

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

Docket No. 286 MD 2022

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

Petitioners, :

v. :

LEIGH M. CHAPMAN, in her capacity :
As Secretary of the Commonwealth of :
Pennsylvania, et al., :

Respondents. :

ANSWER OF BUCKS COUNTY BOARD OF ELECTIONS, RESPONDENT

*Application for the Court to Exercise King’s Bench Powers and/or to Grant
Extraordinary Relief Over the Proceedings in the Commonwealth Court at Docket
No. 286 MD 2022*

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**ANSWER TO APPLICATION FOR THE COURT TO EXERCISE KING’S
BENCH POWERS AND/OR TO GRANT EXTRAORDINARY RELIEF
OVER THE PROCEEDINGS IN THE COMMONWEALTH COURT AT
DOCKET NO. 286 MD 2022**

I. INTRODUCTION.

The Bucks County Board of Elections (“Bucks County”) submits this Answer in support of the Application to the Court to Exercise Jurisdiction Pursuant to its King’s Bench Powers and/or Powers to Grant Extraordinary Relief Over the Proceedings in the Commonwealth Court at Docket No. 286 MD 2022 (the “Application for Extraordinary Relief”) and request that the Court exercise extraordinary jurisdiction over this issue of public importance.

Importantly, and in contravention to what is alleged by Petitioners, Bucks County has canvassed and counted ballots contained within Declaration envelopes that lack a handwritten date as well as those that bear a date out of the expected range. Bucks County has segregated those ballots pending a determination from the courts to enable the County to provide an accurate count regardless of the courts’ decisions.

Despite Petitioners’ mischaracterization of which ballots have been counted, Bucks County supports Petitioners’ Application for Extraordinary Relief and welcomes clarity from the Court given the conflicts between the Judgment issued by the Third Circuit Court of Appeals in *Migliori v. Lehigh Cnty. Bd. Of Elections*, No. 22-1499, Doc. 80 (3d. Cir. May 20, 2022) (holding that the dating provisions of

§§3146.6(a) and 3150.16(a) are immaterial under 52 U.S.C. §10101(a)(2)(B) and do not serve as a basis to refuse to count undated ballots and further directing undated ballots to be counted forthwith); the Commonwealth Court’s decision in *Ritter v. Lehigh County Board of Elections*, 2022 Pa. Commw. Unpub. LEXIS 1, 2022 WL 16577 (directing ballots within un-dated envelopes may not be counted); this Court’s denial of *allocator* from that Commonwealth Court decision, *see Ritter v. Lehigh County Board of Elections*, at 2022 Pa. LEXIS 89, 2022 WL 244122; and this Court’s 2020 decision in *In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. 2020) (directing that ballots within un-dated declaration envelopes be counted). To ensure uniformity in the Commonwealth’s election administration process, Bucks County echoes Petitioners’ urging that this Court grant extraordinary jurisdiction over the matter.

Further, for the reasons stated herein, Bucks County firmly believes that the ballots in question should be counted and that failure to do so wrongfully disenfranchises Bucks County voters and voters all over this Commonwealth.

II. RELEVANT FACTUAL BACKGROUND

Bucks County mailed the mail-in and absentee ballots out to qualified electors on April 22nd and April 23rd, 2022, approximately three weeks before Primary Election Day on May 17, 2022. Each returned ballot, contained within two envelopes, bears a date-stamp on the outer envelope reflecting the day and time that each ballot was received by Bucks County. All returned mail-in and absentee ballots

are date-stamped upon receipt by Bucks County. Only ballots that were returned by 8:00 p.m. on Primary Election Day, May 17, 2022 were canvassed, with the exception of Military and Overseas Civilian Ballots which were only canvassed if they were received by May 24, 2022, by 5:00 p.m. Only ballots contained within envelopes specific to this Primary Election can be accepted and scanned by Bucks County, i.e. there is no ability to scan any ballots that correspond with anything other than this specific Primary Election in this county. There is no question that all the subject ballots are appropriately associated with this election and were returned by electors by the statutorily required deadline.

Upon receipt of the guidance from the Department of State concerning examination of absentee and mail-in ballot return envelopes (the “DOS Guidance”), Bucks County held a public meeting to, *inter alia*, vote on whether to accept certain categories of mail-in ballots which had been segregated on Primary Election Day. In accordance with the recent Third Circuit judgment in *Migliori v. Lehigh Cnty. Bd. Of Elections*, No. 22-1499, Doc. 80 (3d Cir. May 20, 2022) (the “*Migliori Judgment*”) and the DOS Guidance, Bucks County voted to accept ballots within envelopes that did not contain a date handwritten by the elector. However, all of these envelopes did reflect a date and time stamp indicating when the ballot was received by Bucks County. Bucks County also voted to accept ballots within envelopes that did reflect a handwritten date, albeit a date that was out of the

expected range of April 22nd to May 17th.¹ Thereafter, these ballots were canvassed and scanned. The results were segregated. Specifically, the ballots at issue were counted and treated as a separate ‘election’ pursuant to Department of State instructions. Election results were provided to the Department of State, pursuant to their guidance, as two separate ‘elections’ – the election results without undated ballots and the election results with undated ballots.

III. ARGUMENT.

The Pennsylvania Constitution requires 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. This provision “mandates clearly and unambiguously, and in the broadest possible terms, that *all* elections conducted in this Commonwealth must be ‘free and equal.’” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018) (emphasis in original). It is “specifically intended to equalize the power of voters in our Commonwealth’s election process.” *Id.* at 812.

Although the Pennsylvania Election Code requires that voters date their mail-in ballots, it is “a well-settled principle of Pennsylvania election law that every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.” 25 Pa. Cons. Stat. §§ 3146.6(a) and 3150.16(a); *In re*

¹ The most common examples of this are ballots with what appears to be the voter’s date of birth or where the voter listed the wrong year.

Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058, 1071 (plurality op.) (cleaned up). Thus, “while constituting [a] technical violation[] of the Election Code,” *id.* at 1079, a failure to handwrite a date on the ballot’s outer envelope does not “implicate ... ‘weighty interests’ in the election process, like ballot confidentiality or fraud prevention,” *id.* at 1076 (citation omitted). This “minor irregularit[y] does “not warrant the wholesale disenfranchisement of,” “thousands of Pennsylvania voters.” *Id.* at 1079. As held by this Court, “the 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.” *See Appeal of James*, 105 A.2d 64, 66 (Pa. 1954). Any procedural mistakes on the elector’s behalf, are similar to the types of minor mistakes that Pennsylvania courts have held should not result in ballots being stricken. *See Shambach v. Bickhart*, 845 A.2d at 798-99 (Pa. 2004); *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972).

Bucks County submits that the Third Circuit’s *Migliori* Judgment is well reasoned. Although, as of the date of this filing, no opinion has been issued by the Third Circuit, the plain reading of the Judgment is that Pennsylvania’s dating requirement violates the Materiality Provision of the federal Civil Rights Act. 52 U.S.C. § 10101(2)(B). This provision states:

No person acting under color of state 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.

See 52 U.S.C. § 10101(2)(B).

Here, it is uncontested that the Bucks County electors at issue received and returned their ballots between April 22, 2022 and May 17, 2022 since we know when the ballots were mailed out by Bucks County, and on which date and at what time they were returned. Under no circumstances were mail-in ballots accepted after 8:00 p.m. on Primary Election Day, May 17, 2022. Similarly, Military and Overseas Civilian Ballots were only accepted if they were received by May 24, 2022 at 5:00 p.m. The inclusion of a handwritten date on the declaration envelope by the elector does nothing to reduce the potential for fraud and is irrelevant to the qualifications of the elector's eligibility to vote. Indeed, it is superfluous and immaterial to the individual's qualification to vote.

The ballots at issue belong to Bucks County voters and voters all over this Commonwealth who took the time to fill out a request for a mail-in or absentee ballot; received that ballot; filled that ballot out; included it within two envelopes; signed their names on the declaration affirming that they were voting in accordance with the law; and then returned that ballot in a timely way. Their only fault is simply

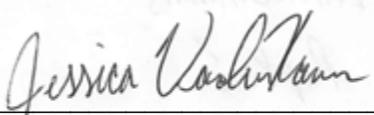
failing to note what day it was when they filled the ballot out. There is no logical or reasonable basis to invalidate these ballots on this basis.

Both electors and county boards of elections need clarity and finality as to the issue of whether declaration envelopes that do not reflect a handwritten date by the elector should be counted as a valid vote. Confidence and faith in our elections are critical to the health of our Commonwealth and uncertainty as to even the smallest of issues undermines that confidence.

For the foregoing reasons, the Bucks County Board of Elections respectfully requests this Court to GRANT the Petitioner's Application for Extraordinary Relief.

Date: May 26, 2022

Respectfully submitted,
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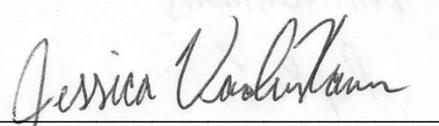
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As Secretary of the Commonwealth of	:
Pennsylvania, et al.,	:
	:
Respondents.	:

CERTIFICATE OF COMPLIANCE

I, Jessica L. VanderKam, certify that this filing complies with the provisions of the *Public Access Policy of the United Judicial System of Pennsylvania: Case Records of Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: May 26, 2022 By: 

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