

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioners,

v.

BERKS COUNTY BOARD OF ELECTIONS, et. al.,

Respondents.

No. 355 MD 2022

**APPLICATION FOR LEAVE TO FILE SUPPLEMENTAL
DECLARATION**

Petitioners, Acting Secretary of the Commonwealth Leigh M. Chapman and the Pennsylvania Department of State, seek leave to file the Declaration of Jonathan Marks, attached to this application as Petitioners' Exhibit 3, to supplement the record in this case. In support of this application, Petitioners state:

1. In their filings in this matter as well and in statements at the July 28, 2022, hearing, Petitioners stated that the only counties that did not include timely received undated ballots from qualified voters in their certified totals were Berks, Fayette, and Lancaster, the three respondents in this action. In addition, Jonathan Marks, Deputy Secretary for Elections and Commissions at the Pennsylvania Department of State, testified at the July 28 hearing that only those three counties

had not included timely received ballots from qualified voters that had failed to write a date on the return-envelope declaration.

2. Following the July 28 hearing, however, Counsel for the Fayette County Board of Elections notified Petitioners' counsel that the Butler County Board of Elections, which is not a party to this action, may not have included in the certified returns it submitted to the Department totals from timely received ballots cast by qualified voters that had failed to write a date on the return-envelope declaration.

3. The Department subsequently investigated the matter and determined that the Butler County Board of Elections had not included any such ballots in the certified returns it submitted to the Department, but that the Department inadvertently had not identified Butler County's failure to do so. Petitioners were not aware of this fact as of the July 28 hearing.

4. As a result, a total of four counties—the three respondent counties as well as Butler—did not include any timely received ballots cast by qualified voters that had failed to write a date on the return-envelope declaration in their certified totals, and Petitioners' prior statements to the effect that only the respondent counties had done so were not correct.

5. Petitioners apologize to the Court for this error.

6. On August 2, 2022, Petitioners submitted a letter informing the Court of this error and seeking to correct the record on this point.

7. Petitioners now seek leave to file the attached Declaration of Jonathan Marks, which contains additional information about the process the Department of State used to track which counties had failed to include timely received ballots cast by qualified voters that had failed to write a date on the return-envelope declaration in their certified totals and explains why Butler County was inadvertently missed. The declaration also discusses the steps the Department has taken since identifying this error to confirm that no other county excluded such ballots from its certified totals.

8. Additionally, Petitioners' August 2 letter stated that they "may take further action shortly with respect to Butler County if necessary." Petitioners respectfully inform the Court that, in light of the fact that the Acting Secretary has already certified races for districts that include all or part of Butler County, they do not intend to take further action with respect to Butler County.

9. All respondents have reserved the right to take a position on the requested relief until after reviewing this application.

WHEREFORE, Petitioners respectfully request that the Court grant this application and enter the attached Declaration of Jonathan Marks as part of the record in this action.

Dated: August 8, 2022

Respectfully submitted,

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Attorney General

Christine P. Sun (appearing *pro hac vice*)
Marina Eisner (appearing *pro hac vice*)
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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: August 8, 2022

/s/ Jacob B. Boyer

Jacob B. Boyer

Petitioners' Exhibit 3

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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 canvassing 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

A handwritten signature in black ink, appearing to read "Jonathan M. Marks", is written over a horizontal line.

Jonathan M. Marks
Deputy Secretary for Elections and Commissions
Pennsylvania Department of State