

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

No. 102 MM 2022

DAVID BALL, ET AL.,

Petitioners

v.

**LEIGH M. CHAPMAN, ACTING SECRETARY OF THE
COMMONWEALTH, ET AL.,**

Respondents

**ACTING SECRETARY’S RESPONSE TO MOTION FOR
RECONSIDERATION OR CLARIFICATION**

Respondent Acting Secretary of the Commonwealth respectfully submits this response to the “Application for Reconsideration/Motion to Clarify Supplemental Order of November 5, 2022,” submitted by Respondent Blair County Board of Elections. The motion should be denied and *this Court should reaffirm that counties follow the date ranges set forth in the Court’s Supplemental Order of November 5, 2022*, in determining whether absentee and mail-in ballots should be preliminarily set aside as “incorrectly dated.” Any further modification prior to Election Day will impose tremendous burdens on county boards and undermine their ability to perform their responsibilities under the Election Code in a timely fashion.

On November 1, this Court entered an order directing, *inter alia*, that county boards of elections not “count[] any absentee and mail-in ballots received for the

November 8, 2022 general election that are contained in undated or *incorrectly* dated outer envelopes” (emphasis added). The direction to identify, segregate, and not count ballots returned in “incorrectly dated” envelopes (something no county had previously done) generated considerable uncertainty and confusion among election officials across the Commonwealth. This Court’s November 1 Order, issued without opinion, did not define what constituted an “incorrectly dated” envelope or provide any further guidance as to how counties were to identify such ballots.

This Court’s subsequent November 5 Supplemental Order, while still leaving many questions unanswered, provided the following definition of “incorrectly dated” outer envelopes:

- (1) mail-in ballot outer envelopes with dates that fall outside the date range of September 19, 2022, through November 8, 2022; and
- (2) absentee ballot outer envelopes with dates that fall outside the date range of August 30, 2022, through November 8, 2022.

Supplemental Order (Nov. 5, 2022).

The definition of “incorrectly dated” articulated in the Court’s Supplemental Order is capable of being followed by counties as they conduct their pre-canvass and should not unduly delay that process. Modifying it now, with less than 24 hours remaining before pre-canvassing begins, would impose an unacceptable burden on county election officials.

In particular, requiring a specific determination of a different applicable range for each individual absentee or mail-in ballot would engender further confusion and could slow the process to a crawl. Election officials across the Commonwealth all endeavor to carefully review and accurately count all votes as expeditiously as possible. Moreover, this year, for the first time, 63 counties are statutorily obligated to begin pre-canvassing at 7 a.m. on Election Day and to “continue without interruption until each mail-in ballot and absentee ballot received by 7 a.m. on election day is pre-canvassed” because those counties accepted grants pursuant to Act 88 of 2022. *See* Sec. 1601-A(j)(1). Election officials must be permitted to perform their obligations under the Election Code. Any further modification of the definition of “incorrectly dated” prior to Election Day would only make administering the 2022 General Election a greater challenge.

When the Court exercised jurisdiction over this matter, it instructed the parties to brief three issues, none of which encompassed the question of *what* date a voter must write on her ballot return envelope for it to be counted.¹ As a result, further

¹ The Court phrased the relevant question as whether “the votes of those electors who do not comply with [the instruction that electors “shall . . . date” absentee and mail-in ballots] are not counted,” without discussing what compliance with that requirement entails. Order (Oct. 21, 2022). As has previously been discussed, some number of voters write their dates of birth on their envelopes. *See Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *18 (Pa. Commw. Ct. Aug. 19, 2022) (“The statute says ‘date’ – it does not specify which date.”).

exploration of this question may be warranted. And because this Court has directed counties to segregate and preserve ballots identified as undated or incorrectly dated, the supplemental order does not impede further litigation over whether all ballots in envelopes with dates outside the relevant ranges should be excluded.

But given that counties must begin to pre-canvass ballots tomorrow, this Court should not attempt to modify its November 5 Supplemental Order before that process begins. That order provides a workable rule and should be left intact.

CONCLUSION

The motion filed by the Blair County Board of Elections should be denied.

November 7, 2022

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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: November 7, 2022

/s/ Michael J. Fischer

Michael J. Fischer