is; and the same is true here. We're here
1	Page 256		Page 258
1 2	Page 256 MR. BOYER: I don't believe it was in our papers, so we weren't responding to the argument about	1	Page 258 because the Court's order and because case law compels the counties to include in their certifications the ballots
2	MR. BOYER: I don't believe it was in our papers, so we weren't responding to the argument about	2	because the Court's order and because case law compels the
2	MR. BOYER: I don't believe it was in our	2 3	because the Court's order and because case law compels the counties to include in their certifications the ballots
2 3 4	MR. BOYER: I don't believe it was in our papers, so we weren't responding to the argument about JUDGE COHN JUBELIRER: Right. I think it	1 2 3 4	because the Court's order and because case law compels the counties to include in their certifications the ballots that are at issue.
2 3 4 5	MR. BOYER: I don't believe it was in our papers, so we weren't responding to the argument about JUDGE COHN JUBELIRER: Right. I think it was cited in the Ritter.	1 2 3 4 5	because the Court's order and because case law compels the counties to include in their certifications the ballots that are at issue. Much like in Ziccarelli, we have no
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$\overline{}$	2 050		2 061
1	understand. It's a little	1	Page 261 I'll say and this is exactly the right case
2	MR. BOYER: It is correct to say the	2	to do it, and there is a clear case in controversy. The
3	Secretary cannot certify results if she receives from the	3	issues are squarely presented, thoroughly briefed in
4	counties incomplete certifications and incomplete by virtue	4	Pennsylvania law, and voters generally need clarity on
5	of them excluding lawfully cast ballots. She does not have	5	these issues; and I think we have presented reasons why
6	the independent authority to decide what constitutes a	6	clarity should counsel for counting these ballots and
7	lawfully cast ballot or not. That's up to the Courts. And	7	ultimately have them included in the final certifications
8	in this context the Courts have spoken as to what qualifies	8	of elections.
9	as a lawfully cast ballot.	9	Thank you, Your Honor.
10	JUDGE COHN JUBELIRER: So she's here trying	10	JUDGE COHN JUBELIRER: Thank you very much.
11	to give effect to a Court's decision and how she	11	As we conclude this very long day, I want to
12	understands it?	12	thank all of you for your preparation, for your thoughtful
13	MR. BOYER: Correct. If you imagine two	13	legal arguments, and a very thorough presentation of the
14	poles, at one a Secretary who believes she has the	14	issues. Clearly you're all extremely knowledgeable; and
15	independent authority to review and make her own judgments	15	while you and the parties have different interpretations of
16	of the law; another a Secretary that's purely a rubber	16	the law, you are united in appreciating the importance of
17	stamp even if there are patently mistakes in the	17	your common purpose to assure that ballots are accurately
18	certifications whether they're clerical, whether there are	18	counted and that the voters of Pennsylvania can exercise
19	whole swaths of ballots. I think the Secretary's authority	19	their right to vote for the candidates of their choice in a
20	clearly falls somewhere in between those.	20	free and fair election.
21	And when there is a decision or decisions of	21	I want to recognize all the county boards,
22	the Court that say the certifications are excluding ballots	22	the county boards that were here as well as all of the
23	that under state law, under federal law, under the	23	county boards and election workers who steadfastly and
24	consequences of this Court's order must be canvassed and	24	tirelessly work to meet the challenge; and we heard some of
25	counted, those ballots cannot be excluded from	25	what is involved with that today.
1	Page 260 certification. The Secretary is aware of those Court	1	Page 262 It is now the Court's responsibility to
2	decisions and not	2	render a decision based on the law and applying the law to
3	JUDGE COHN JUBELIRER: And now a final	3	the facts of this case. While it's a challenging task in
4	question by me is, if I just assume for the sake of	4	this very interesting and very important case, your
5	argument that I don't agree with your interpretation of the	5	advocacy, both oral and written, will guide the Court's
6	June 2nd order, is that the end of it or are you still	6	decision.
7	relying on the Migliori case or federal law or any other	7	So I thank you all very much, and with that
8	opinion of the Court that would support your position?	8	I believe we can conclude.
9	MR. BOYER: If Your Honor disagrees with our	9	(Whereupon, at $4:45$ p.m., the hearing was
10	read of the June 2nd order, I believe that's it for the	10	adjourned.)
11	mandamus count but not for the declaratory and injunctive	11	***
12	relief count. I think the arguments we have presented make	12	
13	it clear as to why even in the absence of that order the	13	
14	law does require the counties to include these	14	
15	certifications under the reasoning announced and	15	
16	articulated in the opinion from Your Honor, in the opinion	16	
17	from the Third Circuit.	17	
18	So yes, the mandamus count does depend on	18	
19	the consequence of the order. The declaratory and	19	
20	injunctive relief count does not.	20	
21	JUDGE COHN JUBELIRER: Okay. Thank you.	21	
22	MR. BOYER: I would like to make one last	22	
1 1		ıl	
23	point about uniformity and finality. The Secretary has	23	
	point about uniformity and finality. The Secretary has been pushing for uniformity and finality on this issue for	23 24	

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1	CERTIFICATE	
2	I hereby certify that the foregoing proceedings,	
3		
4	28, 2022, and that I, Judith E. Shuller, have read this	
5	transcript and attest that this transcript is a true and	
6	accurate record of the proceedings.	
7		
8	By: Judith E. Shuller	
9	Oddiel 2. Share	
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