

IN THE SUPREME COURT OF PENNSYLVANIA

No. 102 MM 2022

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

Petitioners

v.

Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth, *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,¹ 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.

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.

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

c. 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,

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.”³

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

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); *Zicarelli 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 pre-canvass 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.”⁶ *Munsingwear*,

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 the 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 well-established 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

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 as “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

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 that because “[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”).¹⁵ 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

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

therefore is of no moment that Petitioners can identify a string of reasons 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).¹⁶ 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

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. Cmwth. Aug. 19, 2022); *McCormick for U.S. Senate v. Chapman*, No. 286 MD 2022, 2022 WL 2900112 (Pa. Cmwth. June 2, 2022); *but see In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, 272 A.3d 933, 2022 WL 96156 (Pa. Cmwth. Jan. 10, 2022); *Ritter v. Lehigh Cnty. Bd. of Elections*, 272 A.3d 989, 2022 WL 16577 (Pa. Cmwth. 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

Respectfully submitted,

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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

v.

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.

BERKS COUNTY BOARD OF ELECTIONS, et. al.,

Respondents.

No. 355 MD 2022

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,

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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

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 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.

Appendix page 1

Voter, sign or mark here (Required)

X

Today's Date (Required)

FOR COUNTY ELECTION USE ONLY

To be Completed by Voter Unable to 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 reason of my illness or physical disability. I have made or received assistance in making my mark in lieu of my signature.

Voter, mark here

X

Today's Date

Witness, address (street)

Witness, address (city, zip code)

Witness, sign here

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

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 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.

Appendix page

Voter, sign or mark here (Required)

X

Today's Date (Required)

FOR COUNTY ELECTION USE ONLY

To be Completed by Voter Unable to 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 reason of my illness or physical disability. I have made or received assistance in making my mark in lieu of my signature.

Voter, mark here

X

Today's Date

Witness, address (street)

Witness, address (city, zip code)

Witness, sign here

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

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



**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 mail-in 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 RETURN OF BALLOTS BY VOTERS

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.pa.gov/Pages/voterregistrationstatus.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>

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.

emergency

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/#/OnlineAbsenteeBegin>
may request a mail-in ballot

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

Option 1: Apply for a Mail Ballot Online	▼
Option 2: Apply for a Mail Ballot by mail	▼
Option 3: Apply at your county election board's office or other designated locations	▼

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/Pages/Annual-Mail-in-Voter-List.aspx)

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

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 pre-addressed 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

- [\(/Resources/Pages/Contact-Your-Election-Officials.aspx\)](/Resources/Pages/Contact-Your-Election-Officials.aspx)

or

other officially designated site

- (</Voting-in-PA/Pages/Return-Ballot.aspx>)
- Some counties are providing
 (</Voting-in-PA/Pages/Return-Ballot.aspx>)
drop-boxes 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.aspx>)
county election board 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)

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

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-Overseas-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 long-term 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

[request an Emergency Absentee Ballot](https://www.vote.pa.gov/Resources/Documents/PADOS_EmergencyAbsenteeBallotApplication_English.pdf)

(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_EmergencyAbsenteeBallotApplication_English.pdf)

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

[Authorized Representative for Emergency Absentee Ballot Form](#)

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

- https://www.vote.pa.gov/Resources/Documents/PADOS_AuthorizeRepresentativeforEmergencyAbsenteeBallot.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



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.

JOINT EXHIBIT 6

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

- 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 <jmarks@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.

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.

JOINT EXHIBIT 7

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 \(pottsmmerc.com\)](https://pottsmmerc.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 <jmarks@pa.gov>
Sent: Friday, June 17, 2022 9:08 AM
To: Marks, Jonathan <jmarks@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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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.

JOINT EXHIBIT 8

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 [Report Phishing button in Outlook](#).*

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

From: Marks, Jonathan
Sent: Friday, June 17, 2022 9:08 AM
To: Marks, Jonathan <jmarks@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 (jmathis@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: jmarks@pa.gov / Phone: (717) 783-2035*

JOINT EXHIBIT 9

From: Pfursich, Jacquelyn E <JEPfursich@co.lancaster.pa.us>
Sent: Monday, June 27, 2022 2:08 PM
To: Marks, Jonathan <jmarks@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 [Report Phishing button in Outlook](#).*

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 <jmarks@pa.gov>
Sent: Monday, June 27, 2022 12:17 PM
To: Marks, Jonathan <jmarks@pa.gov>
Subject: [EXTERNAL] FW: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals
Importance: High

Dear County Election Official,

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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 (jmathis@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 <jmarks@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.

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*Jonathan Marks
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401 North Office Building
Harrisburg, PA 17120
Email: jmarks@pa.gov / Phone: (717) 783-2035*

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JOINT EXHIBIT 10

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>; Ischaefter <Ischaefter@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: CLEinbach@CountyofBerks.com
Website: www.CountyofBerks.com



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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

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: 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.

JOINT EXHIBIT 11



**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL**

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,

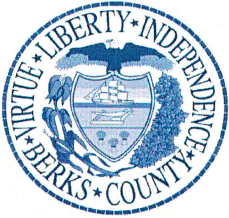


Timothy E. Gates
Chief Counsel
Pennsylvania Department of State

Cc:

Leigh M. Chapman, Acting Secretary

JOINT EXHIBIT 12



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

JOINT EXHIBIT 13

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
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 <JEPfursich@co.lancaster.pa.us>
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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JOINT EXHIBIT 14

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.

BERKS COUNTY BOARD OF ELECTIONS, et. al.,

Respondents.

No. 355 MD 2022

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
tking@dmkcg.com
Thomas E. Breth
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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

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 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.

Appendix page 99

Voter, sign or mark here (Required)

X

Today's Date (Required)

FOR COUNTY ELECTION USE ONLY

To be Completed by Voter Unable to 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 reason of my illness or physical disability. I have made or received assistance in making my mark in lieu of my signature.

Voter, mark here

X

Today's Date

Witness, address (street)

Witness, address (city, zip code)

Witness, sign here

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

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 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.

Appendix p 004

Voter, sign or mark here (Required)

X

Today's Date (Required)

FOR COUNTY ELECTION USE ONLY

To be Completed by Voter Unable to 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 reason of my illness or physical disability. I have made or received assistance in making my mark in lieu of my signature.

Voter, mark here

X

Today's Date

Witness, address (street)

Witness, address (city, zip code)

Witness, sign here

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

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



**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 mail-in 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 RETURN OF BALLOTS BY VOTERS

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.pa.gov/Pages/voterregistrationstatus.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>

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.

emergency

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/#/OnlineAbsenteeBegin>)
may request a mail-in ballot

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

Option 1: Apply for a Mail Ballot Online	▼
Option 2: Apply for a Mail Ballot by mail	▼
Option 3: Apply at your county election board's office or other designated locations	▼

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/Pages/Annual-Mail-in-Voter-List.aspx)

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

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 pre-addressed 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-Officials.aspx>)

or

other officially designated site

- [\(/Voting-in-PA/Pages/Return-Ballot.aspx\)](/Voting-in-PA/Pages/Return-Ballot.aspx)
- Some counties are providing [\(/Voting-in-PA/Pages/Return-Ballot.aspx\)](/Voting-in-PA/Pages/Return-Ballot.aspx) **drop-boxes** 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

[\(/Resources/Pages/Contact-Your-Election-Officials.aspx\)](/Resources/Pages/Contact-Your-Election-Officials.aspx) **county election board** or

other officially designated site

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

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

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-Overseas-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 long-term 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

[request an Emergency Absentee Ballot](https://www.vote.pa.gov/Resources/Documents/PADOS_EmergencyAbsenteeBallotApplication_English.pdf)

(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_EmergencyAbsenteeBallotApplication_English.pdf)

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

[Authorized Representative for Emergency Absentee Ballot Form](#)

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

- (https://www.vote.pa.gov/Resources/Documents/PADOS_AuthorizeRepresentativeforEmergencyAbsenteeBallot.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 7



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.

Appendix 8

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

- 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 <jmarks@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.

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 9

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 \(pottsmmerc.com\)](https://pottsmmerc.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 <jmarks@pa.gov>
Sent: Friday, June 17, 2022 9:08 AM
To: Marks, Jonathan <jmarks@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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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.

Appendix 10

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 [Report Phishing button in Outlook](#).*

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

From: Marks, Jonathan
Sent: Friday, June 17, 2022 9:08 AM
To: Marks, Jonathan <jmarks@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 (jmathis@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: jmarks@pa.gov / Phone: (717) 783-2035

Appendix 11

From: Pfursich, Jacquelyn E <JEPfursich@co.lancaster.pa.us>
Sent: Monday, June 27, 2022 2:08 PM
To: Marks, Jonathan <jmarks@pa.gov>
Cc: Miller, Christa <MChrista@co.lancaster.pa.us>
Subject: [External] FW: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals
Importance: High

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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 <jmarks@pa.gov>
Sent: Monday, June 27, 2022 12:17 PM
To: Marks, Jonathan <jmarks@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 (jmathis@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 <jmarks@pa.gov>
Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals
Importance: High

Dear County Election Official,

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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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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

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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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Appendix 12

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>; Ischafer <Ischafer@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: CLEinbach@CountyofBerks.com
Website: www.CountyofBerks.com



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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

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.

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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*

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

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Thank you.

Appendix 13



**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL**

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,

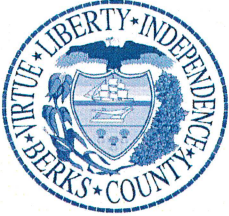


Timothy E. Gates
Chief Counsel
Pennsylvania Department of State

Cc:

Leigh M. Chapman, Acting Secretary

Appendix 14



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

Appendix 15

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
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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 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.

2 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
10 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
15 responsibility primarily is to certify the results of the
16 election upon receipt of the certified election returns
17 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.
22 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

1 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
15 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
22 totals from absentee and mail-in balloting which are done
23 centrally by the county Board of Elections.

24 So that precanvass that we have that begins on
25 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
12 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
15 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.

22 Q. Sir, I'd like to ask you specifically now about
23 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

1 Joint Exhibit Number 1 for
2 identification.)

3 THE WITNESS: Thank you.

4 BY MR. FISCHER:

5 Q. Sir, are you familiar with this document?

6 A. I am, yes.

7 Q. What is this document?

8 A. This is the declaration envelope template drafted
9 by the Department of State. A declaration envelope meaning
10 that outside envelope that the voter inserts their ballot
11 inside the secrecy envelope and they sign the declaration.

12 Q. Could you just explain again? You mentioned two
13 different envelopes. Could you just explain the function
14 of the two envelopes?

15 A. Sure. So the secrecy envelope or I believe the
16 statute identifies it as official ballot envelope is just a
17 plain envelope with the wording official election ballot on
18 it that the voter inserts their voted ballot into. The
19 declaration envelope then is the envelope that that inner
20 envelope, that secrecy envelope is inserted into, sealed,
21 and then signed by the elector. And that is then returned
22 to the county Board of Elections for canvassing.

23 Q. So what we're looking at as Joint Exhibit 1
24 appears on the outer envelope; is that your testimony?

25 A 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.

22 Q. How do counties determine whether mail-in and
23 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
13 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
19 birth date on there as they misunderstand what's being
20 requested or they'll put a date with the wrong year or the
21 wrong month.

22 Q. Outside those situations where the date is
23 obviously incorrect, do the counties have a mechanism of
24 verifying whether the date is accurate?

25 A. No, they do not.

1 Q. Now, earlier you testified about guidance issued
2 by the Department. Has the Department issued guidance
3 relating to undated ballots or wrongly dated ballots as you
4 describe them?

5 A. Yes. Since early June -- well, actually since
6 May 20th I believe when the Third Circuit ruled in the
7 Migliori case, we issued guidance to the counties at that
8 point indicating that the counties should -- well, sorry.
9 I want to make sure I get the timeline correct; but, yes,
10 we've issued guidance prior to the primary. We obviously
11 issued guidance subsequent to that in light of various
12 Court rulings.

13 Q. So let me drill down a little bit on that. First
14 of all, are you an attorney for the Department?

15 A. I am not, no.

16 Q. You had mentioned the Department issued guidance
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
20 voter lists his or her birth date?

21 A. It has been our guidance since I believe
22 September of 2020 that counties cannot and should not set
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 Q. And has the Department's guidance with respect to
2 wrongly dated ballots only changed over that time?

3 A. It has not.

4 Q. Now, with respect to undated ballots, has the
5 Department's guidance changed over time?

6 A. It has, yes.

7 Q. And what has prompted those changes?

8 A. Rulings by the Court, this Court as well as the
9 Third Circuit.

10 Q. So leading up to the May, 2022 primary, what was
11 the Department's guidance with respect to undated ballots?

12 A. It was the Department's guidance leading up to
13 the May, 2022 primary that those ballots could not be
14 counted and based on our analysis of the 2020 decision by
15 the Pennsylvania Supreme Court.

16 Q. I'm going to hand you what's been marked as Joint
17 Exhibit 6.

18 (Whereupon, the document was marked as
19 Joint Exhibit Number 6 for
20 identification.)

21 THE WITNESS: Thank you.

22 Your Honor, is my volume okay? I tried to

23 --

24 JUDGE COHN JUBELIRER: I think so. Thank
25 you.

1 Any problem?

2 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
16 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
22 all county Boards of Elections, June 17th e-mail.

23 Q. Thank you for that clarification. What is the
24 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
2 other events in between that led to the Department's
3 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
15 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 Q. 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
12 Joint Exhibit Number 11 for
13 identification.)

14 BY MR. FISCHER:

15 Q. Have you seen this document before?

16 A. I have, yes.

17 Q. And what is the date on this letter?

18 A. This letter is dated June 29th of 2022.

19 Q. And who is it sent from?

20 A. It's sent by Chief Counsel of the Department of
21 State, Timothy Gates.

22 Q. Now, the letter is directed to the Director of
23 the Berks County Election Services. Do you recall if this
24 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
6 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
15 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
21 Joint Exhibit Number 8 for
22 identification.)

23 BY MR. FISCHER:

24 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
15 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
23 responding to which begins on the bottom of the first page
24 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
10 from those counties a certification per my original request
11 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
15 Joint Exhibit Number 9 for
16 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.

25 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
10 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
14 Joint Exhibit Number 10 for
15 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.

23 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
11 Joint Exhibit Number 12 for
12 identification.)

13 BY MR. FISCHER:

14 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 Q. 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.

2 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
11 Joint Exhibit Number 13 for
12 identification.)

13 BY MR. FISCHER:

14 Q. Have you seen this e-mail before?

15 A. Are you referring to the July 5th, 4:17 p.m.?

16 Q. Yes, that's correct.

17 A. I have, yes.

18 Q. And is it fair to say Ms. Pfursich is reiterating
19 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.

22 Q. Now, finally I'd like to direct you to Joint
23 Exhibit 14.

24 (Whereupon, the document was marked as
25 Joint Exhibit Number 14 for

1 identification.)

2 BY MR. FISCHER:

3 Q. This is an e-mail from Mr. Gates to Ms. Kuznik.

4 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
10 in this e-mail?

11 A. Following up again. Please advise on your
12 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
18 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.

22 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
4 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
15 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 Q. In the Department's view have those three
22 counties complied with their obligation to certify the
23 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
2 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,
11 it is your understanding that undated ballots were not
12 included?

13 A. That is correct. Yes.

14 Q. Thank you.

15 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?

19 MR. BUKOWSKI: I'll go first, Your Honor.

20 JUDGE COHN JUBELIRER: Okay. And if you can
21 either come up here or --

22 MR. BUKOWSKI: I'll come up.

23 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
16 paper.

17 Q. Okay. Take your time.

18 A. I have it. You're referring to this
19 (indicating) --

20 Q. Yes.

21 A. -- ballot envelope template?

22 Q. And that's the form of voter declaration on the
23 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
14 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
22 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.

2 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
23 polling place; is that right?

24 A. To be voided to the Judge of Elections at my
25 polling place.

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
12 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
20 the date is not required.

21 Q. And there's nothing -- and the date in question
22 says pretty plainly, you would agree, wouldn't you, it's
23 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

1 following year, so I understand how it happens.

2 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.
15 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.

19 MR. BUKOWSKI: Do you have that?

20 MR. BOYER: These are all the exhibits.

21 (Documents handed to Mr. Bukowski.)

22 MR. BUKOWSKI: Here's a set of all 14 so
23 I'll direct you. Here you go.

24 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
15 Joint Exhibit Number 3 for
16 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
25 3, let me know when you're there.

1 A. I am there.

2 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 prec canvass 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
19 be opened in such a manner as not to destroy the
20 declarations executed thereon; is that right?

21 A. That's correct.

22 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
19 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
22 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

1 shouldn't.

2 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
13 the Third Circuit's ruling in Migliori.

14 Q. And the Department believes that that guidance is
15 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.

19 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
23 think that might be in the binder if you had a binder. I
24 think the first correspondence from --

25 A. It might be --

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
15 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.

22 Q. Okay. But prior to that on June 6th, June 7th,
23 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 Q. 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.

22 Q. Okay. So for example?

23 A. Some congressional districts, some senatorial,
24 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
12 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.

12 MR. BUKOWSKI: But the stipulated facts,
13 Your Honor, do say that Lancaster submitted certified
14 results on June 6th, 2022. Berks did a partial
15 certification on June 6th, 2022. It had another issue
16 regarding provisional ballots. Berks later submitted
17 certified results, updated certified results that included
18 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:

22 Q. So Berks was the last of those three to certify,
23 and there's no issue of timeliness in this case. As of
24 June 8th, 2022, you would agree the Third Circuit's order
25 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
7 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
13 e-mail says?

14 A. Correct.

15 Q. 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;
18 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
22 she had received on June 6th, 7th, and 8th; isn't that
23 right, within two days?

24 A. Up until that point, no.

25 Q. Okay. Would you describe your e-mail to the

1 county boards a directive?

2 A. I don't know that I would describe it as a
3 directive. Again, though, I believe that it is, you know,
4 it was our determination, the Department's determination
5 that, you know, based on the case law counties had a duty
6 to certify results that included vote totals from undated
7 ballots and that failing to do so essentially would in
8 effect mean that the counties have not completed their
9 statutory duty to certify vote totals from all legally cast
10 ballots.

11 And it's my layman's, probably not the most
12 articulate but that's --

13 Q. No, that's fine. And does the Department and the
14 Acting Secretary leave room for any reasonable disagreement
15 as to the state of the law on certification of undated
16 ballots as of, you know, the deadline for this election?

17 A. No. Again I think our position is that without
18 including those vote totals from undated ballots which this
19 Court had previously asked counties to tabulate, segregate
20 and tabulate, tabulate, that without including those that
21 the certification was not complete, that all legally cast
22 ballots in this case would not be counted, you know. So
23 that's really our position that the certification is
24 incomplete in light of the case law.

25 Q. And you're aware that the June 2nd, 2022 order

1 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
11 which was Joint Exhibit 6, you received responses from all
12 three of these counties, Fayette, Lancaster, and Berks;
13 isn't that right?

14 A. Yes.

15 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,
22 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
21 June or June 17th e-mail, and his response is dated June
22 28th, 2022, at 12:32 p.m.?

23 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

1 guidance. The last sentence of Mr. Leinbach's e-mail says
2 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
11 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 Q. 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,
19 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
25 a summary of why the Department believed that that was the,

1 you know, the mandate from the Courts.

2 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 Q. Okay. So you knew I guess for the second time
21 the Department was aware that Berks and Lancaster were not
22 going to comply because they told Mr. Gates, Attorney Gates
23 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.

2 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
12 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
21 Joint Exhibit Number 5 for
22 identification.)

23 BY MR. BUKOWSKI:

24 Q. And at that point this Court had not issued its
25 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
21 opposed to the courts of common pleas?

22 A. I am familiar with that. I don't have a copy in
23 front of me, but I do recall that; and we circulated that
24 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
15 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 Q. Okay.

21 MR. BUKOWSKI: That's all I have for Mr.
22 Marks at this time. Thank you very much, sir.

23 THE WITNESS: Thank you.

24 JUDGE COHN JUBELIRER: Thank you.

25 MR. KING: Thank you, Your Honor. May it

1 please the Court.

2 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
15 Commonwealth. You've spent many, many years in the Bureau
16 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
23 this because we had this discussion about whether you're a
24 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
13 of Common Pleas where Mr. Breth examined you a couple weeks
14 ago --

15 A. Yes.

16 Q. -- 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
19 made its way to the United States Supreme Court at some
20 point; is that true?

21 A. That's correct. Yes.

22 Q. All right.

23 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
12 working for the Department of State.

13 Q. Oh, you did?

14 A. So prior to -- yes. Prior to that I was working
15 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
22 the Division of SURE, the Statewide Registry, then the
23 Commissioner of the Bureau of Elections, and ultimately
24 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
2 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
15 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
23 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.

15 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.

22 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 Hanglely 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
12 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
15 with counsel. Certainly that's protected by
16 attorney-client privilege here. As Mr. Marks has
17 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:

23 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
12 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
15 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, Zicarelli
19 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
23 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?

3 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
10 it is that was shown to him?

11 MR. KING: It's the verification to the
12 complaint -- to the petition.

13 MR. FISCHER: Thank you.

14 BY MR. KING:

15 Q. So you're the person who verified the petition in
16 this instance, correct?

17 A. Correct.

18 Q. So would you tell the Court the petition
19 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
22 action we believe is -- that the entity is duty-bound to
23 do.

24 Q. Or mandate, correct?

25 A. Mandate, correct.

1 Q. You want to force these three counties that are
2 here in the courtroom, you want to force them to do
3 something, correct?

4 A. Again, I'm not counsel but my understanding of
5 mandamus is that the person who brings the action believes
6 that that entity has failed to do some duty that they're
7 mandated to do and that's why they come before the Court.

8 Q. When is the last time that you're aware of that
9 the Department brought an action to mandate any county
10 Board of Elections?

11 A. It has been a very long time. I believe there
12 was one occasion and do not ask me to tell you what the
13 case was. I believe Allegheny County had to -- no. I'm
14 sorry. I'm wrong about that actually. Allegheny County
15 filed a mandamus against the Secretary asking that the
16 Secretary at that time accept an amended certification of
17 election results.

18 I don't recall at least in my tenure at the
19 Department that the Department pursued a mandamus against a
20 county.

21 Q. Well, let me ask you this. You want to order
22 these folks, these Commissioners to do several things I
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 --
11 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 Q. 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
19 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
22 they've already certified the election in their counties.
23 Where does it say that in the statute?

24 MR. FISCHER: Objection, Your Honor. This
25 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

1 opinion as well I guess based on his experience as to
2 whether he's aware of a section or --

3 MR. FISCHER: If he just testifies as a fact
4 witness about his awareness, I would be okay. I don't
5 think he's giving opinion testimony frankly on anything.

6 JUDGE COHN JUBELIRER: Right. I don't think
7 he was qualified as an expert, and that would anyway be a
8 little questionable with regard to legal opinions. We
9 don't typically have those offered as testimony.

10 MR. KING: I'm just asking, Your Honor, if
11 he knows. I'm asking what -- we're here in front of Your
12 Honor. We're taking up a lot of your time today. You
13 followed a very difficult case we've all followed in the
14 news yesterday. So we appreciate the fact that you're with
15 us today.

16 But the question for him is what's the basis
17 for this action? What is the basis? He's the person who
18 signed the complaint. He's involved in these discussions.
19 He said that. He's a truthful man. He'll answer it
20 truthfully to us.

21 MR. FISCHER: Again, sorry. Mr. King is
22 trying to ask him a legal question. I'm sorry. That is a
23 purely a legal question.

24 JUDGE COHN JUBELIRER: Right, and we don't
25 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.

3 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
13 what she's doing in this case?

14 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 --

23 MR. KING: If you don't mind, Your Honor,
24 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.

23 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

1 think is --

2 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 --

9 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
15 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
22 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
2 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
11 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
22 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

1 don't need to prolong.

2 JUDGE COHN JUBELIRER: Yes. Thank you.

3 MR. KING: I'll withdraw it but I do like
4 the hockey analogy.

5 THE WITNESS: Are you wearing an orange and
6 black tie because you're a Flyers fan or --

7 MR. KING: My son played professional hockey
8 so I'm a big fan. No, I'm a Penguins fan.

9 BY MR. KING:

10 Q. So when you do certify the election, then what do
11 you do with that?

12 A. In the case of a primary, you know, we don't
13 certify it necessarily to any individual or body. It
14 essentially -- you know, the Secretary will put her
15 signature and seal on the official results and that becomes
16 the, you know, official list of nominees for the November
17 election.

18 In the case of a November election, once the
19 Secretary certifies, there are documents that have to be
20 certified to whether it's the Governor or the legislature,
21 you know, those have to be certified to certain individuals
22 or bodies so that they can swear in their members.

23 Q. 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 Zicarelli 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 Zicarelli case in federal court.

13 MR. KING: It's part of the papers that we
14 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.)

22 MR. KING: Are you with me on this one?

23 Do you gentlemen know where --

24 MR. FISCHER: Yes.

25 MR. KING: Thank you.

1 MR. FISCHER: Could you clarify, Mr. King,
2 what page you're on?

3 MR. KING: Sure.

4 Can I see that for a minute, Mr. Marks?

5 THE WITNESS: Sure.

6 MR. KING: I'm at what's marked Exhibit D
7 and it doesn't look like Mr. Wiygul -- yes, he did. It's
8 page 5 of the Memorandum of Law in Support of the Motion of
9 Secretary of the Commonwealth of Pennsylvania, Kathy
10 Boockvar, to Dismiss the Amended Complaint or, in the
11 Alternative, to Grant Summary Judgment. It's in the United
12 States District Court, Your Honor, in Pittsburgh, in the
13 Western District.

14 (Whereupon, the document was marked as
15 Fayette Exhibit Number D for
16 identification.)

17 BY MR. KING:

18 Q. Would you look at the second paragraph, second
19 full paragraph of your brief?

20 A. The paragraph that begins with the Election Code
21 also gives?

22 Q. Could you read that into the record for me,
23 please.

24 A. Sure. The Election Code also gives the Secretary
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

1 November 3rd, 2020 General Election.

2 Q. Thank you. So what you just read was the brief
3 filed by your own lawyers, correct?

4 A. That's correct. Yes.

5 Q. You're aware that the Secretary has no such
6 powers, aren't you?

7 MR. FISCHER: Objection.

8 JUDGE COHN JUBELIRER: Yes, I think --

9 MR. KING: He's the affiant, Your Honor.

10 He's the affiant to this complaint. The whole case depends
11 on whether the Secretary has such powers. He's the person
12 bringing this case.

13 JUDGE COHN JUBELIRER: Counsel?

14 MR. FISCHER: He is not the person bringing
15 the case, and also he verified the facts. The law is for
16 the Court to ultimately decide, and his opinion simply
17 isn't relevant.

18 MR. KING: Your Honor?

19 JUDGE COHN JUBELIRER: Yes.

20 MR. KING: I'm sorry.

21 JUDGE COHN JUBELIRER: No, go ahead.

22 MR. KING: A person appearing before Your
23 Honor needs to come in here and say whether they believe
24 that the law provides for what they're telling the Court it
25 ought to do. This gentleman --

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
10 section in the Code and there's a 20-day section, correct?

11 MR. FISCHER: I'll object. That asks for a
12 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.

20 MR. KING: Thank you.

21 THE WITNESS: I believe the two-day that
22 you're referencing is -- there is a provision wherein an
23 individual who is aggrieved by a determination made by the
24 Board of Elections can appeal that determination to the
25 appropriate court of common pleas.

1 BY MR. KING:

2 Q. All right. So the two-day you're not aware of
3 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
14 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
23 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

1 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
15 of Elections matches what was entered into the database.

16 Q. 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
19 inputted into the system, yes, that's what would happen.
20 That's what our staff would do.

21 Q. What you want to do here I think -- you tell me
22 if I'm wrong -- is you want to ask the Court to ask, to
23 tell these counties, to mandate these counties to recertify
24 these elections because they've already certified them
25 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
11 this courtroom today. We do not believe that these three
12 counties have completed certification, and that's really
13 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
22 of this argument.

23 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
22 not necessarily come to the Department of State.

23 Q. You mentioned guidance, and the stipulated facts
24 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?

15 MR. FISCHER: Objection, Your Honor. This
16 is legal territory again, and it's simply not relevant to
17 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
22 Deputy Secretary so it's important that he knows. He knows
23 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

1 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 Zicarelli 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 Q. 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.

23 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
14 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
18 certainly is the power of the Board of Elections to make
19 those determinations, and they're subject to judicial
20 review.

21 Q. And that judicial review -- so you went through
22 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

1 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?

6 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
15 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.

22 MR. KING: If I might, Your Honor?

23 THE WITNESS: -- certainly subsequent to the
24 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
14 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.

2 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 --

15 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
19 relevant in making that determination. It's the date that
20 the county receives the ballot from the voter that is
21 relevant.

22 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.

9 JUDGE COHN JUBELIRER: I'm going to -- is
10 there --

11 MR. KING: I'll be brief.

12 JUDGE COHN JUBELIRER: Okay. I'm going to
13 allow him to answer this --

14 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
19 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
13 for speculation. That has nothing --

14 MR. KING: He said he knows reasons why.

15 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
22 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,

1 though, is the relevant piece of information. It's the
2 date when the person is deceased.

3 Q. Well, in McCormick --

4 A. It's the date of the election that is relevant.

5 Q. Yes. In the McCormick case, people argued to
6 Judge Cohn Jubelirer about this whether it was important or
7 not. So what you're talking about is you're going to know
8 whether somebody died or not as of Election Day, right?

9 A. Yes.

10 Q. But you're not going to know when that person
11 allegedly voted because we now have mail-in ballots that
12 get mailed in and they come in at various times before the
13 election. So in the case that I'm talking about out of
14 Lancaster County -- and I believe there's another one if
15 I'm not mistaken -- the date on the envelope was critically
16 important to determine whether the person was alive at the
17 time the ballot was cast. Not as of Election Day but when
18 the ballot was cast the date was significant, correct?

19 MR. FISCHER: Objection. I don't think
20 there's been any foundation established that this witness
21 knows the details of these cases.

22 MR. KING: I think he said he did.

23 MR. FISCHER: He said he's familiar with it
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
14 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
24 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
2 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
10 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
15 the offices, but there's no ballot form that you distribute
16 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.

22 Q. Do you remember the Parnell case, Sean Parnell
23 case involving the --

24 A. I do.

25 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 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 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
19 definition of, quote, partial certification within the, end
20 of quote, 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
24 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
12 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.

18 I'm finished, Your Honor. Thank you.

19 JUDGE COHN JUBELIRER: Thank you very much,
20 counsel.

21 MR. FISCHER: Thank you, Your Honor.

22 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
2 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
23 I pick up the phone and I try to talk through it. You
24 know, certainly, you know, when we're sending guidance out
25 to all the counties I'll e-mail that guidance, you know,

1 and deliver it that way. But, you know, typically if
2 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.

15 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 Q. How many did in the end?

21 A. Sixty-four.

22 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

1 of counties who had not yet done that.

2 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
13 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
18 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.

6 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
14 should certify it or not -- I beg your pardon -- whether
15 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.

20 JUDGE COHN JUBELIRER: Yes. I think I
21 allowed you considerable latitude to ask him about his
22 opinion or let me say his --

23 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
6 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.

10 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
14 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.

23 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

1 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
11 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
20 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 Q. 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
24 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

14 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?

24 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.

2 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
12 to a microphone?

13 BY MR. BUKOWSKI:

14 Q. -- the 64 counties who had complied and you used
15 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
22 that, you know, requires them to follow the Secretary's
23 interpretation of the cases; isn't that right?

24 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
12 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
21 and certify?

22 A. You know, my layman's understanding, there is.
23 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
15 of the other.

16 Q. I understand the chicken and the egg story, but
17 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:

1 Q. So, Mr. Marks, with respect to this question of
2 certification versus canvass, would you just tell us when
3 the counties canvass the ballots, what is the process?
4 What do they do?

5 A. Well, the counties -- I went into a little bit
6 earlier in my testimony -- but the counties will receive
7 the precinct-level results on election night; and when the
8 official canvass begins on Friday, they'll review all of
9 those results, compile those results. They also add to
10 those the results from the prec canvass and the canvass of
11 absentee and mail-in ballots.

12 The canvass also includes the adjudication of
13 provisional ballots and also a second canvass where they
14 canvass military and overseas ballots, so that entire
15 process where the county is reviewing and either reviewing
16 returns submitted by precinct election officials or
17 reviewing the tabulation that they've done centrally of
18 absentee and mail-in ballots as well as provisional
19 ballots.

20 Q And then the certification requires the calling
21 of a public meeting and then there's a vote to certify,
22 correct?

23 A. Correct. Yes.

24 Q. All right. So and we were talking earlier of the
25 two separate things that occur?

1 A. Correct. Yes.

2 Q. All right.

3 MR. KING: I think that's all, Your Honor.

4 Thank you very much.

5 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

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.

14 MR. HOLLAND: Please raise your right hand.

15 Whereupon,

16 SCOTT DUNN,

17 having been duly sworn, testified as follows.

18 MR. HOLLAND: Please be seated.

19 DIRECT EXAMINATION (as on Cross)

20 BY MR. FISCHER:

21 Q. 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.

3 MR. KING: I think that's all, Your Honor.
4 Thank you very much.

5 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
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.

14 MR. HOLLAND: Please raise your right hand.
15 Whereupon,

16 SCOTT DUNN,
17 having been duly sworn, testified as follows.

18 MR. HOLLAND: Please be seated.

19 DIRECT EXAMINATION (as on Cross)

20 BY MR. FISCHER:

21 Q. 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.

1 Q. And as a result of that position, do you have
2 certain responsibilities with respect to the management of
3 elections in Fayette County?

4 A. Yes. I serve on the Board of Elections, and we
5 as Commissioners oversee the Election Bureau.

6 Q. And do you have any specific role on the Board of
7 Elections?

8 A. As far as?

9 Q. Chair? Vice-chair?

10 A. I think I'm the Secretary.

11 Q. Okay. Thank you. And could you briefly explain
12 the boards's role in the administration of elections in
13 Fayette County?

14 A. We're an overseer of the department. We have a
15 department head. Our Election Director, Marybeth Kuznik,
16 and she oversees all facets of the election including the
17 applications for mail-in ballots, sending out the mail-in
18 ballots, receiving the mail-in ballots, training poll
19 workers for the day-of operations.

20 Making sure that all of the equipment is prepared
21 and certified to go out to our 77 precincts, making sure
22 that all the equipment is delivered in a timely fashion,
23 set up, ready to go, and that the ballots are prepared in
24 such a way that they will -- there's a logic testing that
25 they make sure all the ballots are prepared that will be

1 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
13 is or is not counted?

14 A. We do have a meeting one week after the election
15 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
19 would be in charge of that as well; but at this point I've
20 never had that happen, just the provisional aspect.

21 Q. And if there is a challenge to a provisional
22 ballot, the board resolves those in the first instance;
23 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.

15 Q. And the board tries to comply with all relevant
16 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.
22 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.

2 Q. So if a voter drops it in the mail at 7:00 p.m.
3 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
15 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 Q. And do you also enter information about the
21 ballots -- I'm sorry. Let me withdraw that. Do the
22 election administrators, 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
12 on the outer envelope but otherwise signed and otherwise
13 complied with the Election Code as far as --

14 MR. FISCHER: Can I use that phrase?

15 MR. KING: That's fine.

16 BY MR. FISCHER:

17 Q. -- Fayette County did not include undated ballots
18 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
15 was not one that was omitted.

16 A. Okay.

17 Q. Are you aware that on June 2nd this Court entered
18 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

1 decide how to proceed from there.

2 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
10 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
15 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
18 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
23 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

1 that's where it started. So actually it started before the
2 June 2nd date. It started May 24th with this guidance that
3 said, you know, submit and we will tell you the next steps.

4 Q. At that meeting you just discussed, did the board
5 take a vote on this question?

6 A. We did not. The meeting was adjourned, and we
7 never reconvened a meeting of the board of election to take
8 up this matter.

9 Q. So even after this Court issued its order on June
10 2nd, you did not reconvene the board to address its
11 implications?

12 A. No. Our opinion --

13 MR. KING: Your Honor, this is beyond the
14 proffer. The proffer is pretty simple what the Attorney
15 General said they were going to ask this witness about.
16 And because I was granted great latitude, I've let this go
17 somewhat.

18 But at page 2 of the proffer the county
19 commissioner witnesses will be questioned about the
20 Respondent board's practices for the 2022 general primary
21 election with respect to determining the timeliness of an
22 absentee or mail-in ballot with respect to recording the
23 date that absentee and mail-in ballots are received and
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
12 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
14 votes should not count; and that's kind of where I was
15 going.

16 As a Commissioner and as a member of the board of
17 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
22 saying do another thing or, you know, the Constitution
23 doesn't even cover mail-in ballots. Act 77 says one thing.

24 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
14 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.

22 Q. So I'm not sure whether -- I think Berks was 6
23 and Fayette was 7 and Lancaster was 8. Of course, I have
24 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.

Appendix 19

1 MR. HOLLAND: Please raise your right hand.

2 Whereupon,

3 RAY D'AGOSTINO,

4 having been duly sworn, testified as follows.

5 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.

23 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
20 absentee and mail-in ballots is 8:00 p.m. on Election Day?

21 A. Correct.

22 Q. And does Lancaster County time-stamp ballots when
23 they are received?

24 A. We do time-stamp ballots.

25 Q. And do you use that time stamp to determine

1 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.

14 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 Q. 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
12 is material, that it could go to the validity and
13 authenticity of the ballot received. And so depending on
14 the date, it may be set aside for further research and
15 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
23 case that we did not count the ballot because of the date.
24 It was determined -- it was found out that the voter fraud
25 occurred because of that date.

1 Q. Explain to me the circumstances of that voter
2 fraud case.

3 A. Sure. So we received mail ballots or absentee
4 ballots. When I say mail ballots, I mean absentee and no
5 excuse mail ballots. We receive them. They are
6 date-stamped and then they are scanned to go into the SURE
7 system.

8 In this one case it happened to be our Chief
9 Clerk of the Board of Elections that scanned this
10 particular ballot that came in the outer envelope, the
11 declaration; and the SURE system popped up and said that
12 the person was deceased. Our Chief Clerk put that aside to
13 then look at later; and when the Chief Clerk looked at it
14 again, realized that the date that someone put on that
15 declaration was a date after the person had died.

16 And so at that point she did more research and
17 actually pulled up the obituary and found out that person
18 was deceased, referred it to our District Attorney's
19 office. Our District Attorney's office is now prosecuting
20 that person and that person has admitted to voter fraud.

21 Q. So in that case it led to a criminal
22 investigation, correct?

23 A. That is correct.

24 Q. But it did not affect whether you counted that
25 ballot, correct?

1 A. Not that one but there can be instances where it
2 could be. So, for instance, if it was a person who moved
3 and is alive, we may not count that ballot because we've
4 determined that the date is different than the date they
5 may have moved out. So it is material to us, and we do
6 treat it as such.

7 The plain language of the law says that obviously
8 if -- I say obviously -- that if there's no date, you set
9 them aside. We treat those that have dates as potentially
10 ones that can be processed; but depending on the date
11 that's put in there, it may not be.

12 Q. So just so I understand, Lancaster County
13 election officials review every date on every mail-in
14 ballot that you receive?

15 A. There's instances where it depends on whether the
16 date looks to be something that makes sense like within the
17 time period of the election. It might cause our staff to
18 then take another look.

19 Q. But just to clarify my question was, you look at
20 every date on every mail-in ballot; is that correct?

21 A. I'm not the one that does it, but I understand
22 the staff does take it seriously. It does look at the
23 dates, but I can't say for certain whether every single
24 one.

25 Q. And with respect to a voter who moves, is it your

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.

14 Q. So you testified that a voter could move before
15 Election Day, and you could use the date to determine
16 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
14 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
18 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.

23 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
15 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 Q. 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
15 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 Q. Good afternoon, Mr. D'Agostino. The case of the
22 voter fraud that you were referring to, is that the case
23 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

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 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
13 dates that may or may not be correct, those are subject to
14 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 Q. 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
23 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

1 State?

2 A. Yes.

3 Q. And I think you said that the dates -- the
4 undated ballots are not counted; is that right?

5 A. That is correct.

6 Q. And why is that?

7 A. Again, the plain reading of the language of the
8 Code, the Election Code is that it should not be counted.

9 Q. As a member of the Lancaster --

10 MR. FISCHER: I have an objection. This is
11 a legal opinion. I mean if that's his understanding,
12 that's fine. But that's --

13 JUDGE COHN JUBELIRER: And thank you for the
14 clarification.

15 I don't think you intended to ask him for
16 his legal opinion.

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
20 wasn't trying to elicit a legal opinion. We'll save that
21 for argument.

22 MR. FISCHER: Your Honor?

23 THE WITNESS: I would say, though, that as
24 my role as a Board of Commissioner and Board of Elections
25 member that I can be called upon to interpret the Code.

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.

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
21 give you the numbers.

22 A. I don't know the breakdown. I'm pretty sure it
23 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.

2 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
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.

22 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
6 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.

9 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
19 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.

23 Q. So that's two weeks before the date the ballot
24 was received?

25 A. Correct.

1 Q. Christa Miller said this was confirmed by an
2 obituary and records for the Department of Health. She
3 said Teresa J. Mihaliak was removed from the voter rolls on
4 April 25th, 2022; is that correct?

5 A. That's correct.

6 MR. FISCHER: Nothing further, Your Honor.

7 MR. BUKOWSKI: I just have one brief
8 redirect based on Mr. King's question which was Mr.
9 D'Agostino because I wasn't sure if your answer included
10 this.

11 RE-CROSS-EXAMINATION (as on Further Redirect)

12 BY MR. BUKOWSKI:

13 Q. As you know, the Secretary has refused to certify
14 the statewide election results that include votes from
15 Berks, Lancaster, and Fayette Counties. Do you have an
16 understanding of whether any of those elections would be
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 undated 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 MR. BUKOWSKI: That's all I have.

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

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.

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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

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
19 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.

23 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
11 and mail-in ballots must be received by the county in order
12 to be counted in an election?

13 A. 8:00 p.m. on Election Day with the exception of
14 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
19 members and their families, will the county board receive
20 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
12 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
19 disqualify that ballot based on the date that's written?

20 A. Absolutely not.

21 Q. Okay. Would you investigate what the voter meant
22 by May 10th meaning, for example, would you have any means
23 to determine if the voter who wrote May 10th, in fact,
24 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.

2 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
11 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.

22 Q. Okay. I don't believe I asked you. When Berks
23 receives absentee or mail-in ballots, does it date-stamp
24 the outer envelope to indicate when that ballot was
25 received?

1 A. There are two ways that it can be determined
2 relative to date. One is the outer envelope of the ballot
3 has a unique bar code unique to the election and unique to
4 Berks County. If someone uses some other or an older outer
5 envelope, it will not be accepted. That is the first test
6 of timeliness. It only relates to that election.

7 When it's received in the office, whether from a
8 drop box, from the mail, or by the voters themselves, it is
9 dated and time-stamped upon receipt.

10 Q. Sorry. I want to make sure I understand the
11 first part of your answer. With respect to the scanning,
12 is what you're saying the bar code that appears on the
13 return envelope is scanned upon the county's receipt of the
14 envelope?

15 A. It is and it is unique to that specific election
16 and to Berks County.

17 Q. 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 A. It does and it also generates information to the
21 voter. So when it is scanned in, it notifies the system
22 that the absentee and/or mail-in ballot has been received;
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

1 if it's not signed that it's not signed letting them know
2 that that is the case.

3 Q. Okay. And is one of the pieces of information
4 that appears after the envelope is scanned the date on
5 which the ballot was received?

6 A. Please repeat that question.

7 Q. Certainly. Yes. You said that scanning the
8 ballot or, excuse me, scanning the return envelope, the
9 unique bar code on the return envelope generates certain
10 information. Is one piece of information generated by --

11 A. It does not gener -- that is a manual process.
12 So when the ballots are received in the election office,
13 the first thing that happens is they're viewed. If there's
14 a missing date or a missing signature, they are set aside.
15 If everything is there, they are immediately scanned. The
16 ones that are missing -- into SURE. The ones that are --
17 and I might add when they're scanned into SURE, they look
18 again. So that's a second look to make sure they're signed
19 and dated. If they are signed and dated, they go into the
20 SURE system.

21 If for some reason, there's a third check
22 and that's precanvassing that begins on 7:00 a.m. on
23 Election Day. As part of the precanvassing process in
24 Berks County, before they are opened they're determined
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
2 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
11 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;
14 is that correct?

15 A. It did not.

16 Q. 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.

22 Q. Why does Berks County and the Berks County Board
23 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
14 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.

22 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
15 belief that there's an incorrect date on the ballot, how
16 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
19 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
22 determination, and if not that would come before the Board
23 of Elections to adjudicate.

24 Q. And in the May, 2022 primary election, were any
25 absentee or mail-in ballots submitted to the Board of

1 Elections of Berks County to be adjudicated where the date
2 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
12 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.

15 I don't have the discretion to determine whether
16 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
22 respect to handling either of the issues adjudicated by the
23 board?

24 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
10 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
24 votes from undated ballots?

25 A. There was no mention of certification at all.

1 Q. Okay. You're aware that the Third Circuit Court
2 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
10 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
15 three different pieces of communication that I'm familiar
16 with but basically directed the county to recertify the
17 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 Q. -- in some e-mails? And, in fact, one of those
22 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.

3 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

15 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

19 directs us to send those certified vote totals by a certain

20 date.

21 And at the bottom it says, as noted in my

22 original e-mail, please send copies of your certifications

23 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
17 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
20 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

1 Department of State the letter from Attorney Gates dated
2 June 29th, 2022, addressed to the Berks County Director of
3 Elections Services, Paige Riegner?

4 A. That is correct.

5 Q. And that is what is marked as Joint Exhibit 11,
6 correct?

7 A. That is correct.

8 Q. After receiving the June 29th letter from
9 Attorney Gates and your exchange with Mr. Marks, did the
10 Berks County Board of Elections have another meeting?

11 A. We did on July the 1st.

12 Q. What happened at that meeting?

13 A. Well, I did my best to get additional information
14 prior to any vote on this important decision. I did not
15 receive a response from Jonathan Marks. The only response
16 was, as noted, from counsel for the Department of State.
17 And so at that meeting I reiterated my clear reading of the
18 current statute that ballots, outer envelopes of the
19 ballots that are either undated or not signed shall not be
20 counted.

21 And I also noted that the two decisions cited,
22 neither one of them dealt with certification. Both of them
23 occurred -- the one where we abided by the Commonwealth
24 Court, this Court, we did exactly what the Court asked us
25 to do. And based on the lack of clear judicial guidance

1 and the plain language of the statute, I could not in good
2 conscience vote to certify undated ballots.

3 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
6 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
15 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.

19 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.

1 Q. I wanted to ask you, in Berks County according to
2 the stipulated facts, we show 507 democratic ballots and
3 138 republican ballots that were undated and not counted,
4 correct?

5 A. Total of 645, that is correct.

6 Q. And are you familiar enough with the results in
7 Berks County to know down-ballot whether the state
8 committee posts in either party, republican or democrat,
9 local county committee posts, if any of those might be
10 affected by 507 democratic ballots and 138 republicans if
11 you're ordered to recertify this election?

12 A. That's a fairly substantial number of undated
13 ballots, 645. Obviously it would change the results in any
14 elections where votes were cast for a particular race.
15 Based on the number of races down-ballot, committee slots
16 in particular, that were ties or extremely close, I would
17 not be surprised to understand that it would impact the
18 outcome of some of those races.

19 Q. And do you know whether the Berks County
20 republican party, the Berks County democratic party, the
21 Pennsylvania republican party, or the democratic party of
22 Pennsylvania, do you know if they've had meetings after
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.

22 Q. Now, you're familiar at least a little bit
23 because you all were deeply involved in the McCormick and
24 Oz election debate?

25 A. Yes.

1 Q. And so are you aware of whether the Secretary
2 herself was, in fact, a participant in that case before
3 Judge Cohn Jubelirer?

4 A. I can only speak to my experience, and the
5 individuals that appeared before our election board were
6 representatives of the McCormick campaign and
7 representatives of the Oz campaign. I was not -- we had no
8 one from the Secretary of the Commonwealth weigh in in our
9 hearing or in the meeting where we made subsequent
10 decisions.

11 Q. Now, of course, the Attorney General himself is
12 on the ballot this year, correct?

13 A. He is not.

14 MR. BOYER: Objection to relevance.

15 THE WITNESS: Yes, I take it back.

16 JUDGE COHN JUBELIRER: He is.

17 THE WITNESS: Yes, not as the Attorney
18 General.

19 JUDGE COHN JUBELIRER: Just --

20 MR. KING: I'm sorry. The sitting Attorney
21 General is on the ballot running for Governor of
22 Pennsylvania. I just want to know whether he filed an
23 appeal.

24 MR. BOYER: And my objection is to
25 relevance, Your Honor.

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.

1 MR. KING: Yes, ma'am.

2 Thank you very much, Commissioner.

3 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
10 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.

22 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.

2 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.

19 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
22 argument in your papers? Is that before the Court? I
23 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

1 raised equitable defenses.

2 JUDGE COHN JUBELIRER: I know you did. I
3 wasn't sure if unclean hands was one of them.

4 MR. KING: I'm not sure either.

5 JUDGE COHN JUBELIRER: If you did and there
6 are factual questions that would assist you obviously in a
7 defense that you've raised to this action, I don't want to
8 preclude that.

9 MR. KING: I appreciate that. I don't think
10 it's necessary at this point.

11 JUDGE COHN JUBELIRER: Okay.

12 MR. KING: Thank you, Your Honor.

13 JUDGE COHN JUBELIRER: Thank you.

14 MR. BUKOWSKI: Just one last follow-up
15 question, Commissioner Leinbach.

16 RE-CROSS-EXAMINATION (as on Further Redirect)

17 BY MR. BUKOWSKI:

18 Q. In response to the last question about following
19 clear Court guidance, is it the -- is it your understanding
20 that the November, 2020 Pennsylvania Supreme Court decision
21 in In Re: Canvass is clear guidance stating that undated
22 absentee and mail-in ballots should not be counted for all
23 elections after November, 2020?

24 A. It is based on my consultation with our
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 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.

2 I'd like to move now to our second count
3 which is the count for declaratory and injunctive relief
4 and walk through a bit more broadly what it is that the
5 Election Code requires, not just this Court's June 2nd
6 order but stepping back what it is that the Election Code
7 requires with respect to ballots that a voter has failed to
8 write a date on the return envelope but otherwise are
9 timely and otherwise have no deficiencies or irregularities
10 as Your Honor described in the June 2nd order.

11 Now, there's been a great deal of attention
12 paid to Section 3146.6 which is the section that describes
13 the process by which a voter completes an absentee. That
14 one is specific to absentee ballots. There is a parallel
15 section with substantively identical language for mail-in
16 ballots, and that's the section that's been alluded to that
17 says a voter shall date the return envelope. That section
18 alone does not dictate whether a ballot that's missing or a
19 return envelope that's missing a date meets the conditions
20 for canvassing.

21 As I mentioned earlier, the process that
22 describes canvassing or rather the section that describes
23 canvassing is not 3146.6, but instead is 3146.8 and
24 specifically paragraph (g)(3) and that section says that a
25 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 prec canvassing 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 prec canvassing 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

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 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

1 the Commissioners, you know, all those ballots that are
2 incorrectly dated as they're processed they're subject to
3 challenge.

4 And I'm going to make a prediction here I
5 guess -- maybe that's dangerous -- but because the Courts
6 keep saying, you know, that we, that counting the undated
7 ballots somehow means we should count -- or counting the
8 incorrectly dated ballots means we shouldn't, you know,
9 enforce the date requirement that's plainly written in the
10 statute, I suggest that's probably the next set of cases
11 that candidates are going to start challenging ballots that
12 have incorrect dates.

13 And then we're going to have hearings at
14 county Boards of Elections on that issue because I don't
15 think that's what the Legislature intended, and I think
16 what it intended is that it would be the date that the
17 ballot was signed. The instructions say that. The ballot
18 itself says today's date trying to comply with Justice
19 Wecht's concern or satisfy his concern that there be clear
20 language so the voter knows what's required and what the
21 consequences of not complying are.

22 And I think that ballot that's Joint Exhibit
23 1 does that. The instructions, we stipulated the
24 instructions are not in dispute here, that those do that.
25 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

1 ordered to, you know, certify the results of the election.

2 JUDGE COHN JUBELIRER: Thank you.

3 MR. BUKOWSKI: Thank you, Your Honor.

4 MR. KING: May it please the Court. I'll
5 try not to repeat the excellent argument that my colleague
6 just made. I will say that with respect to this action, we
7 join in the request that this action be terminated, be
8 dismissed.

9 I think it's pretty clear what this action
10 is, Your Honor. It's simply an attempt to ask this Court
11 to modify the order that you entered in McCormick. The
12 order in McCormick did not and certainly Your Honor could
13 have included an order to certify those results. Had Your
14 Honor ordered the certification of those results, I would
15 suggest respectfully that there would have been -- that the
16 appeal that was taken and later discontinued and other
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

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1 ordered to, you know, certify the results of the election.

2 JUDGE COHN JUBELIRER: Thank you.

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18 respect to certification would have been in front of the
19 Court.

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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

1 aggrieved party. She is the Commonwealth.

2 When she comes here -- and I'm telling the
3 Court something that you know better than I. When the
4 Secretary comes here as the Acting Secretary, she comes as
5 the Commonwealth. She doesn't come as Leigh Chapman. She
6 comes as the Honorable Leigh Chapman, the Secretary of the
7 Commonwealth, which means she's invoking the Commonwealth.
8 She's not an aggrieved person.

9 There is no aggrieved person in this matter.
10 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 McCormick 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 COHN JUBELIRER: But let me give you
18 just a hypothetical.

19 MR. KING: Yes, ma'am.

20 JUDGE COHN JUBELIRER: 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
23 no challenge but left out a municipality. Or I mean I'm
24 trying to think of something where it's clear to the
25 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 Zicarelli case. Clearly the Zicarelli 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 Zicarelli, 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

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

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.

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 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?

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 Zicarelli 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 Zicarelli, 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 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

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 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.

Appendix p 42
J. Ex. 1

Voter, sign or mark here (Required)

X

Today's Date (Required)

FOR COUNTY ELECTION USE ONLY

To be Completed by Voter Unable to 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 reason of my illness or physical disability. I have made or received assistance in making my mark in lieu of my signature.

Voter, mark here

X

Today's Date

Witness, address (street)

Witness, address (city, zip code)

Witness, sign here

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

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 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.

Voter, sign or mark here (Required)

X

Today's Date (Required)

FOR COUNTY ELECTION USE ONLY

To be Completed by Voter Unable to 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 reason of my illness or physical disability. I have made or received assistance in making my mark in lieu of my signature.

Voter, mark here

X

Today's Date

Witness, address (street)

Witness, address (city, zip code)

Witness, sign here

YOUR BALLOT WILL NOT BE COUNTED UNLESS:

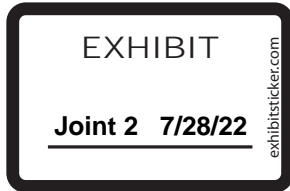
- You sign and date the voter's declaration in your own handwriting
- You seal your ballot inside the [color] secrecy envelope ("Official Election Ballot") and place it in here



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	



GUIDANCE CONCERNING CIVILIAN ABSENTEE AND MAIL-IN BALLOT PROCEDURES

Date: September 28, 2020

Version: 1.0

EXHIBIT

Joint 3 7/28/22

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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 mail-in 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 RETURN OF BALLOTS BY VOTERS

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

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

How to return your mai...



EXHIBIT

Joint 4 7/28/22

exhibitsticker.com

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.pa.gov/Pages/voterregistrationstatus.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>

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.

[emergency](#)

Missed the deadline? If you have an [emergency](#) (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 [emergency absentee ballot](#).

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

Any registered voter

<https://www.pavoterservices.pa.gov/OnlineAbsenteeApplication/#/OnlineAbsenteeBegin>
may request a mail-in ballot

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

Option 1: Apply for a Mail Ballot Online	▼
Option 2: Apply for a Mail Ballot by mail	▼
Option 3: Apply at your county election board's office or other designated locations	▼

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/Pages/Annual-Mail-in-Voter-List.aspx)

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

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 pre-addressed 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-Officials.aspx>)

or

other officially designated site

- (</Voting-in-PA/Pages/Return-Ballot.aspx>)
- Some counties are providing
[\(/Voting-in-PA/Pages/Return-Ballot.aspx\)](/Voting-in-PA/Pages/Return-Ballot.aspx) **drop-boxes** 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

[\(/Resources/Pages/Contact-Your-Election-Officials.aspx\)](/Resources/Pages/Contact-Your-Election-Officials.aspx) **county election board** or

other officially designated site

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

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

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-Overseas-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 long-term 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

[request an Emergency Absentee Ballot](https://www.vote.pa.gov/Resources/Documents/PADOS_EmergencyAbsenteeBallotApplication_English.pdf)

(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_EmergencyAbsenteeBallotApplication_English.pdf)

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

[Authorized Representative for Emergency Absentee Ballot Form](#)

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

- (https://www.vote.pa.gov/Resources/Documents/PADOS_AuthorizeRepresentativeforEmergencyAbsenteeBallot.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

EXHIBIT

Joint 5 7/28/22

exhibitsticker.com

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 <jmarks@pa.gov>
Sent: Friday, June 17, 2022 11:46 AM
To: Marks, Jonathan <jmarks@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



- 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 <jmarks@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.

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: 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 \(pottsmmerc.com\)](https://pottsmmerc.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

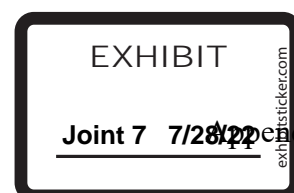
From: Marks, Jonathan <jmarks@pa.gov>
Sent: Friday, June 17, 2022 9:08 AM
To: Marks, Jonathan <jmarks@pa.gov>
Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals
Importance: High

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.**



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.

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,

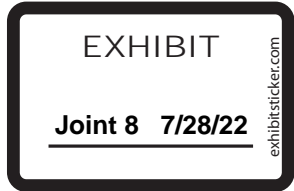
The Board of Elections of Fayette County has voted not to open or count the undated ballots from the May 17, 2022, General Primary. For this reason, I am unable to provide the information you request in your email below.

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

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

From: Marks, Jonathan
Sent: Friday, June 17, 2022 9:08 AM
To: Marks, Jonathan <jmarks@pa.gov>
Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals
Importance: High

Dear County Election Official,

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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.

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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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- 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.
- 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

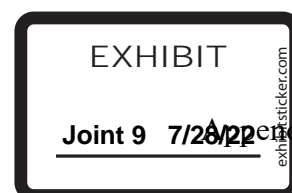
From: Pfursich, Jacquelyn E <JEPfursich@co.lancaster.pa.us>
Sent: Monday, June 27, 2022 2:08 PM
To: Marks, Jonathan <jmarks@pa.gov>
Cc: Miller, Christa <MChrista@co.lancaster.pa.us>
Subject: [External] FW: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals
Importance: High

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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 <jmarks@pa.gov>
Sent: Monday, June 27, 2022 12:17 PM
To: Marks, Jonathan <jmarks@pa.gov>
Subject: [EXTERNAL] 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 (jmathis@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 <jmarks@pa.gov>
Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals
Importance: High

Dear County Election Official,

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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

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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>; Ischafer <Ischafer@pacounties.org>; awhite <awhite@pacounties.org>; Daryl Miller (millerd@mail.bradfordco.org) <millerd@mail.bradfordco.org>
Subject: Certification of undated ballots
Importance: High

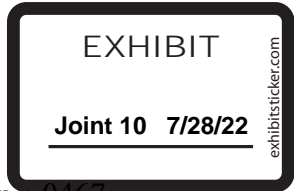
Jonathan

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: CLEinbach@CountyofBerks.com
Website: www.CountyofBerks.com





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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

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**.

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

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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

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 [Report Phishing button in Outlook](#).

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
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 <JEPfursich@co.lancaster.pa.us>
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.

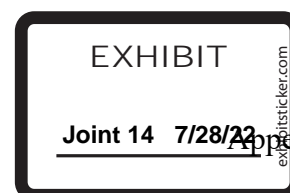
--Tim

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

ATTENTION: *This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the [Report Phishing button in Outlook](#).*

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
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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

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE COHN JUBELIRER**

FILED: June 2, 2022

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,⁷ 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 election. Republican Intervenors object to these ballots ever being counted, 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 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 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.”¹⁶ *W. Chester Sch. Dist. v. A.M.*, 164 A.3d 620, 630 (Pa. Cmwlth. 2017).

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

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

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

Order Exit
06/10/2022

General Docket
Third Circuit Court of Appeals

Court of Appeals Docket #: 22-1499 **Docketed:** 03/18/2022
Nature of Suit: 3441 Civil Rights Voting **Termed:** 05/27/2022
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
- 2) private
- 3) 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: 03/16/2022 **Date Order/Judgment EOD:** 03/16/2022 **Date NOA Filed:** 03/18/2022

Prior Cases:

None

Current Cases:

None

MS. LINDA MIGLIORI
Plaintiff - Appellant

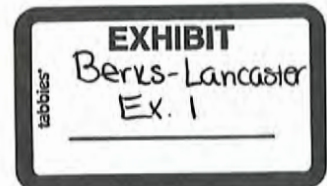
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MS. LINDA MIGLIORI; FRANCIS J. FOX; RICHARD E. RICHARDS;
KENNETH RINGER; SERGIO RIVAS,
Appellants

v.

ZACHARY COHEN,
Intervenor - Plaintiff

v.

LEHIGH COUNTY BOARD OF ELECTIONS

v.

DAVID RITTER,
Intervenor - Defendant

- 03/18/2022 [1](#) 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]
37 pg, 2.5 MB
- 03/18/2022 [2](#) RECORD available on District Court CM/ECF. (JK) [Entered: 03/18/2022 11:43 AM]
- 03/18/2022 [3](#) 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]
1 pg, 241.22 KB
- 03/18/2022 [4](#) ECF FILER: DISCLOSURE STATEMENT on behalf of Appellee Lehigh County Board of Elections. [22-1499] (LJR) [Entered: 03/18/2022 02:29 PM]
2 pg, 80.57 KB
- 03/19/2022 [5](#) 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]
2 pg, 986 KB
- 03/19/2022 [6](#) 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]
318 pg, 9.36 MB
- 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](#) ECF FILER: ENTRY OF APPEARANCE from Adriel I. Cepeda Derieux on behalf of Appellant(s) Linda Miglori, Richard E. Richards, Sergio Rivas. [22-1499] (AIC) [Entered: 03/19/2022 03:47 PM]
1 pg, 197.65 KB
- 03/19/2022 [9](#) 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]
28 pg, 357.67 KB
- 03/19/2022 [10](#) 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]
1 pg, 311.2 KB
- 03/19/2022 [11](#) 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]
177 pg, 4.08 MB
- 03/20/2022 [12](#) 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]
2 pg, 131.95 KB
- 03/21/2022 [13](#) ECF FILER: ENTRY OF APPEARANCE from Ari Savitzky on behalf of Appellant(s) Linda Miglori, Richard E. Richards, Sergio Rivas. [22-1499] (AJS) [Entered: 03/21/2022 10:50 AM]
1 pg, 184.57 KB
- 03/21/2022 [14](#) ECF FILER: ENTRY OF APPEARANCE from Sophia Lin Lakin on behalf of Appellant(s) Linda Miglori, Richard E. Richards, Sergio Rivas. [22-1499] (SLL) [Entered: 03/21/2022 11:49 AM]
1 pg, 82.97 KB
- 03/21/2022 [15](#) 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]
1 pg, 197.27 KB
- 03/21/2022 [16](#) 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]
10 pg, 48.96 KB
- 03/21/2022 [17](#) 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]
1 pg, 244.71 KB
- 03/22/2022 [18](#) 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]
1 pg, 106.37 KB
- 03/22/2022 [19](#) ECF FILER: ENTRY OF APPEARANCE from Stephen A. Loney, Jr. on behalf of Appellant(s) Linda Miglori, Richard E. Richards, Sergio Rivas, Francis J. Fox, Kenneth Ringer. [22-1499] (SAL) [Entered: 03/22/2022 01:43 PM]
1 pg, 297.15 KB
- 03/22/2022 [20](#) ECF FILER: CIVIL INFORMATION 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: 03/22/2022 01:46 PM]
3 pg, 111.27 KB
- 03/22/2022 [21](#) ECF FILER: Concise Summary of the Case filed by Appellees Francis J. Fox, Kenneth Ringer and Appellants Ms. Linda Miglori, Richard E. Richards and Sergio Rivas. [22-1499] (SAL) [Entered: 03/22/2022 01:48 PM]
32 pg, 1.13 MB
- 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]
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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]
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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]
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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]
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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]
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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]
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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]
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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.

- 1 pg, 10.16 KB [22-1499] (SGZ) [Entered: 04/01/2022 02:29 PM]
- 04/01/2022 [42](#) 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]
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- 04/01/2022 [45](#) 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]
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- 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]
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- 04/08/2022 [50](#) 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]
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- 04/08/2022 [51](#) 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]
24 pg, 298.48 KB
- 04/08/2022 [52](#) 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]
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- 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](#) 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 Pennsylvania 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]
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- 04/11/2022 [55](#) 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 Pennsylvania 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]
19 pg, 261.19 KB
- 04/13/2022 [56](#) 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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- 04/13/2022 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 Pennsylvania 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](#) 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]
38 pg, 206.96 KB
- 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](#) Oral Argument Notification for 05/18/2022. Setting & Time: Maris Courtroom/11:00am. Location: Philadelphia, PA. (CMH) [Entered: 04/20/2022 09:30 AM]
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- 04/20/2022 [62](#) 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]
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- 04/21/2022 63 ECF FILER: SUMMARY OF ORAL ARGUMENT submitted by Attorney Joshua J. Voss, Esq. for Appellee 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]
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1 pg, 28.14 KB ECF FILER: DIVISION OF TIME FORM filed by Attorney Joshua Mazin, Esq. for Appellee Lehigh County Board of Elections. Certificate of Service dated 04/22/2022. Service made by ECF. [22-1499] (JM) [Entered: 04/22/2022 01:33 PM]
- 04/22/2022 69 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]
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1 pg, 26.14 KB 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]
- 04/26/2022 71 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 Plaintiff's right to vote. Post Video: YES. [22-1499] (JM) [Entered: 04/26/2022 12:17 PM]
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5 pg, 104.5 KB ECF FILER: Motion filed by Amicus Appellant USA for Noah B. Bokot-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]
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2 pg, 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]
- 05/03/2022 [76](#)
1 pg, 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]
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1 pg, 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]
- 05/18/2022 78 ARGUED on Wednesday, May 18, 2022. Panel: MCKEE, GREENAWAY JR. and MATEY, Circuit Judges. Noah Bokot-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

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]

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COURT MINUTES OF ARGUED/SUBMITTED CASES. (PM) [Entered: 05/18/2022 12:41 PM]

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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]

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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]

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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]

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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]

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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]

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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]

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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]

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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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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]

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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]

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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]

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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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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

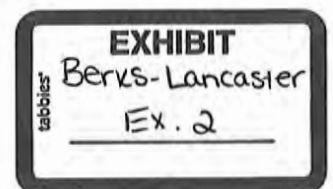


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STATEMENT OF INTEREST

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.2.¹

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.

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

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.

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

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.

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.

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.

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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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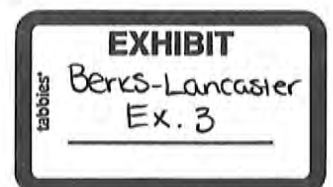


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League of Women Voters of Arkansas v. Thurston, No. 20-5174, 2021 WL 5312640 (W.D. Ark. Nov. 15, 2021).....18

Martin v. Crittenden, 347 F. Supp. 3d 1302 (N.D. Ga. 2018)..... 10, 18

McGovern v. City of Philadelphia, 554 F.3d 114 (3d Cir. 2009).....21

Mixon v. Commonwealth, 759 A.2d 442 (Pa. Commw. Ct. 2000)2

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Ritter v. Lehigh Cnty. Bd. of Elections, No. 1322 CD 2021, 2022 WL 16577 (Pa. Commw. Ct. Jan. 3, 2022)..... 6, 10, 11

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Schwier v. Cox, 412 F. Supp. 2d 1266 (N.D. Ga. 2005).....10

Wash. Ass'n of Churches v. Reed, 492 F. Supp. 2d 1264 (W.D. Wash. 2006)10

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25 P.S. § 3150.122

25 P.S. § 3150.12b3

25 P.S. § 3150.16 3, 4, 7

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52 U.S.C. § 1030222

52 U.S.C. § 2010522

52 U.S.C. § 2051022

Civil Rights Act of 1957, Pub. L. No. 85-31523

Civil Rights Act of 1964, Pub. L. No. 88-3529

Voting Rights Act of 1965, Pub. L. No. 89-1109

Other Authorities

1972 Op. Atty. Gen. No. 1212

Civil Rights-1957: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, 85th Cong. (Feb. 14, 1957) 24, 25

Email from Jonathan Marks, Deputy Secretary for Elections & Commissions, Dep’t of State, to County Election Officials (June 1, 2021)11

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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").¹

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.

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).

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

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).³ 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*.⁴ 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/ballotracking.aspx>.

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).

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).

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. "Back-dating" 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,

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

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.

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

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 I*, 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

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.*

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 & Mail-in 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 & Mail-in 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).

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).⁸ 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.

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.

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

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

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

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.

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

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).

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)

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.

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

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.

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;
3. 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

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

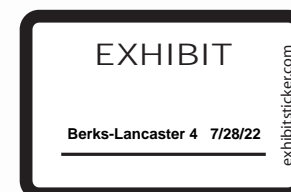
Why are there two envelopes with my mail-in ballot?

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 pre-addressed 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.
2. 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.
5. 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)
2022 Daily Journal D.A.R. 5881

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 [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.

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.¹

EXHIBIT

Berks-Lancaster
EX. 5

tabbles

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. 5:22-cv-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

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

1. 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.
2. 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."

From: Marks, Jonathan <jmarks@pa.gov>
Sent: Tuesday, June 1, 2021 9:21 AM
To: Marks, Jonathan <jmarks@pa.gov>
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 A

Appendix p. 0383 Exhibit A 7/28/22

EXHIBIT

exhibitsticker.com

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

Attorneys for Petitioner

EXHIBIT B

Appendix p. 0584 **Fayette B 7/28/22**

EXHIBIT

exhibitsticker.com

QUESTION PRESENTED

Pennsylvania requires voters to sign and date a declaration when they vote by mail. In a private lawsuit 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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Appendix

Appendix A

Opinion in the United States Court of Appeals for the Third Circuit
(May 27, 2022)App. 1

Appendix B

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Cases

<i>Afr. Methodist Episcopal Church v. Kemp</i> , 2021 WL 6495360 (N.D. Ga. Dec. 9, 2021).....	30
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<i>DNC v. Wis. State Leg.</i> , 141 S. Ct. 28 (2020)	2, 21
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<i>Duran v. Lollis</i> , 2019 WL 691203 (E.D. Cal. Feb. 19)	24
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<i>League of Women Voters of Ark. v. Thurston</i> , 2021 WL 5312640 (W.D. Ark. Nov. 15)	24, 30
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<i>Ne. Ohio Coal. for the Homeless v. Husted</i> , 837 F.3d 612 (6th Cir. 2016).....	23, 24
<i>Purcell v. Gonzales</i> , 549 U.S. 1 (2006).....	29
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<i>Vote.org v. Callanen</i> , 2022 WL 2181867 (W.D. Tex. June 16).....	30
<i>Vote.Org v. Callanen</i> , 2022 WL 2389566 (5th Cir. July 2) ...	22, 23, 28, 32
<i>Wright v. City of Roanoke Redevelopment & Hous. Auth.</i> , 479 U.S. 418 (1987).....	23
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52 U.S.C. §10101(a)(2)(B).....	passim
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Other Authorities

13C Fed. Prac. & Proc. Juris. §3533.10.3 (3d ed.)....26

Envelope Guide, Pa. Dep’t of State, bit.ly/3LBsM4Q
(last visited July 5, 2022)6

*Guidance Concerning Examination of Absentee and
Mail-In Ballot Return Envelopes*, Pa. Dep’t of
State (May 24, 2022), bit.ly/3NLG8x012, 29

H.R. Rep. No. 88-914 (Nov. 20, 1963)3, 18

Pratt, *Eight Months Later, Lehigh County Certifies
2021 General Election*, WLVR (June 28, 2022),
bit.ly/3bQwNWX11

OPINIONS BELOW

The Third Circuit’s opinion is reported at 36 F.4th 153 and is reproduced at App.1-26. The Eastern District of Pennsylvania’s opinion is reported at 397 F.Supp.3d 126 and is reproduced at App.32-67.

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 mail-in 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., dissent), 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., dissent). 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., dissent). 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. *Arizonaans 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., dissent) (“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., dissent). 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., dissent).

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 mail-in 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., dissent)). 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 analysis 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., concurring). 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., dissenting); *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 *Munisingwear* 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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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,

v.

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, 27th 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 Zicarelli, 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.” *Zicarelli v. Allegheny Cnty. Bd. of Elections*, No. GD 20-011654, 2020 WL 7012634, at *1 (C.P. Allegheny Cnty. Nov. 18, 2020) (“*Zicarelli*”) (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.*” *Zicarelli*, 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.” *Zicarelli*, 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 state-court 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 Zicarelli 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 dilution—state 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 “Zicarelli Voters” who neglected to date their Westmoreland County ballots.⁷ 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 Zicarelli 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 *Balant 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 *Zicarelli*, 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.” *Zicarelli*, 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

- 1 That Plaintiff added, as defendants in this action, certain parties who were not parties to the state-court proceeding is 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.
- 4 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.*” *Zicarelli*, 2020 WL 7012634, at *2 (emphasis added).

- 5 As discussed below, although Plaintiff may have standing to seek relief for this injury, she is unable to state a claim for relief.
- 6 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. *Keys 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.
- 8 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.
- 9 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."
- 10 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 Zicarelli 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.
- 11 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).
- 12 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*

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

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No. 32 EAP 2020

|

No. 33 EAP 2020

|

No. 34 EAP 2020

|

No. 35 EAP 2020

|

No. 29 WAP 2020

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Submitted: November 18, 2020

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Submitted: November 20, 2020

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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 Zicarelli, 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. *Zicarelli v. Allegheny County Board of Elections*, No. GD-20-011654 (Allegheny Cty. Ct. Com. Pl.). Zicarelli 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 blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be

placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. **The elector shall then fill out, date and sign the declaration printed on such envelope.** Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 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 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 *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 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 *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]

Voter, sign or mark here/Votante firme o margue aqui

X _____

Date of signing (MM/DD/YYYY)/Fecha de firme (MM/DD/YYYY)

Voter, print name/Votante, nombre en letra de impreta

Voter, address (street)/Votante, direccion (calle)

[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 Mail-in 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 pre-canvassed 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*, — Pa. — 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 DNC¹ 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 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?

On November 10, 2020, the Allegheny County Board decided to canvass 2,349 mail-in ballots that contained a signed but undated declaration. Zicarelli 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 (Zicarelli's opponent in the 45th Senatorial District race) moved to intervene, which motion was granted. At the hearing, Zicarelli 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 time-stamped 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.

Zicarelli 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 Zicarelli*, 241 A.3d 694, 1162 C.D. 2020 (Commw. Ct. 2020). Zicarelli 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 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.

Zicarelli 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 Zicarelli's reliance on *In Re Nov. 3, 2020 General Election* by noting that Zicarelli'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 Zicarelli 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 “in-person” 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 non-conforming 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 mail-in) 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 Zicarelli 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 Zicarelli 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 Zicarelli*, 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 ballot-

return 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.

Zicarelli 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, Zicarelli 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. Zicarelli'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 mail-in voting. Among other things, the canvassing statute, 25 P.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, Zicarelli 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.” Zicarelli'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 Zicarelli 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.” Zicarelli'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 non-compliance: 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 Code¹ 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 language⁶—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 inter-county 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 third-party 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

- 1 DNA Services Corp./Democratic National Committee (hereinafter “DNC”) intervened in the proceedings 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).
- 3 Conversely, the Philadelphia Board and the DNC have both selectively relied upon guidance provided by 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 qualified 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., *Schwieb 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, Zicarelli 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.

- 1 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 mail-in 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”).
- 5 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.’*”
- 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).
- 11 *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).
- 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).
- 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 Melody*, 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 *Id.*
- 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.*
- 48 *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).
- 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.

Appendix 26

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 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.

Appendix page 1
J. Ex. 1

Voter, sign or mark here (Required)

X

Today's Date (Required)

FOR COUNTY ELECTION USE ONLY

To be Completed by Voter Unable to 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 reason of my illness or physical disability. I have made or received assistance in making my mark in lieu of my signature.

Voter, mark here

X

Today's Date

Witness, address (street)

Witness, address (city, zip code)

Witness, sign here

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

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 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.

Voter, sign or mark here (Required)

X

Today's Date (Required)

FOR COUNTY ELECTION USE ONLY

To be Completed by Voter Unable to 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 reason of my illness or physical disability. I have made or received assistance in making my mark in lieu of my signature.

Voter, mark here

X

Today's Date

Witness, address (street)

Witness, address (city, zip code)

Witness, sign here

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

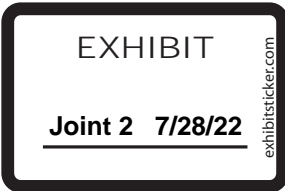
Appendix 27



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 28



**GUIDANCE CONCERNING CIVILIAN ABSENTEE AND MAIL-IN
BALLOT PROCEDURES**

Date: September 28, 2020

Version: 1.0

EXHIBIT

Joint 3 7/28/22

exhibitsticker.com

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 mail-in 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 RETURN OF BALLOTS BY VOTERS

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

exhibitsticker.com

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.pa.gov/Pages/voterregistrationstatus.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-Election-Officials.aspx>)

county election board

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

emergency

Missed the deadline? If you have an emergency (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/#/OnlineAbsenteeBegin>)
may request a mail-in ballot

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

Option 1: Apply for a Mail Ballot Online	▼
Option 2: Apply for a Mail Ballot by mail	▼
Option 3: Apply at your county election board's office or other designated locations	▼

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/Pages/Annual-Mail-in-Voter-List.aspx)

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

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 pre-addressed 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-Officials.aspx>)

or

other officially designated site

- (</Voting-in-PA/Pages/Return-Ballot.aspx>)
- Some counties are providing
[\(/Voting-in-PA/Pages/Return-Ballot.aspx\)](/Voting-in-PA/Pages/Return-Ballot.aspx) **drop-boxes** 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

[\(/Resources/Pages/Contact-Your-Election-Officials.aspx\)](/Resources/Pages/Contact-Your-Election-Officials.aspx) **county election board** or

other officially designated site

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

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

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-Overseas-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 long-term 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

[request an Emergency Absentee Ballot](https://www.vote.pa.gov/Resources/Documents/PADOS_EmergencyAbsenteeBallotApplication_English.pdf)

(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_EmergencyAbsenteeBallotApplication_English.pdf)

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

[Authorized Representative for Emergency Absentee Ballot Form](#)

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

- (https://www.vote.pa.gov/Resources/Documents/PADOS_AuthorizeRepresentativeforEmergencyAbsenteeBallot.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

TLP: WHITE



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

Date: May 24, 2022

Version: 2.0

EXHIBIT

Joint 5 7/28/22

exhibitsticker.com

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.

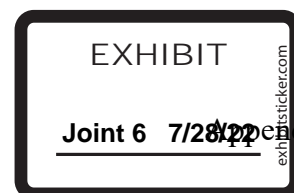
Appendix 31

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



- 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 <jmarks@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.

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 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 \(pottsmmerc.com\)](https://pottsmmerc.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

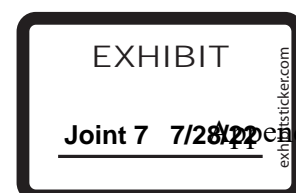
From: Marks, Jonathan <jmarks@pa.gov>
Sent: Friday, June 17, 2022 9:08 AM
To: Marks, Jonathan <jmarks@pa.gov>
Subject: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals
Importance: High

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.**



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,

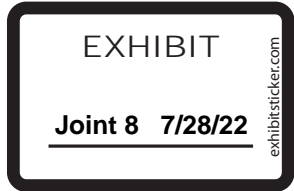
The Board of Elections of Fayette County has voted not to open or count the undated ballots from the May 17, 2022, General Primary. For this reason, I am unable to provide the information you request in your email below.

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

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

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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.

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 <jmarks@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.
- 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

Appendix 34

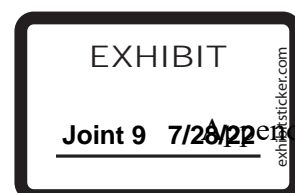
From: Pfursich, Jacquelyn E <JEPfursich@co.lancaster.pa.us>
Sent: Monday, June 27, 2022 2:08 PM
To: Marks, Jonathan <jmarks@pa.gov>
Cc: Miller, Christa <MChrista@co.lancaster.pa.us>
Subject: [External] FW: IMPORTANT DOS EMAIL: Certification of Undated Ballot Vote Totals
Importance: High

ATTENTION: *This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the [Report Phishing button in Outlook](#).*

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 <jmarks@pa.gov>
Sent: Monday, June 27, 2022 12:17 PM
To: Marks, Jonathan <jmarks@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 (jmathis@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 <jmarks@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: 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>; Ischafer <Ischafer@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: CLEinbach@CountyofBerks.com
Website: www.CountyofBerks.com

EXHIBIT

Joint 10 7/28/22

exhibitsticker.com



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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

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: 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 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

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

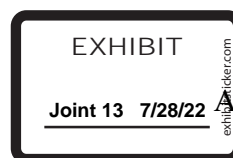
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From: Pfursich, Jacquelyn E <JEPfursich@co.lancaster.pa.us>
Sent: Tuesday, July 5, 2022 4:17 PM
To: Gates, Timothy <tgates@pa.gov>
Subject: [External] RE: Certification of Undated Ballots

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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
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 <JEPfursich@co.lancaster.pa.us>
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

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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

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE COHN JUBELIRER**

FILED: June 2, 2022

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,⁷ 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 election. Republican Intervenors object to these ballots ever being counted, 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 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 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.”¹⁶ *W. Chester Sch. Dist. v. A.M.*, 164 A.3d 620, 630 (Pa. Cmwlth. 2017).

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

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

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

Order Exit
06/10/2022

Appendix p.0785
Ptr. Ex. 2

Appendix 40

General Docket
Third Circuit Court of Appeals

Court of Appeals Docket #: 22-1499 **Docketed:** 03/18/2022
Nature of Suit: 3441 Civil Rights Voting **Termed:** 05/27/2022
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
- 2) private
- 3) 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: 03/16/2022 **Date Order/Judgment EOD:** 03/16/2022 **Date NOA Filed:** 03/18/2022

Prior Cases:

None

Current Cases:

None

MS. LINDA MIGLIORI
Plaintiff - Appellant

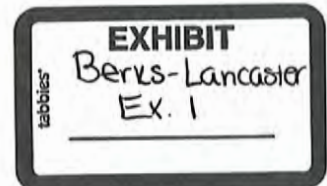
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MS. LINDA MIGLIORI; FRANCIS J. FOX; RICHARD E. RICHARDS;
KENNETH RINGER; SERGIO RIVAS,
Appellants

v.

ZACHARY COHEN,
Intervenor - Plaintiff

v.

LEHIGH COUNTY BOARD OF ELECTIONS

v.

DAVID RITTER,
Intervenor - Defendant

- 03/18/2022 [1](#) 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]
37 pg, 2.5 MB
- 03/18/2022 [2](#) RECORD available on District Court CM/ECF. (JK) [Entered: 03/18/2022 11:43 AM]
- 03/18/2022 [3](#) 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]
1 pg, 241.22 KB
- 03/18/2022 [4](#) ECF FILER: DISCLOSURE STATEMENT on behalf of Appellee Lehigh County Board of Elections. [22-1499] (LJR) [Entered: 03/18/2022 02:29 PM]
2 pg, 80.57 KB
- 03/19/2022 [5](#) 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]
2 pg, 986 KB
- 03/19/2022 [6](#) 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]
318 pg, 9.36 MB
- 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](#) ECF FILER: ENTRY OF APPEARANCE from Adriel I. Cepeda Derieux on behalf of Appellant(s) Linda Miglori, Richard E. Richards, Sergio Rivas. [22-1499] (AIC) [Entered: 03/19/2022 03:47 PM]
1 pg, 197.65 KB
- 03/19/2022 [9](#) 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]
28 pg, 357.67 KB
- 03/19/2022 [10](#) 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]
1 pg, 311.2 KB
- 03/19/2022 [11](#) 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]
177 pg, 4.08 MB
- 03/20/2022 [12](#) 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]
2 pg, 131.95 KB
- 03/21/2022 [13](#) ECF FILER: ENTRY OF APPEARANCE from Ari Savitzky on behalf of Appellant(s) Linda Miglori, Richard E. Richards, Sergio Rivas. [22-1499] (AJS) [Entered: 03/21/2022 10:50 AM]
1 pg, 184.57 KB
- 03/21/2022 [14](#) ECF FILER: ENTRY OF APPEARANCE from Sophia Lin Lakin on behalf of Appellant(s) Linda Miglori, Richard E. Richards, Sergio Rivas. [22-1499] (SLL) [Entered: 03/21/2022 11:49 AM]
1 pg, 82.97 KB
- 03/21/2022 [15](#) 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]
1 pg, 197.27 KB
- 03/21/2022 [16](#) 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]
10 pg, 48.96 KB
- 03/21/2022 [17](#) 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]
1 pg, 244.71 KB
- 03/22/2022 [18](#) 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]
1 pg, 106.37 KB
- 03/22/2022 [19](#) ECF FILER: ENTRY OF APPEARANCE from Stephen A. Loney, Jr. on behalf of Appellant(s) Linda Miglori, Richard E. Richards, Sergio Rivas, Francis J. Fox, Kenneth Ringer. [22-1499] (SAL) [Entered: 03/22/2022 01:43 PM]
1 pg, 297.15 KB
- 03/22/2022 [20](#) ECF FILER: CIVIL INFORMATION 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: 03/22/2022 01:46 PM]
3 pg, 111.27 KB
- 03/22/2022 [21](#) ECF FILER: Concise Summary of the Case filed by Appellees Francis J. Fox, Kenneth Ringer and Appellants Ms. Linda Miglori, Richard E. Richards and Sergio Rivas. [22-1499] (SAL) [Entered: 03/22/2022 01:48 PM]
32 pg, 1.13 MB
- 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](#) 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]
1 pg, 154.02 KB
- 03/22/2022 [24](#) 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]
1 pg, 89.5 KB
- 03/22/2022 [25](#) 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]
1 pg, 128.85 KB
- 03/22/2022 [26](#) 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]
1 pg, 89.08 KB
- 03/22/2022 [27](#) 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]
33 pg, 2.32 MB
- 03/22/2022 [28](#) AMENDED CASE CAPTION SENT (JK) [Entered: 03/22/2022 05:24 PM]
1 pg, 42.35 KB
- 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](#) 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]
1 pg, 25.98 KB
- 03/28/2022 [31](#) 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]
1 pg, 190.3 KB
- 03/29/2022 [32](#) 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]
67 pg, 498.54 KB
- 03/29/2022 [33](#) 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]
849 pg, 96 MB
- 03/29/2022 [34](#) 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]
1 pg, 26.01 KB
- 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](#) 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]
2 pg, 13.61 KB
- 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](#) 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]
4 pg, 231.49 KB
- 04/01/2022 [41](#) ECF FILER: ENTRY OF APPEARANCE from Samantha G. Zimmer on behalf of Appellee(s) David Ritter.

- 1 pg, 10.16 KB [22-1499] (SGZ) [Entered: 04/01/2022 02:29 PM]
- 04/01/2022 [42](#) 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]
33 pg, 119.14 KB
- 04/01/2022 [43](#) 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]
1 pg, 147.02 KB
- 04/01/2022 [44](#) ECF FILER: ENTRY OF APPEARANCE from Noah B. Bokot-Lindell on behalf of Amicus Curiae United States. [22-1499] (NB) [Entered: 04/01/2022 04:15 PM]
1 pg, 147.18 KB
- 04/01/2022 [45](#) 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]
40 pg, 322.28 KB
- 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](#) 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]
76 pg, 686.73 KB
- 04/08/2022 [50](#) 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]
39 pg, 389.41 KB
- 04/08/2022 [51](#) 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]
24 pg, 298.48 KB
- 04/08/2022 [52](#) 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]
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- 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](#) 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 Pennsylvania 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]
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- 04/11/2022 [55](#) 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 Pennsylvania 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]
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- 04/13/2022 [56](#) 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]
1 pg, 27.19 KB
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- 04/20/2022 [61](#) Oral Argument Notification for 05/18/2022. Setting & Time: Maris Courtroom/11:00am. Location: Philadelphia, PA. (CMH) [Entered: 04/20/2022 09:30 AM]
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- 04/20/2022 [62](#) 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]
1 pg, 10.14 KB

- 04/21/2022 63 ECF FILER: SUMMARY OF ORAL ARGUMENT submitted by Attorney Joshua J. Voss, Esq. for Appellee 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]
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1 pg, 158.16 KB ECF FILER: ARGUMENT ACKNOWLEDGMENT filed by Attorney Joshua J. Voss, Esq. for Appellee David Ritter. Certificate of Service dated 04/21/2022. Service made by ECF. [22-1499] (JJV) [Entered: 04/21/2022 09:10 AM]
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- 04/22/2022 [68](#)
1 pg, 28.14 KB ECF FILER: DIVISION OF TIME FORM filed by Attorney Joshua Mazin, Esq. for Appellee Lehigh County Board of Elections. Certificate of Service dated 04/22/2022. Service made by ECF. [22-1499] (JM) [Entered: 04/22/2022 01:33 PM]
- 04/22/2022 69 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]
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1 pg, 26.14 KB 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]
- 04/26/2022 71 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 Plaintiff's right to vote. Post Video: YES. [22-1499] (JM) [Entered: 04/26/2022 12:17 PM]
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4 pg, 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]
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5 pg, 104.5 KB ECF FILER: Motion filed by Amicus Appellant USA for Noah B. Bokot-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]
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- 04/28/2022 [75](#)
2 pg, 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]
- 05/03/2022 [76](#)
1 pg, 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]
- 05/05/2022 [77](#)
1 pg, 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]
- 05/18/2022 78 ARGUED on Wednesday, May 18, 2022. Panel: MCKEE, GREENAWAY JR. and MATEY, Circuit Judges. Noah Bokot-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

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]

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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 [82](#)
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 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]
- 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

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

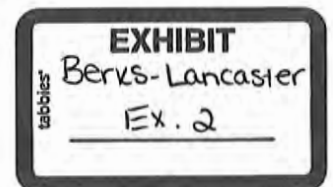


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STATEMENT OF INTEREST

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.2.¹

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.

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

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.

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

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.

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.

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

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

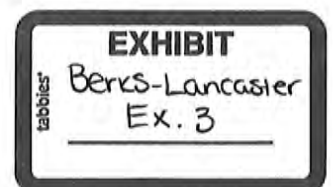
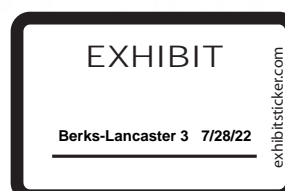


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STATEMENT OF INTEREST

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").¹

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.

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).

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

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).³ 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*.⁴ 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/ballotracking.aspx>.

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).

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).

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. "Back-dating" 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,

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

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.

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

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 I*, 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

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.*

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 & Mail-in 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 & Mail-in 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).

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).⁸ 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.

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.

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

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

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 *eiusdem generis*. *Contra* J.A. 677-78 (Ritter Opp’n to Summ. J.). The Supreme Court has rejected

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.

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

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).

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)

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.

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

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.

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;
3. 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

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

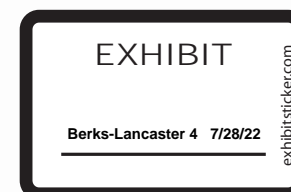
Why are there two envelopes with my mail-in ballot?

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 pre-addressed 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.
2. 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.
5. 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)
2022 Daily Journal D.A.R. 5881

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 [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.

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.¹

EXHIBIT

Berks-Lancaster
EX. 5

tabbles

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. 5:22-cv-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

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

1. 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.
2. 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."

Appendix 45

From: Marks, Jonathan <jmarks@pa.gov>
Sent: Tuesday, June 1, 2021 9:21 AM
To: Marks, Jonathan <jmarks@pa.gov>
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 A

Appendix p. 0865
EXHIBIT A 7/28/22

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

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July 7, 2022

Attorneys for Petitioner

EXHIBIT B

Appendix p. 0837 **Fayette B 7/28/22**

EXHIBIT

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QUESTION PRESENTED

Pennsylvania requires voters to sign and date a declaration when they vote by mail. In a private lawsuit 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 mail-in 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., dissent), 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., dissent). 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., dissent). 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. *Arizonaans 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., dissent) (“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., dissent). 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., dissent). 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., dissent).

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[ie]d 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 mail-in 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., dissent)). 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 analysis 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., concurring). 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., dissenting); *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 *Munisingwear* 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



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,

v.

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

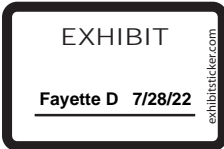
Mark A. Aronchick, Michele D. Hangley, * Robert A. Wiygul, * John G. Coit, ** Hangley Aronchick Segal Pudlin & Schiller, One Logan Square, 27th Floor, Philadelphia, PA 19103, Telephone: (215) 496-7050, Email: mhangley@hangley.com, for defendant Kathy Boockvar, in her official capacity as the Secretary of the Commonwealth of Pennsylvania.

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I. INTRODUCTION

Plaintiff, Nicole Zicarelli, 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.” *Zicarelli v. Allegheny Cnty. Bd. of Elections*, No. GD 20-011654, 2020 WL 7012634, at *1 (C.P. Allegheny Cnty. Nov. 18, 2020) (“*Zicarelli*”) (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.*” *Zicarelli*, 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.” *Zicarelli*, 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 state-court 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 Zicarelli 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 dilution—state 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 “Zicarelli Voters” who neglected to date their Westmoreland County ballots.⁷ 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 Zicarelli 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 *Balant 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 *Zicarelli*, 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.” *Zicarelli*, 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

- 1 That Plaintiff added, as defendants in this action, certain parties who were not parties to the state-court proceeding is 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.
- 4 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.” *Zicarelli*, 2020 WL 7012634, at *2 (emphasis added).

- 5 As discussed below, although Plaintiff may have standing to seek relief for this injury, she is unable to state a claim for relief.
- 6 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. *Keys 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.
- 8 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.
- 9 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."
- 10 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 Zicarelli 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.
- 11 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).
- 12 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*

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

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No. 32 EAP 2020

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No. 33 EAP 2020

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No. 34 EAP 2020

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No. 35 EAP 2020

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No. 29 WAP 2020

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Submitted: November 18, 2020

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Submitted: November 20, 2020

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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*, — 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 Zicarelli, 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. *Zicarelli v. Allegheny County Board of Elections*, No. GD-20-011654 (Allegheny Cty. Ct. Com. Pl.). Zicarelli 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 blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed “Official Election Ballot.” This envelope shall then be

placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. **The elector shall then fill out, date and sign the declaration printed on such envelope.** Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 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 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 *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 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 *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]

Voter, sign or mark here/Votante firme o margue aqui

X _____

Date of signing (MM/DD/YYYY)/Fecha de firme (MM/DD/YYYY)

Voter, print name/Votante, nombre en letra de impreta

Voter, address (street)/Votante, direccion (calle)

[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 Mail-in 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 pre-canvassed 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*, — Pa. — 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 DNC¹ 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 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?

On November 10, 2020, the Allegheny County Board decided to canvass 2,349 mail-in ballots that contained a signed but undated declaration. Zicarelli 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 (Zicarelli's opponent in the 45th Senatorial District race) moved to intervene, which motion was granted. At the hearing, Zicarelli 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 time-stamped 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.

Zicarelli 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 Zicarelli*, 241 A.3d 694, 1162 C.D. 2020 (Commw. Ct. 2020). Zicarelli 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 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.

Zicarelli 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 Zicarelli's reliance on *In Re Nov. 3, 2020 General Election* by noting that Zicarelli'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 Zicarelli 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 “in-person” 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 non-conforming 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 mail-in) 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 Zicarelli 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 Zicarelli 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 Zicarelli*, 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 ballot-

return 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.

Zicarelli 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, Zicarelli 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. Zicarelli'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 mail-in voting. Among other things, the canvassing statute, 25 P.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, Zicarelli 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.” Zicarelli'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 Zicarelli 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.” Zicarelli'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 non-compliance: 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 Code¹ 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 language⁶—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 inter-county 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 third-party 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

- 1 DNA Services Corp./Democratic National Committee (hereinafter “DNC”) intervened in the proceedings 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).
- 3 Conversely, the Philadelphia Board and the DNC have both selectively relied upon guidance provided by 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 qualified 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., *Schwieb 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, Zicarelli 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.

- 1 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 mail-in 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”).
- 5 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.’*”
- 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).
- 11 *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).
- 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).
- 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 Melody*, 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 *Id.*
- 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 engraving 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. Cmwith. 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.*
- 48 *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).
- 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.

Appendix 50

C E R T I F I C A T E

1
2 I hereby certify that the foregoing proceedings,
3 docket number 355 M.D. 2022, were reported by me on July
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 Judith E. Shuller
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Appendix 51

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

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@attorneygeneral.gov, with agreement of:
Michael J. Fischer, Executive Deputy Attorney General
(267) 768-3968
Office of Attorney General
1600 Arch Street, Suite 300
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JBukowski@SmithBukowski.com, with agreement of:
Jeffrey D. Bukowski, Esquire
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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

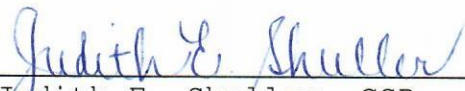
Dillon, McCandless, King, Coulter & Graham, LLP

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

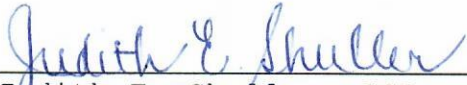
LEIGH M. CHAPMAN, ACTING SECRETARY OF THE
COMMONWEALTH AND THE PENNSYLVANIA DEPARTMENT
OF STATE V. BERKS COUNTY BOARD OF
ELECTIONS, FAYETTE COUNTY BOARD OF ELECTIONS,
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NO. 355 M.D. 2022

HEARING HELD JULY 28, 2022

See Pa. R.A.P. 1922(c)

DATED: August 5, 2022



Judith E. Shuller, CSR
Strehlow & Associates, Inc.
54 Friends Lane, Suite 116
Newtown, Pennsylvania 18940
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TO: Michael J. Fischer, Executive Deputy Attorney
General

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filed a transcript in the case of:

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

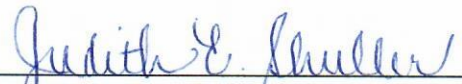
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Judith E. Shuller, CSR
Strehlow & Associates, Inc.
54 Friends Lane, Suite 116
Newtown, Pennsylvania 18940
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TO: Jeffrey D. Bukowski, Esquire

Please be advised that I have this date
filed a transcript in the case of:

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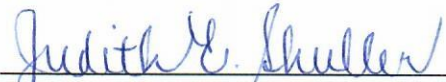
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DATED: August 5, 2022



Judith E. Shuller, CSR
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TO: Thomas W. King, III, Esquire

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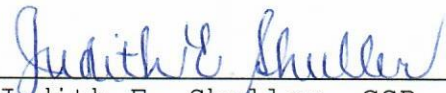
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DATED: August 5, 2022



Judith E. Shuller, CSR
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Appendix 52

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

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

Appendix 53

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

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

*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*

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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

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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: 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

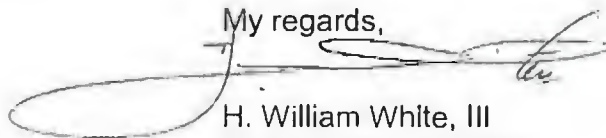
Jonathan Marks
jmarks@pa.gov

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.

My regards,



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

APPEARANCES (continued):

THOMAS W. KING, III, Esquire
THOMAS E. BRETH, Esquire
Dillon McCandless King Coulter & Graham L.L.P.
128 West Cunningham Street
Butler, Pennsylvania 16001
(For Respondent, Fayette County Board of
Elections)

<p style="text-align: right;">Page 7</p> <p style="text-align: center;">P R O C E E D I N G S</p> <p>JUDGE COHN JUBELIRER: Good morning, everyone, and welcome to Commonwealth Court. We are here today in the matter of Leigh Chapman, Acting Secretary of the Commonwealth and the Pennsylvania Department of State, Petitioners, versus Berks County Board of Elections, Fayette County Board of Elections, and Lancaster County Board of Elections, Respondents. It is a hearing on Petitioners' Emergency Application for Peremptory Judgment and Summary Relief. So welcome.</p> <p>We will begin. I understand that there are some witnesses that you anticipating calling. Would you each like to make a brief opening statement or would you prefer to jump right in?</p> <p>MR. BUKOWSKI: I'm not sure, Your Honor, and the Court's preference is, you know, one of the issues we raised some threshold issues as to how we even get to an evidentiary hearing; and we'll defer to Your Honor on how you want to handle that, whether you want us to argue those first before calling witnesses.</p> <p>We do think that how we got here is the Secretary's filing this action late to challenge the Board, the three County Boards of Elections' certified results in an untimely manner in which no voter challenge exists, no candidate challenge exists, and they're seeking to enforce</p>	<p style="text-align: right;">Page 9</p> <p>Secretary Mr. Marks is here who we would call on cross-examination.</p> <p>We're prepared to go however Your Honor would see fit, but I think there are preliminary issues that we ought to at least address. I guess we're kind of addressing them now, but I think we ought to get to those. And I would think that the Court would most likely have, with all due respect, would most likely have questions for both sides about those issues.</p> <p>JUDGE COHN JUBELIRER: And --</p> <p>Yes?</p> <p>MR. BUKOWSKI: And, Your Honor, I didn't introduce myself, so I apologize. Jeff Bukowski on behalf of both Berks and Lancaster County; and I do have Commissioner Christian Leinbach, Chairman of the Berks County Commissioners, here and Commissioner Ray D'Agostino from the Lancaster County Board of Commissioners here.</p> <p>And I didn't intend to argue it first other than raise the issue so that if the Court preferred to go that way, maybe Mr. Boyer or Mr. Fischer would try and, you know, convince the Court why they should be here now and then we would argue why they shouldn't be.</p> <p>JUDGE COHN JUBELIRER: And thank you very much. I appreciate and I understand that you haven't actually made your arguments. You've just presented what</p>
<p style="text-align: right;">Page 8</p> <p>a directive by the Secretary to have the three counties recertify their results of their elections in accordance with the Acting Secretary's interpretation of a Third Circuit decision that wasn't even in effect as of the deadline and actual date of certification.</p> <p>So we can argue those before the Court first before putting on witnesses, but we're prepared to proceed however the Court would prefer.</p> <p>MR. KING: Good morning. Thomas W. King, III, for the Fayette County Board of Elections. With me is my partner, Thomas Breth, who has appeared before you previously.</p> <p>I would echo what Mr. Bukowski said. There are preliminary matters that I'm certain that the Court has seen the papers in the case, but there are preliminary matters that call into question the jurisdiction with respect to hearing this matter because of the failure to comply with the statutory requirements. Also there is no case or controversy before you; and in addition to that, whatever is filed is completely untimely.</p> <p>So I'm not sure that we shouldn't at least address those preliminary issues in some way. There are witnesses here. There are County Commissioners here. I have Commissioner Dunn and Commissioner Lohr from Fayette County made the trip here today, and I know that the Deputy</p>	<p style="text-align: right;">Page 10</p> <p>you would like to, the method you would like to proceed with.</p> <p>Counsel?</p> <p>MR. BOYER: Good morning, Your Honor, Jacob Boyer --</p> <p>JUDGE COHN JUBELIRER: Good morning.</p> <p>MR. BOYER: -- from the Office of Attorney General on behalf of the Acting Secretary and the Department of State.</p> <p>I think our view is we're prepared to proceed as Your Honor sees fit. Unless Your Honor's prepared to rule on the legal issues right now, I think it probably makes sense out of respect to the witnesses to proceed with the evidentiary hearing and then to argument.</p> <p>I will say a couple of the comments that my colleagues on the other side made during their presentation reflects a basic --</p> <p>JUDGE COHN JUBELIRER: And please, you know what, before we continue and this is just more of just a method of proceeding here, I have no objection if you wish to speak from your tables where you're sitting because you can have all your materials in front of you; and I also appreciate the respect accorded to the Court by your standing when you speak.</p> <p>With the streaming of the proceedings so</p>

<p style="text-align: right;">Page 11</p> <p>1 that other people can watch this on YouTube without having</p> <p>2 to be in court, the volume of your voice is difficult to</p> <p>3 hear if you're not sitting or close to the microphone. So</p> <p>4 I will not take it amiss if you sit while you speak to the</p> <p>5 Court so that the microphone can catch what you're saying</p> <p>6 or, of course, you may stand at the podium. But I want to</p> <p>7 make sure that everybody can hear what you're saying.</p> <p>8 So excuse the interruption but please --</p> <p>9 (Mr. Boyer approached the podium.)</p> <p>10 JUDGE COHN JUBELIRER: -- okay -- feel free</p> <p>11 to go wherever it's most suitable and convenient.</p> <p>12 MR. BOYER: Thank you, Your Honor, and I</p> <p>13 appreciate the courtesy.</p> <p>14 I will say we believe that these issues can</p> <p>15 be resolved on the paper much like they were in the</p> <p>16 McCormick matter. If Your Honor disagrees and believes</p> <p>17 there are relevant disputed facts, I think our view is that</p> <p>18 it makes sense out of courtesy to the witnesses to have</p> <p>19 them testify and then proceed to argument.</p> <p>20 The threshold issues that my colleagues</p> <p>21 raised I think reflect a couple basic misunderstandings</p> <p>22 about the issues in this case. Number one, this is not a</p> <p>23 case to enforce guidance from the Secretary. This is a</p> <p>24 case to enforce an order of this Court, state law, and</p> <p>25 federal law.</p>	<p style="text-align: right;">Page 13</p> <p>1 I am going to be taking all of these matters</p> <p>2 under consideration, so I don't intend to rule</p> <p>3 preliminarily on the issues that you've raised which are</p> <p>4 important and I think will benefit from considered thought</p> <p>5 and research.</p> <p>6 So given the fact that you have witnesses</p> <p>7 here that may or may not want to remain through all of the</p> <p>8 arguments, if there is no objection I think we should begin</p> <p>9 with the testimony, allow the witnesses to be questioned,</p> <p>10 make the record, and then afterwards I do want to hear all</p> <p>11 of the arguments that you've raised.</p> <p>12 Even though we're taking it a little out of</p> <p>13 order, given the situation I think that probably makes most</p> <p>14 sense although I appreciate your having brought the</p> <p>15 preliminary threshold issues to the fore.</p> <p>16 MR. KING: Yes, Your Honor. That's fine</p> <p>17 with us. Thank you very much.</p> <p>18 MR. BUKOWSKI: Thank you, Your Honor. We</p> <p>19 will proceed accordingly.</p> <p>20 JUDGE COHN JUBELIRER: Thank you very much.</p> <p>21 MR. BUKOWSKI: Thank you.</p> <p>22 MR. BOYER: Thank you, Your Honor.</p> <p>23 JUDGE COHN JUBELIRER: Okay. Given the way</p> <p>24 we're going to proceed, would you like to spend a few</p> <p>25 minutes before we begin with an opening statement or would</p>
<p style="text-align: right;">Page 12</p> <p>1 And, number two, I think they refer to</p> <p>2 issues of timeliness. I believe that's a reference to</p> <p>3 Section 3157 of the Election Code which doesn't apply here</p> <p>4 since it doesn't apply to contests about certification</p> <p>5 which is a ministerial duty that it's supposed to follow</p> <p>6 the resolution of issues about computation and canvassing</p> <p>7 which are the only things that can be challenged under the</p> <p>8 statutes being alluded to. So I don't think that --</p> <p>9 JUDGE COHN JUBELIRER: I think are you</p> <p>10 having trouble hearing?</p> <p>11 THE REPORTER: Yes, and he needs to slow</p> <p>12 down.</p> <p>13 JUDGE COHN JUBELIRER: And you need to speak</p> <p>14 a little slower, please.</p> <p>15 MR. BOYER: I'm sorry.</p> <p>16 JUDGE COHN JUBELIRER: Yes.</p> <p>17 MR. BOYER: I apologize.</p> <p>18 The threshold issues, Your Honor, in our</p> <p>19 view are actually quite easily resolved and don't apply in</p> <p>20 this matter. So unless Your Honor is in a position to rule</p> <p>21 ahead of an evidentiary hearing, I think we should proceed</p> <p>22 with that and then follow the evidentiary hearing with</p> <p>23 argument.</p> <p>24 JUDGE COHN JUBELIRER: Okay. Thank you very</p> <p>25 much.</p>	<p style="text-align: right;">Page 14</p> <p>1 you prefer to wait and at the end do the conclusions?</p> <p>2 MR. FISCHER: Your Honor, I think we're fine</p> <p>3 dispensing with opening statements.</p> <p>4 JUDGE COHN JUBELIRER: Okay.</p> <p>5 Would you?</p> <p>6 MR. BUKOWSKI: We agree, Your Honor.</p> <p>7 JUDGE COHN JUBELIRER: Okay.</p> <p>8 MR. BUKOWSKI: And since the Court has</p> <p>9 directed that we'll get a full chance to argue, we agree</p> <p>10 that makes sense.</p> <p>11 JUDGE COHN JUBELIRER: Absolutely and I will</p> <p>12 place no time limitations on your arguments because I know</p> <p>13 how important they are, and I want to make sure that</p> <p>14 everyone has the opportunity to make their best arguments</p> <p>15 and present their best case.</p> <p>16 MR. KING: Thank you very much.</p> <p>17 MR. BUKOWSKI: Very good, Your Honor. Thank</p> <p>18 you.</p> <p>19 JUDGE COHN JUBELIRER: Thank you.</p> <p>20 In that case I believe it is up to the</p> <p>21 Secretary to proceed. Since you are the moving party, you</p> <p>22 have the burden.</p> <p>23 MR. FISCHER: Thank you very much, Your</p> <p>24 Honor. We'd like to call Jonathan Marks as our first</p> <p>25 witness.</p>

<p style="text-align: right;">Page 15</p> <p>1 MR. HOLLAND: Please raise your right hand.</p> <p>2 Whereupon,</p> <p>3 JONATHAN MARKS,</p> <p>4 having been duly sworn, testified as follows:</p> <p>5 MR. HOLLAND: Please be seated. Thank you.</p> <p>6 MR. KING: Excuse me. May it please the</p> <p>7 Court. Your Honor, with respect to these witnesses, will</p> <p>8 the parties be bound by the declarations made to the Court</p> <p>9 in the form of a proffer that was included in the</p> <p>10 memorandum filed? So, for example, would the Commonwealth</p> <p>11 be bound by the proffer of what this witness is about to</p> <p>12 testify about?</p> <p>13 JUDGE COHN JUBELIRER: Is there any</p> <p>14 objection to that?</p> <p>15 MR. FISCHER: No objection, Your Honor.</p> <p>16 We've laid out in general terms what we'd like to ask this</p> <p>17 witness, but I don't intend to go much beyond that. If Mr.</p> <p>18 King on cross elicits other points, then we certainly</p> <p>19 reserve the right on redirect to respond.</p> <p>20 MR. KING: That's fine, Your Honor. I just</p> <p>21 wanted to make sure what the rules were before we got into</p> <p>22 the game here.</p> <p>23 JUDGE COHN JUBELIRER: Sure. Thank you very</p> <p>24 much.</p> <p>25 MR. KING: Yes, ma'am. Thank you.</p>	<p style="text-align: right;">Page 17</p> <p>1 election administration at the State level.</p> <p>2 Q. Generally speaking, what are the responsibilities</p> <p>3 of the county boards?</p> <p>4 A. Generally speaking, you know, it's to instruct</p> <p>5 poll workers, to procure and staff polling places</p> <p>6 throughout their county. It also includes receiving and</p> <p>7 tabulating both Election Day votes as well as votes cast by</p> <p>8 absentee or through the mail.</p> <p>9 Q. And what are the responsibilities broadly</p> <p>10 speaking of the Department of State with respect to</p> <p>11 elections?</p> <p>12 A. Our duties are primarily ministerial in nature.</p> <p>13 We do provide guidance to the counties; but as it relates</p> <p>14 to elections or a given election, you know, our</p> <p>15 responsibility primarily is to certify the results of the</p> <p>16 election upon receipt of the certified election returns</p> <p>17 from the various 67 county Boards of Elections.</p> <p>18 Q. Now, you mentioned guidance issued by the</p> <p>19 Department of State. Is the Department of State's guidance</p> <p>20 binding on the counties?</p> <p>21 A. Guidance, no, it is not binding on the counties.</p> <p>22 The Secretary of the Commonwealth does have the authority</p> <p>23 to issue directives in some cases. But when we use the</p> <p>24 term guidance, we're talking about something that is what</p> <p>25 the name implies. It's guidance that counties we expect</p>
<p style="text-align: right;">Page 16</p> <p>1 DIRECT EXAMINATION</p> <p>2 BY MR. FISCHER:</p> <p>3 Q. Good morning, Mr. Marks.</p> <p>4 A. Good morning.</p> <p>5 Q. What is your current position, sir?</p> <p>6 A. Currently I am the Deputy Secretary for Elections</p> <p>7 and Commissions at the Pennsylvania Department of State.</p> <p>8 Q. How long have you been employed by the</p> <p>9 Pennsylvania Department of State?</p> <p>10 A. Employed by the Pennsylvania Department of State</p> <p>11 27 years, 28 years. I started in the Corporation Bureau</p> <p>12 before I came to Elections.</p> <p>13 Q. How long have you worked in the Elections Bureau?</p> <p>14 A. I've worked in Elections in a variety of</p> <p>15 positions for over 18 years, since late 2003.</p> <p>16 Q. And how long have you held your current position?</p> <p>17 A. Since February of 2019.</p> <p>18 Q. Thank you. I'd just like to ask you briefly</p> <p>19 about the administration of elections in Pennsylvania.</p> <p>20 What governmental entity or entities is responsible for</p> <p>21 administering elections on a day-to-day basis?</p> <p>22 A. Primarily the county Boards of Elections. They</p> <p>23 are statutorily given that duty to administer the</p> <p>24 day-to-day on election administration. Of course, the</p> <p>25 Department of State plays an important role as well in</p>	<p style="text-align: right;">Page 18</p> <p>1 will follow but as we learned not always.</p> <p>2 Q. Thank you. And who in Pennsylvania has the final</p> <p>3 say over disputed questions relating to the administration</p> <p>4 of elections?</p> <p>5 A. The final say, I would think the final say would</p> <p>6 be the Court, you know, a competent Court, whatever that</p> <p>7 Court happens to be.</p> <p>8 Q. Does the Department make an effort to see that</p> <p>9 its guidance is consistent with relevant decisions from the</p> <p>10 Courts?</p> <p>11 A. We do, yes.</p> <p>12 Q. So I'd like to ask you a little about the process</p> <p>13 of certifying elections which you mentioned and then</p> <p>14 specifically relating to the May, 2022 primary. First of</p> <p>15 all, can I ask a question? What does it mean to canvass</p> <p>16 the votes cast?</p> <p>17 A. Canvass really means the entire process of, you</p> <p>18 know, the viewing and tabulating of the election returns.</p> <p>19 So canvass, the county Board of Elections comes together</p> <p>20 and they will review the returns submitted by the various</p> <p>21 precincts in their counties. It also includes adding those</p> <p>22 totals from absentee and mail-in balloting which are done</p> <p>23 centrally by the county Board of Elections.</p> <p>24 So that prec canvass that we have that begins on</p> <p>25 7:00 a.m. on Election Day as well as the official canvass</p>

<p style="text-align: right;">Page 19</p> <p>1 that continues thereafter, all of that is part of the</p> <p>2 canvass. So it's not just the tabulation of votes. It's</p> <p>3 also everything that precedes that during the official</p> <p>4 canvassing.</p> <p>5 Q. But it's fair to say that canvassing includes</p> <p>6 counting votes and tabulating votes?</p> <p>7 A. It does, yes.</p> <p>8 Q. Thank you. And what does certification of the</p> <p>9 election refer to?</p> <p>10 A. Certification is essentially an act, a</p> <p>11 ministerial act that occurs once the canvass is completed</p> <p>12 and you've tallied up all the results. The county will</p> <p>13 then certify those results to the Secretary of the</p> <p>14 Commonwealth, and subsequently the Secretary will certify</p> <p>15 the final results after she compiles them.</p> <p>16 Q. So both the counties and the Secretary certify</p> <p>17 results; is that correct?</p> <p>18 A. Correct. Yes.</p> <p>19 Q. Does the Secretary strive to make sure that her</p> <p>20 certification is accurate and complete?</p> <p>21 A. She does, yes.</p> <p>22 Q. Sir, I'd like to ask you specifically now about</p> <p>23 mail-in and absentee ballots, and I'm going to hand you</p> <p>24 what's been marked as Joint Exhibit 1.</p> <p>25 (Whereupon, the document was marked as</p>	<p style="text-align: right;">Page 21</p> <p>1 Q. Now, there's a place for the voter to sign and</p> <p>2 mark, sign or mark and then a line below that for the date.</p> <p>3 Do you see that?</p> <p>4 A. I do, yes.</p> <p>5 Q. Could you explain under the Election Code when do</p> <p>6 mail-in and absentee ballots need to be returned to the</p> <p>7 counties?</p> <p>8 A. A mail-in or absentee ballot must be returned to</p> <p>9 the county by 8:00 p.m. on Election Day.</p> <p>10 Q. And was that true with respect to the May, 2022</p> <p>11 primary?</p> <p>12 A. It was, yes.</p> <p>13 Q. And was this certification form in use for the</p> <p>14 May, 2022 primary?</p> <p>15 A. It was, yes.</p> <p>16 Q. Now, with respect to the November, 2020 general</p> <p>17 election, was the deadline 8:00 p.m. on Election Day?</p> <p>18 A. No. The deadline was not 8:00 p.m. on Election</p> <p>19 Day November, 2020. Pursuant to the order of the</p> <p>20 Pennsylvania Supreme Court, that deadline for receipt was</p> <p>21 extended to Friday after election.</p> <p>22 Q. How do counties determine whether mail-in and</p> <p>23 absentee ballots were submitted by the deadline?</p> <p>24 A. Typically the counties will date-stamp or</p> <p>25 otherwise put some indicia on the outer envelope indicating</p>
<p style="text-align: right;">Page 20</p> <p>1 Joint Exhibit Number 1 for</p> <p>2 identification.)</p> <p>3 THE WITNESS: Thank you.</p> <p>4 BY MR. FISCHER:</p> <p>5 Q. Sir, are you familiar with this document?</p> <p>6 A. I am, yes.</p> <p>7 Q. What is this document?</p> <p>8 A. This is the declaration envelope template drafted</p> <p>9 by the Department of State. A declaration envelope meaning</p> <p>10 that outside envelope that the voter inserts their ballot</p> <p>11 inside the secrecy envelope and they sign the declaration.</p> <p>12 Q. Could you just explain again? You mentioned two</p> <p>13 different envelopes. Could you just explain the function</p> <p>14 of the two envelopes?</p> <p>15 A. Sure. So the secrecy envelope or I believe the</p> <p>16 statute identifies it as official ballot envelope is just a</p> <p>17 plain envelope with the wording official election ballot on</p> <p>18 it that the voter inserts their voted ballot into. The</p> <p>19 declaration envelope then is the envelope that that inner</p> <p>20 envelope, that secrecy envelope is inserted into, sealed,</p> <p>21 and then signed by the elector. And that is then returned</p> <p>22 to the county Board of Elections for canvassing.</p> <p>23 Q. So what we're looking at as Joint Exhibit 1</p> <p>24 appears on the outer envelope; is that your testimony?</p> <p>25 A. Correct. Yes.</p>	<p style="text-align: right;">Page 22</p> <p>1 that it was timely received by the county Board of</p> <p>2 Elections.</p> <p>3 Q. Do the counties use the date written by the voter</p> <p>4 on the outer envelope to determine timeliness?</p> <p>5 A. Not that I'm aware of, no.</p> <p>6 Q. Are you aware of any purpose for which the</p> <p>7 counties use the date as written on the outer envelope?</p> <p>8 A. I cannot think of any administrative purpose.</p> <p>9 Q. Do voters occasionally omit to write a date on</p> <p>10 the outer envelope?</p> <p>11 A. Yes, they do.</p> <p>12 Q. And if I refer to those ballots as undated</p> <p>13 ballots, do you understand what I'm referring to?</p> <p>14 A. I do.</p> <p>15 Q. And do voters sometimes write a date that is</p> <p>16 obviously incorrect?</p> <p>17 A. Yes. Voters, anecdotally we've heard from</p> <p>18 counties where voters will, you know, either put their</p> <p>19 birth date on there as they misunderstand what's being</p> <p>20 requested or they'll put a date with the wrong year or the</p> <p>21 wrong month.</p> <p>22 Q. Outside those situations where the date is</p> <p>23 obviously incorrect, do the counties have a mechanism of</p> <p>24 verifying whether the date is accurate?</p> <p>25 A. No, they do not.</p>

<p style="text-align: right;">Page 23</p> <p>1 Q. Now, earlier you testified about guidance issued 2 by the Department. Has the Department issued guidance 3 relating to undated ballots or wrongly dated ballots as you 4 describe them? 5 A. Yes. Since early June -- well, actually since 6 May 20th I believe when the Third Circuit ruled in the 7 Migliori case, we issued guidance to the counties at that 8 point indicating that the counties should -- well, sorry. 9 I want to make sure I get the timeline correct; but, yes, 10 we've issued guidance prior to the primary. We obviously 11 issued guidance subsequent to that in light of various 12 Court rulings. 13 Q. So let me drill down a little bit on that. First 14 of all, are you an attorney for the Department? 15 A. I am not, no. 16 Q. You had mentioned the Department issued guidance 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 20 voter lists his or her birth date? 21 A. It has been our guidance since I believe 22 September of 2020 that counties cannot and should not set 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.</p>	<p style="text-align: right;">Page 25</p> <p>1 Any problem? 2 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 16 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 22 all county Boards of Elections, June 17th e-mail. 23 Q. Thank you for that clarification. What is the 24 summary of events that you have here? 25 A. This was basically a summary of, you know,</p>
<p style="text-align: right;">Page 24</p> <p>1 Q. And has the Department's guidance with respect to 2 wrongly dated ballots only changed over that time? 3 A. It has not. 4 Q. Now, with respect to undated ballots, has the 5 Department's guidance changed over time? 6 A. It has, yes. 7 Q. And what has prompted those changes? 8 A. Rulings by the Court, this Court as well as the 9 Third Circuit. 10 Q. So leading up to the May, 2022 primary, what was 11 the Department's guidance with respect to undated ballots? 12 A. It was the Department's guidance leading up to 13 the May, 2022 primary that those ballots could not be 14 counted and based on our analysis of the 2020 decision by 15 the Pennsylvania Supreme Court. 16 Q. I'm going to hand you what's been marked as Joint 17 Exhibit 6. 18 (Whereupon, the document was marked as 19 Joint Exhibit Number 6 for 20 identification.) 21 THE WITNESS: Thank you. 22 Your Honor, is my volume okay? I tried to 23 -- 24 JUDGE COHN JUBELIRER: I think so. Thank 25 you.</p>	<p style="text-align: right;">Page 26</p> <p>1 relevant events, mostly, you know, rulings by the Court and 2 other events in between that led to the Department's 3 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 15 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 Q. 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</p>

<p style="text-align: right;">Page 27</p> <p>1 stay in the Migliori case.</p> <p>2 Q. Now, you mentioned the June 2nd decision of this</p> <p>3 Court. Did that involve litigation regarding the</p> <p>4 republican senate primary?</p> <p>5 A It did, yes.</p> <p>6 Q. And that was actually brought by Mr. McCormick,</p> <p>7 one of the candidates, correct?</p> <p>8 A. Correct.</p> <p>9 Q. Sir, I'm going to hand you what's been marked as</p> <p>10 Joint Exhibit 11.</p> <p>11 (Whereupon, the document was marked as</p> <p>12 Joint Exhibit Number 11 for</p> <p>13 identification.)</p> <p>14 BY MR. FISCHER:</p> <p>15 Q. Have you seen this document before?</p> <p>16 A. I have, yes.</p> <p>17 Q. And what is the date on this letter?</p> <p>18 A. This letter is dated June 29th of 2022.</p> <p>19 Q. And who is it sent from?</p> <p>20 A. It's sent by Chief Counsel of the Department of</p> <p>21 State, Timothy Gates.</p> <p>22 Q. Now, the letter is directed to the Director of</p> <p>23 the Berks County Election Services. Do you recall if this</p> <p>24 letter was sent to any other county officials?</p> <p>25 A. Yes. My recollection is this letter was sent to</p>	<p style="text-align: right;">Page 29</p> <p>1 Q. And this is an e-mail sent to you from Marybeth</p> <p>2 Kuznik, am I saying that right?</p> <p>3 A. Kuznik.</p> <p>4 Q. Kuznik, with the Fayette County Election Bureau,</p> <p>5 correct?</p> <p>6 A. Correct. Yes.</p> <p>7 Q. Dated June 27th?</p> <p>8 A. That's correct, yes.</p> <p>9 Q. And what is Ms. Kuznik saying in her e-mail?</p> <p>10 A. So Ms. Kuznik, I'm actually going to read it if</p> <p>11 that --</p> <p>12 Q. Certainly.</p> <p>13 A. -- pleases the Court. The Board of Elections of</p> <p>14 Fayette County has voted not to open or count the undated</p> <p>15 ballots from the May 17th, 2022 general primary. For this</p> <p>16 reason, I am unable to provide the information you</p> <p>17 requested in your e-mail below. Dated ballots with the</p> <p>18 wrong date were counted and were already included in</p> <p>19 Fayette's original certification of the primary and</p> <p>20 subsequent recount, referring to the recount, statewide</p> <p>21 recount for U.S. Senate.</p> <p>22 Q. So now let's look at your e-mail that she was</p> <p>23 responding to which begins on the bottom of the first page</p> <p>24 and carries over into the second page. Do you recall</p> <p>25 sending this e-mail?</p>
<p style="text-align: right;">Page 28</p> <p>1 I believe four counties, Berks, Bradford, Fayette, and</p> <p>2 Lancaster.</p> <p>3 Q. And what was the purpose of this letter?</p> <p>4 A. The purpose of this letter was to reiterate the</p> <p>5 Department's position that counties were required, in light</p> <p>6 of relevant rulings by the Courts, the counties were</p> <p>7 required to canvass, tabulate, and certify vote totals cast</p> <p>8 on undated or wrongly dated ballots as the case may be.</p> <p>9 And it outlines how the Department arrived at that</p> <p>10 conclusion, briefly summarizes it.</p> <p>11 Q. And in between your June 17th e-mail and this</p> <p>12 June 29th letter, had you been in communication with any</p> <p>13 counties about those certifications?</p> <p>14 A. Yes. I certainly received questions, had some</p> <p>15 phone conversations with various counties about the June</p> <p>16 17th e-mail.</p> <p>17 Q. I'm going to hand you what's been marked as Joint</p> <p>18 Exhibit 8 and also give you the next two to save time but</p> <p>19 I'll let you know when we're ready for those.</p> <p>20 (Whereupon, the document was marked as</p> <p>21 Joint Exhibit Number 8 for</p> <p>22 identification.)</p> <p>23 BY MR. FISCHER:</p> <p>24 Q Do you recognize Joint 8?</p> <p>25 A. I do, yes.</p>	<p style="text-align: right;">Page 30</p> <p>1 A. I do, yes. This was sort of my final reminder to</p> <p>2 the counties who at that point had not yet certified vote</p> <p>3 totals for undated and wrongly dated ballots.</p> <p>4 Q. Did this go to all 67 counties?</p> <p>5 A. It did not. This one went to nine counties</p> <p>6 including Bradford, Berks, Fayette, and Lancaster.</p> <p>7 Q. How had you selected those nine counties to</p> <p>8 receive the e-mail?</p> <p>9 A. They were selected based on whether we received</p> <p>10 from those counties a certification per my original request</p> <p>11 of June 17th.</p> <p>12 Q. All right. Thank you. I'd like to now direct</p> <p>13 you to Joint Exhibit 9 which is the next document up there.</p> <p>14 (Whereupon, the document was marked as</p> <p>15 Joint Exhibit Number 9 for</p> <p>16 identification.)</p> <p>17 BY MR. FISCHER:</p> <p>18 Q. This is another e-mail sent to you from Jacquelyn</p> <p>19 Pfursich. Am I saying that correctly?</p> <p>20 A. I don't know. This is the first time I actually</p> <p>21 had any interaction with Jacquelyn, so I believe that's</p> <p>22 correct but don't quote me on that. I'm sure one of the</p> <p>23 Commissioners from Lancaster County can tell you the</p> <p>24 correct pronunciation.</p> <p>25 MR. D'AGOSTINO: Pfursich.</p>

<p style="text-align: right;">Page 31</p> <p>1 MR. FISCHER: Pfursich, thank you.</p> <p>2 BY MR. FISCHER:</p> <p>3 Q. What is Ms. Pfursich's position?</p> <p>4 A. I believe she is the Lancaster County Solicitor.</p> <p>5 Q. And this e-mail is dated June 27th?</p> <p>6 A. It is, yes.</p> <p>7 Q. And I won't ask you to read the entire e-mail,</p> <p>8 but is it fair to say that in this e-mail Ms. Pfursich says</p> <p>9 that Lancaster County will not be including undated ballots</p> <p>10 in its certified totals?</p> <p>11 A. Yes, that is correct.</p> <p>12 Q. And now I'd like to go to Joint Exhibit 10.</p> <p>13 (Whereupon, the document was marked as</p> <p>14 Joint Exhibit Number 10 for</p> <p>15 identification.)</p> <p>16 BY MR. FISCHER:</p> <p>17 Q. This is another e-mail sent to you from Christian</p> <p>18 Leinbach. Do you know who Mr. Leinbach is?</p> <p>19 A. I do, yes. I believe he is the Chair of the</p> <p>20 Berks County Commissioners.</p> <p>21 Q. And this is sent on June 28th, correct?</p> <p>22 A. Correct. Yes.</p> <p>23 Q. And in this e-mail Mr. Leinbach says please help</p> <p>24 me understand where the clear Court guidance is regarding</p> <p>25 certification on undated ballots. I do not see it. Do you</p>	<p style="text-align: right;">Page 33</p> <p>1 A. Correct.</p> <p>2 Q. And what correspondence is Mr. Kauffman referring</p> <p>3 to there?</p> <p>4 A. He's referring to the June 29th letter from our</p> <p>5 Chief Counsel, from Mr. Gates to the Election Director in</p> <p>6 Berks County.</p> <p>7 Q. I'd like to direct you to Joint Exhibit 13 and</p> <p>8 specifically the second e-mail in the chain which is from</p> <p>9 Ms. Pfursich to Mr. Gates.</p> <p>10 (Whereupon, the document was marked as</p> <p>11 Joint Exhibit Number 13 for</p> <p>12 identification.)</p> <p>13 BY MR. FISCHER:</p> <p>14 Q. Have you seen this e-mail before?</p> <p>15 A. Are you referring to the July 5th, 4:17 p.m.?</p> <p>16 Q. Yes, that's correct.</p> <p>17 A. I have, yes.</p> <p>18 Q. And is it fair to say Ms. Pfursich is reiterating</p> <p>19 what she previously said to you which is that Lancaster</p> <p>20 County will not be including undated ballots in its total?</p> <p>21 A. That is correct. Yes.</p> <p>22 Q. Now, finally I'd like to direct you to Joint</p> <p>23 Exhibit 14.</p> <p>24 (Whereupon, the document was marked as</p> <p>25 Joint Exhibit Number 14 for</p>
<p style="text-align: right;">Page 32</p> <p>1 see that?</p> <p>2 A. I do, yes.</p> <p>3 Q. So is it fair to say that you understood this</p> <p>4 e-mail to be communicating that Mr. Leinbach did not agree</p> <p>5 with the Department's position?</p> <p>6 A. Yes, I think that's a fair --</p> <p>7 Q. I'm going to hand you the next three exhibits</p> <p>8 which are 12, 13, and 14. I want to direct you to Joint</p> <p>9 Exhibit 12 first.</p> <p>10 (Whereupon, the document was marked as</p> <p>11 Joint Exhibit Number 12 for</p> <p>12 identification.)</p> <p>13 BY MR. FISCHER:</p> <p>14 Q. Now, this is the letter from the Berks County --</p> <p>15 First Assistant Berks County Solicitor to Mr. Gates,</p> <p>16 correct?</p> <p>17 A. Yes, that's correct.</p> <p>18 Q. And dated July 1st?</p> <p>19 A. Yes.</p> <p>20 Q. And in this letter Mr. Kauffman, the Assistant</p> <p>21 County Solicitor, says in the second sentence, pursuant to</p> <p>22 a majority vote of the Berks County Board of Elections, the</p> <p>23 County of Berks will not be recertifying the results of the</p> <p>24 May 17th, 2022 primary election as requested in your</p> <p>25 correspondence?</p>	<p style="text-align: right;">Page 34</p> <p>1 identification.)</p> <p>2 BY MR. FISCHER:</p> <p>3 Q. This is an e-mail from Mr. Gates to Ms. Kuznik.</p> <p>4 What is the date on this e-mail?</p> <p>5 A. This e-mail is -- are you referring to the one at</p> <p>6 the top of the chain --</p> <p>7 Q. Yes.</p> <p>8 A. -- which is July 8th, 2022, at 6:31 p.m.?</p> <p>9 Q. Thank you. Can you just read what Mr. Gates says</p> <p>10 in this e-mail?</p> <p>11 A. Following up again. Please advise on your</p> <p>12 response as requested. Fayette County is the only county</p> <p>13 that I have not yet heard from.</p> <p>14 Q. And with respect to the subject that Fayette</p> <p>15 County did not report to Mr. Gates on, do you have an</p> <p>16 understanding of what that refers to?</p> <p>17 A. Yes. Following all the way back to the beginning</p> <p>18 of this thread, it is follow-up from the June 29th e-mail</p> <p>19 from Mr. Gates where he attaches the letter, the June 29th</p> <p>20 letter, the one to the four counties regarding</p> <p>21 certification of undated ballot vote totals.</p> <p>22 Q. And do you see the second e-mail in the chain</p> <p>23 dated July 5th, 2022?</p> <p>24 A. I do, yes.</p> <p>25 Q. Now, this is sent to two e-mail addresses, Ms.</p>

<p style="text-align: right;">Page 35</p> <p>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 4 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 15 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 Q. In the Department's view have those three 22 counties complied with their obligation to certify the 23 results of the May, 2022 primary? 24 A. No. 25 Q. Now, we've talked a little bit about undated</p>	<p style="text-align: right;">Page 37</p> <p>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 16 paper. 17 Q. Okay. Take your time. 18 A. I have it. You're referring to this 19 (indicating) -- 20 Q. Yes. 21 A. -- ballot envelope template? 22 Q. And that's the form of voter declaration on the 23 outer envelope that's circulated by the Department to the 24 Boards of Elections; is that right? 25 A. It is, yes.</p>
<p style="text-align: right;">Page 36</p> <p>1 ballots and wrongly dated ballots earlier. Are you aware 2 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, 11 it is your understanding that undated ballots were not 12 included? 13 A. That is correct. Yes. 14 Q. Thank you. 15 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? 19 MR. BUKOWSKI: I'll go first, Your Honor. 20 JUDGE COHN JUBELIRER: Okay. And if you can 21 either come up here or -- 22 MR. BUKOWSKI: I'll come up. 23 JUDGE COHN JUBELIRER: Okay. 24 CROSS-EXAMINATION 25 BY MR. BUKOWSKI:</p>	<p style="text-align: right;">Page 38</p> <p>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 14 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 22 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?</p>

<p style="text-align: right;">Page 39</p> <p>1 A. That's correct.</p> <p>2 Q. Okay. And now looking at the voter's declaration</p> <p>3 and the signature block, so turning it back right side up,</p> <p>4 the voter's declaration states I hereby declare that I am</p> <p>5 qualified to vote in this election, correct?</p> <p>6 A. Correct.</p> <p>7 Q. Then it goes on to say that I have not already</p> <p>8 voted in this election, correct?</p> <p>9 A. That's correct.</p> <p>10 Q. And I further declare that I marked my ballot in</p> <p>11 secret, correct?</p> <p>12 A. Correct.</p> <p>13 Q. And I am qualified to vote the enclosed ballot?</p> <p>14 A. Correct.</p> <p>15 Q. It further declares I understand I am no longer</p> <p>16 eligible to vote at my polling place after I returned my</p> <p>17 voted ballot?</p> <p>18 A. Correct.</p> <p>19 Q. However, if my ballot is not received by the</p> <p>20 county, I understand I may only vote by provisional ballot</p> <p>21 at my polling place unless I surrender my balloting</p> <p>22 materials to be voted to the Judge of Elections at my</p> <p>23 polling place; is that right?</p> <p>24 A. To be voided to the Judge of Elections at my</p> <p>25 polling place.</p>	<p style="text-align: right;">Page 41</p> <p>1 following year, so I understand how it happens.</p> <p>2 Q. It's a good thing we vote in the primary in May</p> <p>3 then?</p> <p>4 A. Yes.</p> <p>5 Q. Thank you. Now, the next exhibit -- well, before</p> <p>6 we get into the next exhibit, you had discussed guidance</p> <p>7 issued by the Department; is that right?</p> <p>8 A. That is correct. Yes.</p> <p>9 Q. And you conceded that that guidance is not</p> <p>10 binding on county boards of election?</p> <p>11 A. Correct. Yes.</p> <p>12 Q. And the guidance at issue -- well, the guidance</p> <p>13 that was promulgated by the Department prior to the May,</p> <p>14 2022 general primary election were two pieces of guidance.</p> <p>15 There's one that's Joint Exhibit 2 which is guidance issued</p> <p>16 September 11th, 2020; is that right?</p> <p>17 A. I don't have Joint Exhibit 2 in front of me, but</p> <p>18 the timeline sounds correct.</p> <p>19 MR. BUKOWSKI: Do you have that?</p> <p>20 MR. BOYER: These are all the exhibits.</p> <p>21 (Documents handed to Mr. Bukowski.)</p> <p>22 MR. BUKOWSKI: Here's a set of all 14 so</p> <p>23 I'll direct you. Here you go.</p> <p>24 THE WITNESS: Thank you.</p> <p>25 BY MR. BUKOWSKI:</p>
<p style="text-align: right;">Page 40</p> <p>1 Q. To be voided, I apologize. The last one is I</p> <p>2 understand I may only vote by provisional ballot at my</p> <p>3 polling place unless I surrender my balloting materials to</p> <p>4 be voided to the Judge of Elections at my polling place?</p> <p>5 A. That's correct.</p> <p>6 Q. And below that is a block with a big X that says</p> <p>7 voter sign or mark here, right?</p> <p>8 A. Correct.</p> <p>9 Q. And in parentheses in bold text it says required?</p> <p>10 A. That's correct.</p> <p>11 Q. And below that there's a blank, and below the</p> <p>12 line on that blank it says in bold text today's date?</p> <p>13 A. Correct.</p> <p>14 Q. And next to that it says in parentheses in bold</p> <p>15 text required?</p> <p>16 A. Correct.</p> <p>17 Q. Is there anything on this that would indicate to</p> <p>18 the voter that the date is not required on this?</p> <p>19 A. No, nothing that would indicate to the voter that</p> <p>20 the date is not required.</p> <p>21 Q. And there's nothing -- and the date in question</p> <p>22 says pretty plainly, you would agree, wouldn't you, it's</p> <p>23 today's date, the date you sign it?</p> <p>24 A. I would. I'm one of those people that still puts</p> <p>25 the wrong year, though, on checks four months into the</p>	<p style="text-align: right;">Page 42</p> <p>1 Q. Do you have Joint Exhibit 2 now in front of you?</p> <p>2 A. I do, yes.</p> <p>3 Q. Okay. And Joint Exhibit 2 is guidance issued by</p> <p>4 the Department on September 11th, 2020?</p> <p>5 A. That is correct. Yes.</p> <p>6 (Whereupon, the document was marked as</p> <p>7 Joint Exhibit Number 2 for</p> <p>8 identification.)</p> <p>9 BY MR. BUKOWSKI:</p> <p>10 Q. Okay. And now would you turn to Joint Exhibit 3?</p> <p>11 That's similar guidance. It's guidance issued by the</p> <p>12 Department of State dated September 28th, 2020?</p> <p>13 A. Correct, yes.</p> <p>14 (Whereupon, the document was marked as</p> <p>15 Joint Exhibit Number 3 for</p> <p>16 identification.)</p> <p>17 BY MR. BUKOWSKI:</p> <p>18 Q. So a couple weeks after the prior guidance?</p> <p>19 A. Right.</p> <p>20 Q. And the title page of Joint Exhibit 3 says</p> <p>21 Guidance Concerning Civilian Absentee and Mail-in Ballot</p> <p>22 Procedures, correct?</p> <p>23 A. Correct.</p> <p>24 Q. And then if you turn to page 5 of Joint Exhibit</p> <p>25 3, let me know when you're there.</p>

<p style="text-align: right;">Page 43</p> <p>1 A. I am there.</p> <p>2 Q. Okay. In the middle of the page above the bullet</p> <p>3 points, the second set of bullet points, it says, with</p> <p>4 regard to the outer ballot return envelope. And then there</p> <p>5 are three bullet points; is that right?</p> <p>6 A. That's correct. Yes.</p> <p>7 Q. And the first bullet point says -- so I'll read</p> <p>8 the intro and then the bullet point says, with regard to</p> <p>9 the outer ballot return envelope, a ballot return envelope</p> <p>10 with a declaration that is filled out, dated, and signed by</p> <p>11 an elector who was approved to receive an absentee or a</p> <p>12 mail-in ballot is sufficient and counties should continue</p> <p>13 to prec canvass and canvass these ballots, correct?</p> <p>14 A. Correct.</p> <p>15 Q. The next bullet says, a ballot return envelope</p> <p>16 with a declaration that is not filled out, dated, and</p> <p>17 signed is not sufficient and must be set aside, declared</p> <p>18 void, and may not be counted. Ballot return envelopes must</p> <p>19 be opened in such a manner as not to destroy the</p> <p>20 declarations executed thereon; is that right?</p> <p>21 A. That's correct.</p> <p>22 Q. Now, the language in this, filled out, dated, and</p> <p>23 signed, that stems from the Election Code provision that</p> <p>24 requires absentee and mail-in voters to fill out, date, and</p> <p>25 sign their ballots, right?</p>	<p style="text-align: right;">Page 45</p> <p>1 Court in our argument later with some of the specific</p> <p>2 language. So thank you.</p> <p>3 BY MR. BUKOWSKI:</p> <p>4 Q. Now, and this guidance, Joint Exhibit 3, I guess</p> <p>5 is guidance to the Boards of Elections on how they should</p> <p>6 canvass and count these absentee and mail-in ballots,</p> <p>7 correct?</p> <p>8 A. Correct. Yes.</p> <p>9 Q. Do you recognize and does the Department</p> <p>10 recognize that the canvassing and counting or canvassing</p> <p>11 and computing of absentee ballots is discretionary, is a</p> <p>12 discretionary act?</p> <p>13 A. Well, I think certainly the mechanics of it</p> <p>14 certain are discretionary. Whether or not to count legally</p> <p>15 cast ballots I don't believe is discretionary. I think</p> <p>16 that's a duty.</p> <p>17 Q. Let me rephrase my question. Determining whether</p> <p>18 a ballot is legally cast is an act of discretion by the</p> <p>19 county boards of election and subject to interpretation;</p> <p>20 isn't that right?</p> <p>21 A. I think I would disagree with you there. I think</p> <p>22 the statute, you know, provides direction as to which</p> <p>23 ballots should be counted; and the statute in this case as</p> <p>24 interpreted by the Courts I believe that's ultimately the</p> <p>25 authority on which ballots should be counted and which ones</p>
<p style="text-align: right;">Page 44</p> <p>1 A. Yes. I think that's fair.</p> <p>2 Q. Okay. And the language in the second bullet,</p> <p>3 sufficient, a ballot return envelope with a declaration</p> <p>4 that is not filled out, dated, and signed is not sufficient</p> <p>5 and must be set aside. That word sufficient comes from the</p> <p>6 language of the Election Code that directs Boards of</p> <p>7 Elections to determine if the voter's declaration is</p> <p>8 sufficient; isn't that right?</p> <p>9 MR. FISCHER: Your Honor, I'm just going to</p> <p>10 object to the extent that there's a call for a legal</p> <p>11 conclusion here since Mr. Marks is not an attorney.</p> <p>12 MR. BUKOWSKI: He's testified about how</p> <p>13 their guidance complies with the Election Code in cases</p> <p>14 interpreting the Election Code. I think he can at least</p> <p>15 answer his understanding of my question.</p> <p>16 JUDGE COHN JUBELIRER: So I will, yes, kind</p> <p>17 of sustain in part that I recognize that he is not an</p> <p>18 attorney. He is not giving a legal conclusion; but if he</p> <p>19 has an opinion in his position, he can give that.</p> <p>20 MR. FISCHER: Thank you.</p> <p>21 THE WITNESS: I don't have the Election Code</p> <p>22 in front of me so I don't recall if that exact word is</p> <p>23 used, but I think certainly it implies that an envelope is</p> <p>24 insufficient if those items are not completed.</p> <p>25 MR. BUKOWSKI: Okay. And we'll provide the</p>	<p style="text-align: right;">Page 46</p> <p>1 shouldn't.</p> <p>2 Q. And when you say interpreted by the Courts, are</p> <p>3 you talking about the 2020 In Re: Canvass Pennsylvania</p> <p>4 Supreme Court decision?</p> <p>5 A. Well, again you're getting a layman's</p> <p>6 interpretation here, but it would be that as well as recent</p> <p>7 decisions including the Third Circuit's decision in</p> <p>8 Migliori as well as the Commonwealth Court's decision on</p> <p>9 June 2nd.</p> <p>10 Q. Okay. Let's limit it to decisions before</p> <p>11 Election Day 2022. Before May 17th, 2022, the only</p> <p>12 decision that the Department believes is relevant is In Re:</p> <p>13 Canvass by the Supreme Court in November of 2020, correct?</p> <p>14 A. I believe that's fair, yes.</p> <p>15 Q. Right. Because this Court's decision in</p> <p>16 McCormick was June 2nd, 2022, right?</p> <p>17 A. Correct.</p> <p>18 Q. And then the Migliori decision was -- and we'll</p> <p>19 argue about that -- but it was issued -- it came out May</p> <p>20 20th --</p> <p>21 A. Yes.</p> <p>22 Q. -- and then was stayed and then became effective</p> <p>23 ultimately June 9th, 2022, when the Supreme Court vacated</p> <p>24 the decision?</p> <p>25 A. Correct. I'll concede the timing is not perfect.</p>

<p style="text-align: right;">Page 47</p> <p>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 13 the Third Circuit's ruling in Migliori. 14 Q. And the Department believes that that guidance is 15 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. 19 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 23 think that might be in the binder if you had a binder. I 24 think the first correspondence from -- 25 A. It might be --</p>	<p style="text-align: right;">Page 49</p> <p>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 Q. 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. 22 Q. Okay. So for example? 23 A. Some congressional districts, some senatorial, 24 and state house districts for example. 25 Q. All right. And the statute tells, you know,</p>
<p style="text-align: right;">Page 48</p> <p>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 15 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. 22 Q. Okay. But prior to that on June 6th, June 7th, 23 and June 8th, respectively, each of these three counties 24 had submitted final certified results to the Secretary; is 25 that right?</p>	<p style="text-align: right;">Page 50</p> <p>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 12 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.</p>

<p style="text-align: right;">Page 51</p> <p>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. 12 MR. BUKOWSKI: But the stipulated facts, 13 Your Honor, do say that Lancaster submitted certified 14 results on June 6th, 2022. Berks did a partial 15 certification on June 6th, 2022. It had another issue 16 regarding provisional ballots. Berks later submitted 17 certified results, updated certified results that included 18 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: 22 Q. So Berks was the last of those three to certify, 23 and there's no issue of timeliness in this case. As of 24 June 8th, 2022, you would agree the Third Circuit's order 25 in Migliori was not in effect?</p>	<p style="text-align: right;">Page 53</p> <p>1 county boards a directive? 2 A. I don't know that I would describe it as a 3 directive. Again, though, I believe that it is, you know, 4 it was our determination, the Department's determination 5 that, you know, based on the case law counties had a duty 6 to certify results that included vote totals from undated 7 ballots and that failing to do so essentially would in 8 effect mean that the counties have not completed their 9 statutory duty to certify vote totals from all legally cast 10 ballots. 11 And it's my layman's, probably not the most 12 articulate but that's -- 13 Q. No, that's fine. And does the Department and the 14 Acting Secretary leave room for any reasonable disagreement 15 as to the state of the law on certification of undated 16 ballots as of, you know, the deadline for this election? 17 A. No. Again I think our position is that without 18 including those vote totals from undated ballots which this 19 Court had previously asked counties to tabulate, segregate 20 and tabulate, tabulate, that without including those that 21 the certification was not complete, that all legally cast 22 ballots in this case would not be counted, you know. So 23 that's really our position that the certification is 24 incomplete in light of the case law. 25 Q. And you're aware that the June 2nd, 2022 order</p>
<p style="text-align: right;">Page 52</p> <p>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 7 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 13 e-mail says? 14 A. Correct. 15 Q. 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; 18 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 22 she had received on June 6th, 7th, and 8th; isn't that 23 right, within two days? 24 A. Up until that point, no. 25 Q. Okay. Would you describe your e-mail to the</p>	<p style="text-align: right;">Page 54</p> <p>1 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 11 which was Joint Exhibit 6, you received responses from all 12 three of these counties, Fayette, Lancaster, and Berks; 13 isn't that right? 14 A. Yes. 15 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, 22 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.</p>

<p style="text-align: right;">Page 55</p> <p>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 21 June or June 17th e-mail, and his response is dated June 22 28th, 2022, at 12:32 p.m.? 23 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</p>	<p style="text-align: right;">Page 57</p> <p>1 you know, the mandate from the Courts. 2 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 Q. Okay. So you knew I guess for the second time 21 the Department was aware that Berks and Lancaster were not 22 going to comply because they told Mr. Gates, Attorney Gates 23 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?</p>
<p style="text-align: right;">Page 56</p> <p>1 guidance. The last sentence of Mr. Leinbach's e-mail says 2 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 11 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 Q. 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, 19 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 25 a summary of why the Department believed that that was the,</p>	<p style="text-align: right;">Page 58</p> <p>1 A. Correct. Yes. 2 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 12 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 21 Joint Exhibit Number 5 for 22 identification.) 23 BY MR. BUKOWSKI: 24 Q. And at that point this Court had not issued its 25 order in the McCormick case, correct?</p>

<p style="text-align: right;">Page 59</p> <p>1 A. That's correct. Yes.</p> <p>2 Q. So the only thing that had happened before</p> <p>3 issuing that May 24th guidance was the issuance by the</p> <p>4 Third Circuit panel of its decision in the Migliori v.</p> <p>5 Cohen case; is that fair?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. And this guidance, the guidance in Joint</p> <p>8 Exhibit 5 does a 180 on the instructions to the counties</p> <p>9 and says you must count undated ballots, absentee ballots,</p> <p>10 and mail-in ballots provided there are no other</p> <p>11 deficiencies, correct?</p> <p>12 A. Correct.</p> <p>13 Q. And that, you know, May 24th is the week after</p> <p>14 Election Day; is that right?</p> <p>15 A. Yes. Again the timing not ideal.</p> <p>16 Q. Now, were you aware of this Court's</p> <p>17 administrative order issued May 27th stating that because a</p> <p>18 statewide recount had been ordered that appeals from any of</p> <p>19 the decisions -- any of the certified results from the</p> <p>20 recount were to be filed in the Commonwealth Court as</p> <p>21 opposed to the courts of common pleas?</p> <p>22 A. I am familiar with that. I don't have a copy in</p> <p>23 front of me, but I do recall that; and we circulated that</p> <p>24 order to the campaigns as well as the counties.</p> <p>25 Q. Okay. And counsel for Petitioners asked you if</p>	<p style="text-align: right;">Page 61</p> <p>1 please the Court.</p> <p>2 I'll wait until you're done with the water.</p> <p>3 THE WITNESS: Sorry.</p> <p>4 MR. KING: I once observed a witness pour</p> <p>5 water all over his shirt during cross-examination. It</p> <p>6 wasn't a good thing.</p> <p>7 THE WITNESS: That would be something I'd be</p> <p>8 known to do, yes. Water is okay. I've poured coffee on</p> <p>9 myself frequently enough.</p> <p>10 MR. KING: Thank you very much.</p> <p>11 CROSS-EXAMINATION</p> <p>12 BY MR. KING:</p> <p>13 Q. Mr. Marks, my name is Thomas W. King, III, as you</p> <p>14 know and I want to thank you for your service to the</p> <p>15 Commonwealth. You've spent many, many years in the Bureau</p> <p>16 of Elections; am I correct?</p> <p>17 A. I have. It's dating me now so --</p> <p>18 Q. Do you know of anyone who spent more time in the</p> <p>19 Bureau of Elections than you have?</p> <p>20 A. Actually we do have one employee I think who's</p> <p>21 been a year or two longer than I am.</p> <p>22 Q. Let me go back just so the record is clear on</p> <p>23 this because we had this discussion about whether you're a</p> <p>24 lawyer or you're not a lawyer or you're, you know,</p> <p>25 seemingly whether you're an expert or not. You have</p>
<p style="text-align: right;">Page 60</p> <p>1 you were aware of any counties that had refused or not</p> <p>2 certified votes from absentee or mail-in ballots that</p> <p>3 included wrong or incorrect dates, and I think your</p> <p>4 testimony was you were not aware that any of the counties</p> <p>5 had excluded votes from those types of ballots; is that</p> <p>6 right?</p> <p>7 A. Correct.</p> <p>8 Q. Now, doing that is consistent with the guidance</p> <p>9 issued by the Department -- doing that -- let me strike</p> <p>10 that. Restart over. Certifying votes from incorrectly</p> <p>11 dated voter declarations is consistent with the</p> <p>12 Department's guidance; is that right?</p> <p>13 A. It is, yes.</p> <p>14 Q. Do you know whether there was any contest or</p> <p>15 challenge in any of the 67 counties but more specifically</p> <p>16 these three counties, Berks, Lancaster, and Fayette, as to</p> <p>17 the canvassing and counting of an absentee or mail-in</p> <p>18 ballot that included an incorrect date?</p> <p>19 A. I'm not aware of any.</p> <p>20 Q. Okay.</p> <p>21 MR. BUKOWSKI: That's all I have for Mr.</p> <p>22 Marks at this time. Thank you very much, sir.</p> <p>23 THE WITNESS: Thank you.</p> <p>24 JUDGE COHN JUBELIRER: Thank you.</p> <p>25 MR. KING: Thank you, Your Honor. May it</p>	<p style="text-align: right;">Page 62</p> <p>1 expertise with respect to the Pennsylvania Election Code,</p> <p>2 do you not?</p> <p>3 A. I've been accused of being an expert on it, yes.</p> <p>4 Q. Have you testified as an expert in cases</p> <p>5 involving the Pennsylvania Election Code?</p> <p>6 A. I have testified in a multitude of Court cases</p> <p>7 regarding election matters over the years, yes.</p> <p>8 Q. Have you ever been rejected as an expert in any</p> <p>9 case that you were called to testify in?</p> <p>10 A. No, I don't believe so.</p> <p>11 Q. And the Courts that you've testified in including</p> <p>12 you've testified all the way to the Lycoming County Court</p> <p>13 of Common Pleas where Mr. Breth examined you a couple weeks</p> <p>14 ago --</p> <p>15 A. Yes.</p> <p>16 Q. -- to the Commonwealth Court to the federal</p> <p>17 district courts, and your testimony has been accepted in</p> <p>18 the Supreme Court of Pennsylvania and your testimony has</p> <p>19 made its way to the United States Supreme Court at some</p> <p>20 point; is that true?</p> <p>21 A. That's correct. Yes.</p> <p>22 Q. All right.</p> <p>23 MR. KING: Your Honor, I don't want to</p> <p>24 belabor this, but there is nobody that knows more about the</p> <p>25 Election Code. Ask any of the jurists in this</p>

<p style="text-align: right;">Page 63</p> <p>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.</p>	<p style="text-align: right;">Page 65</p> <p>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 12 working for the Department of State. 13 Q. Oh, you did? 14 A. So prior to -- yes. Prior to that I was working 15 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 22 the Division of SURE, the Statewide Registry, then the 23 Commissioner of the Bureau of Elections, and ultimately 24 this position as Deputy Secretary. 25 Q. So literally there is no position within that</p>
<p style="text-align: right;">Page 64</p> <p>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.</p>	<p style="text-align: right;">Page 66</p> <p>1 Department or in that Bureau that you haven't held in terms 2 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 15 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 23 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</p>

<p style="text-align: right;">Page 67</p> <p>1 Pennsylvania, and I work directly for the Acting Secretary.</p> <p>2 So that's why I signed those verifications for these</p> <p>3 various things that are filed with the Courts.</p> <p>4 Q. Mr. Bukowski earlier said that language is</p> <p>5 important here. Language is important here in this arena;</p> <p>6 is that correct?</p> <p>7 A. Yes. I believe language is always important. I</p> <p>8 believe communication is important.</p> <p>9 Q. Okay. And were you involved in the Ziccarelli</p> <p>10 case?</p> <p>11 A. I don't recall that I was involved directly in</p> <p>12 the Ziccarelli case, but I certainly was consulted. This I</p> <p>13 believe is a case out in Western Pennsylvania from 2020 if</p> <p>14 I recall.</p> <p>15 Q. Well, Ziccarelli determined whether Nicole</p> <p>16 Ziccarelli was going to be the senator from Westmoreland</p> <p>17 and Allegheny --</p> <p>18 A. Correct.</p> <p>19 Q. -- or Senator Brewster was going to be the</p> <p>20 senator from Allegheny and Westmoreland; is that correct?</p> <p>21 A. Correct. Yes.</p> <p>22 Q. You remember that case?</p> <p>23 A. I do, yes.</p> <p>24 Q. And in that Ziccarelli case, the Secretary took</p> <p>25 certain positions. The Secretary was involved in that</p>	<p style="text-align: right;">Page 69</p> <p>1 Westmoreland decided to count these ballots which were</p> <p>2 again undated ballots, however Westmoreland decided to</p> <p>3 count them and however Allegheny decided to count them,</p> <p>4 that that was none of the Secretary's business?</p> <p>5 A. I think you're paraphrasing.</p> <p>6 Q. I am paraphrasing.</p> <p>7 A. It might be helpful to have a copy of it in front</p> <p>8 of me. I mean I know what quote you're talking about, but</p> <p>9 I don't have the exact wording in front of me.</p> <p>10 Q. But you know that the result was that</p> <p>11 Westmoreland counted them one way and Allegheny counted</p> <p>12 them a different way, correct?</p> <p>13 A. Yes, that is my understanding. Correct.</p> <p>14 Q. And had the Secretary been able to force one of</p> <p>15 those two counties to count differently, the result may</p> <p>16 have been different. For example, if the Secretary had the</p> <p>17 ability to say to Westmoreland you have to count these</p> <p>18 undated ballots and Westmoreland counted them, Ziccarelli</p> <p>19 would be a senator today and not Brewster, correct?</p> <p>20 A. Well, I'm not going to, you know.</p> <p>21 Q. The possibility exists?</p> <p>22 A. Certainly if, you know, the Courts had ruled</p> <p>23 differently, the possibility exists that the outcome would</p> <p>24 be different, but --</p> <p>25 Q. You are the person. This is your signature I</p>
<p style="text-align: right;">Page 68</p> <p>1 case, correct?</p> <p>2 A. Yes.</p> <p>3 Q. And the Secretary had counsel in that case, the</p> <p>4 Aronchick firm in Philadelphia, correct?</p> <p>5 A. That's my recollection, yes.</p> <p>6 Q. And generally in many of the election cases, the</p> <p>7 Aronchick Hangley firm has been counsel to the Secretary;</p> <p>8 is that correct?</p> <p>9 A. Yes. We've used outside counsel for various</p> <p>10 cases.</p> <p>11 Q. Did you read the papers in this case? Did you</p> <p>12 read the briefs that we filed?</p> <p>13 MR. FISCHER: I'm going to object just to</p> <p>14 the extent that this calls for the substance of discussions</p> <p>15 with counsel. Certainly that's protected by</p> <p>16 attorney-client privilege here. As Mr. Marks has</p> <p>17 testified, his role is that of client in these cases.</p> <p>18 MR. KING: I didn't ask him that.</p> <p>19 THE WITNESS: I reviewed the filings. I</p> <p>20 also reviewed other documents including the exhibits that</p> <p>21 we've been going through today.</p> <p>22 BY MR. KING:</p> <p>23 Q. All right. Did you see the quote that we put in</p> <p>24 our brief and in our papers from the Ziccarelli case where</p> <p>25 the Secretary took the position that in Ziccarelli, however</p>	<p style="text-align: right;">Page 70</p> <p>1 take it.</p> <p>2 MR. KING: May I approach, Your Honor?</p> <p>3 JUDGE COHN JUBELIRER: Yes.</p> <p>4 (Document shown to the witness.)</p> <p>5 THE WITNESS: Yes. Sloppy as it is, that is</p> <p>6 my signature.</p> <p>7 MR. KING: I was thinking it looked pretty</p> <p>8 good.</p> <p>9 MR. FISCHER: May I just ask what document</p> <p>10 it is that was shown to him?</p> <p>11 MR. KING: It's the verification to the</p> <p>12 complaint -- to the petition.</p> <p>13 MR. FISCHER: Thank you.</p> <p>14 BY MR. KING:</p> <p>15 Q. So you're the person who verified the petition in</p> <p>16 this instance, correct?</p> <p>17 A. Correct.</p> <p>18 Q. So would you tell the Court the petition</p> <p>19 basically asks for two things, right? You want a mandamus.</p> <p>20 You understand the term mandamus?</p> <p>21 A. I do, yes. We're basically trying to compel some</p> <p>22 action we believe is -- that the entity is duty-bound to</p> <p>23 do.</p> <p>24 Q. Or mandate, correct?</p> <p>25 A. Mandate, correct.</p>

<p style="text-align: right;">Page 71</p> <p>1 Q. You want to force these three counties that are 2 here in the courtroom, you want to force them to do 3 something, correct? 4 A. Again, I'm not counsel but my understanding of 5 mandamus is that the person who brings the action believes 6 that that entity has failed to do some duty that they're 7 mandated to do and that's why they come before the Court. 8 Q. When is the last time that you're aware of that 9 the Department brought an action to mandate any county 10 Board of Elections? 11 A. It has been a very long time. I believe there 12 was one occasion and do not ask me to tell you what the 13 case was. I believe Allegheny County had to -- no. I'm 14 sorry. I'm wrong about that actually. Allegheny County 15 filed a mandamus against the Secretary asking that the 16 Secretary at that time accept an amended certification of 17 election results. 18 I don't recall at least in my tenure at the 19 Department that the Department pursued a mandamus against a 20 county. 21 Q. Well, let me ask you this. You want to order 22 these folks, these Commissioners to do several things I 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</p>	<p style="text-align: right;">Page 73</p> <p>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</p>
<p style="text-align: right;">Page 72</p> <p>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 -- 11 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 Q. 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 19 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 22 they've already certified the election in their counties. 23 Where does it say that in the statute? 24 MR. FISCHER: Objection, Your Honor. This 25 is a purely legal question.</p>	<p style="text-align: right;">Page 74</p> <p>1 opinion as well I guess based on his experience as to 2 whether he's aware of a section or -- 3 MR. FISCHER: If he just testifies as a fact 4 witness about his awareness, I would be okay. I don't 5 think he's giving opinion testimony frankly on anything. 6 JUDGE COHN JUBELIRER: Right. I don't think 7 he was qualified as an expert, and that would anyway be a 8 little questionable with regard to legal opinions. We 9 don't typically have those offered as testimony. 10 MR. KING: I'm just asking, Your Honor, if 11 he knows. I'm asking what -- we're here in front of Your 12 Honor. We're taking up a lot of your time today. You 13 followed a very difficult case we've all followed in the 14 news yesterday. So we appreciate the fact that you're with 15 us today. 16 But the question for him is what's the basis 17 for this action? What is the basis? He's the person who 18 signed the complaint. He's involved in these discussions. 19 He said that. He's a truthful man. He'll answer it 20 truthfully to us. 21 MR. FISCHER: Again, sorry. Mr. King is 22 trying to ask him a legal question. I'm sorry. That is a 23 purely a legal question. 24 JUDGE COHN JUBELIRER: Right, and we don't 25 want a legal opinion. But I think as a fact witness if</p>

<p>1 he's aware of a section, he can answer that subject to the 2 qualifications I've given. 3 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 13 what she's doing in this case? 14 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 -- 23 MR. KING: If you don't mind, Your Honor, 24 I'll hand it to him. 25 BY MR. KING:</p>	<p>Page 75</p>	<p>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</p>	<p>Page 77</p>
<p>1 Q. Are you aware of this section of the Code, ^{Page 76} 2 3159? 3 MR. KING: This is from our papers. 4 (Document shown to Mr. Fischer.) 5 MR. FISCHER: Yes. 6 BY MR. KING: 7 Q. So would you read 3159, please. It's at the top 8 of the page. 9 A. Upon receiving the certified returns of any 10 primary or election from the various county boards, the 11 Secretary of the Commonwealth shall forthwith proceed to 12 tabulate, compute, and canvass the votes cast for all 13 candidates enumerated in Section 140 and upon all questions 14 voted for by the electors of the state at large and shall 15 thereupon certify and file in his office the tabulation 16 thereof. 17 Q. Thank you. Now, Mr. Marks, you're familiar with 18 that section. You were familiar before you read it; am I 19 correct? 20 A. Yes. 21 Q. You live this section of the Code, don't you? 22 A. I hope I'm not that boring. I don't live the 23 election. 24 Q. In a manner of speaking? 25 A. In a manner of speaking. Q. All right. So this section says, upon receiving</p>	<p>Page 76</p>	<p>1 think is -- 2 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 -- 9 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 15 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 22 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</p>	<p>Page 78</p>

<p style="text-align: right;">Page 79</p> <p>1 the state. Sometimes the reports may vary a little bit</p> <p>2 based on, you know, the county's voting system, etc.</p> <p>3 Q. So it's up to the county board that you want the</p> <p>4 results, right?</p> <p>5 A. We want the results, yes.</p> <p>6 Q. And the form is up to them?</p> <p>7 A. We do provide a form through our system; but if</p> <p>8 a county sends a slightly different form, as long as it is</p> <p>9 signed and certified by, you know, a majority of the</p> <p>10 members of the Board of Elections and it contains the</p> <p>11 election results for all the state-level offices, we will</p> <p>12 accept it.</p> <p>13 Q. All right. So you get these forms in from the 67</p> <p>14 counties. You look at them. You make sure they're</p> <p>15 legitimate. What do you do next?</p> <p>16 A. Well and, you know, we're looking at them to make</p> <p>17 sure that they're -- you use the word legitimate. We're</p> <p>18 looking at them to make sure they're complete, that there</p> <p>19 are no obvious errors.</p> <p>20 On the certification report there are occasions</p> <p>21 where a county will miss something or they'll put a vote</p> <p>22 total that, you know, based on our review against</p> <p>23 unofficial returns that we had received from the counties</p> <p>24 previously, you know, appears to be incorrect. You know,</p> <p>25 we'll reach out to the county before we finalize our</p>	<p style="text-align: right;">Page 81</p> <p>1 don't need to prolong.</p> <p>2 JUDGE COHN JUBELIRER: Yes. Thank you.</p> <p>3 MR. KING: I'll withdraw it but I do like</p> <p>4 the hockey analogy.</p> <p>5 THE WITNESS: Are you wearing an orange and</p> <p>6 black tie because you're a Flyers fan or --</p> <p>7 MR. KING: My son played professional hockey</p> <p>8 so I'm a big fan. No, I'm a Penguins fan.</p> <p>9 BY MR. KING:</p> <p>10 Q. So when you do certify the election, then what do</p> <p>11 you do with that?</p> <p>12 A. In the case of a primary, you know, we don't</p> <p>13 certify it necessarily to any individual or body. It</p> <p>14 essentially -- you know, the Secretary will put her</p> <p>15 signature and seal on the official results and that becomes</p> <p>16 the, you know, official list of nominees for the November</p> <p>17 election.</p> <p>18 In the case of a November election, once the</p> <p>19 Secretary certifies, there are documents that have to be</p> <p>20 certified to whether it's the Governor or the legislature,</p> <p>21 you know, those have to be certified to certain individuals</p> <p>22 or bodies so that they can swear in their members.</p> <p>23 Q. All right. This Zicarelli case, I want to go</p> <p>24 back to it because you're aware of the result from the</p> <p>25 Supreme Court of Pennsylvania with respect to that case,</p>
<p style="text-align: right;">Page 80</p> <p>1 certification to make sure that they didn't make a clerical</p> <p>2 error when they certified.</p> <p>3 But once we've gone through that process, then</p> <p>4 we'll compile results. How long it takes depends on the</p> <p>5 individual election. It depends on how many offices are up</p> <p>6 for election, how many write-in votes were cast for the</p> <p>7 various offices. But we will, you know, do that as soon as</p> <p>8 possible; and once we compile those results, we'll certify</p> <p>9 the final compiled official results.</p> <p>10 Q. So basically if we were analogizing this to a</p> <p>11 hockey game -- which I'm prone to do -- you are the</p> <p>12 scorekeeper, not the referee?</p> <p>13 MR. FISCHER: Your Honor, I'm going to</p> <p>14 object to that as vague and frankly beyond the scope.</p> <p>15 MR. KING: It's the issue here. That's the</p> <p>16 whole issue.</p> <p>17 JUDGE COHN JUBELIRER: Well, it's the legal</p> <p>18 issue --</p> <p>19 MR. KING: Yes, ma'am.</p> <p>20 JUDGE COHN JUBELIRER: -- which is before</p> <p>21 the Court.</p> <p>22 MR. KING: Yes. All right. Can he answer</p> <p>23 the question?</p> <p>24 JUDGE COHN JUBELIRER: You've objected.</p> <p>25 MR. KING: I'll withdraw it, Your Honor. I</p>	<p style="text-align: right;">Page 82</p> <p>1 are you not?</p> <p>2 A. I am, yes.</p> <p>3 Q. And you're aware that the Zicarelli case</p> <p>4 likewise ended up in federal court in Pittsburgh, correct?</p> <p>5 A. That's my recollection, yes.</p> <p>6 Q. Were you involved in both of those matters, the</p> <p>7 state court and the federal court actions?</p> <p>8 A. Yes. I would have been consulted, you know, at</p> <p>9 least during that period of time when the Secretary of the</p> <p>10 Commonwealth is involved in the litigation.</p> <p>11 Q. I want to ask you to look at the brief filed by</p> <p>12 your office in the Zicarelli case in federal court.</p> <p>13 MR. KING: It's part of the papers that we</p> <p>14 filed in this matter, Your Honor.</p> <p>15 BY MR. KING:</p> <p>16 Q. I want you to read from your own brief. First</p> <p>17 I'd like you to look at it and tell me it is your own</p> <p>18 brief, your own being the Department, of course, not you.</p> <p>19 I'm going to ask you to look at this section, the second</p> <p>20 section right below the yellow line.</p> <p>21 (Counsel approached the witness.)</p> <p>22 MR. KING: Are you with me on this one?</p> <p>23 Do you gentlemen know where --</p> <p>24 MR. FISCHER: Yes.</p> <p>25 MR. KING: Thank you.</p>

<p style="text-align: right;">Page 83</p> <p>1 MR. FISCHER: Could you clarify, Mr. King, 2 what page you're on? 3 MR. KING: Sure. 4 Can I see that for a minute, Mr. Marks? 5 THE WITNESS: Sure. 6 MR. KING: I'm at what's marked Exhibit D 7 and it doesn't look like Mr. Wiygul -- yes, he did. It's 8 page 5 of the Memorandum of Law in Support of the Motion of 9 Secretary of the Commonwealth of Pennsylvania, Kathy 10 Boockvar, to Dismiss the Amended Complaint or, in the 11 Alternative, to Grant Summary Judgment. It's in the United 12 States District Court, Your Honor, in Pittsburgh, in the 13 Western District. 14 (Whereupon, the document was marked as 15 Fayette Exhibit Number D for 16 identification.) 17 BY MR. KING: 18 Q. Would you look at the second paragraph, second 19 full paragraph of your brief? 20 A. The paragraph that begins with the Election Code 21 also gives? 22 Q. Could you read that into the record for me, 23 please. 24 A. Sure. The Election Code also gives the Secretary 25 powers and duties including the duty to, in quotes, receive</p>	<p style="text-align: right;">Page 85</p> <p>1 November 3rd, 2020 General Election. 2 Q. Thank you. So what you just read was the brief 3 filed by your own lawyers, correct? 4 A. That's correct. Yes. 5 Q. You're aware that the Secretary has no such 6 powers, aren't you? 7 MR. FISCHER: Objection. 8 JUDGE COHN JUBELIRER: Yes, I think -- 9 MR. KING: He's the affiant, Your Honor. 10 He's the affiant to this complaint. The whole case depends 11 on whether the Secretary has such powers. He's the person 12 bringing this case. 13 JUDGE COHN JUBELIRER: Counsel? 14 MR. FISCHER: He is not the person bringing 15 the case, and also he verified the facts. The law is for 16 the Court to ultimately decide, and his opinion simply 17 isn't relevant. 18 MR. KING: Your Honor? 19 JUDGE COHN JUBELIRER: Yes. 20 MR. KING: I'm sorry. 21 JUDGE COHN JUBELIRER: No, go ahead. 22 MR. KING: A person appearing before Your 23 Honor needs to come in here and say whether they believe 24 that the law provides for what they're telling the Court it 25 ought to do. This gentleman --</p>
<p style="text-align: right;">Page 84</p> <p>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</p>	<p style="text-align: right;">Page 86</p> <p>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?</p>

<p style="text-align: right;">Page 87</p> <p>1 A. I am not, no.</p> <p>2 Q. Is there a time limit set to file such a</p> <p>3 challenge under the Election Code?</p> <p>4 A. There are time limits for, you know, for filing a</p> <p>5 request for recounts or contesting an election, yes.</p> <p>6 Q. And what would those time limits be?</p> <p>7 A. My recollection is that it's 20 days after the</p> <p>8 date of the primary election.</p> <p>9 Q. So there's a two-day, I believe there's a two-day</p> <p>10 section in the Code and there's a 20-day section, correct?</p> <p>11 MR. FISCHER: I'll object. That asks for a</p> <p>12 legal conclusion. I think Mr. Marks can testify about his</p> <p>13 understanding of the challenge process. I think that's</p> <p>14 fine, but he's not speaking authoritatively on the law</p> <p>15 here.</p> <p>16 MR. KING: This is the case, Your Honor, so</p> <p>17 I'll abide by whatever the Court tells me to do.</p> <p>18 JUDGE COHN JUBELIRER: With that</p> <p>19 qualification he can answer the question.</p> <p>20 MR. KING: Thank you.</p> <p>21 THE WITNESS: I believe the two-day that</p> <p>22 you're referencing is -- there is a provision wherein an</p> <p>23 individual who is aggrieved by a determination made by the</p> <p>24 Board of Elections can appeal that determination to the</p> <p>25 appropriate court of common pleas.</p>	<p style="text-align: right;">Page 89</p> <p>1 all of the documents submitted by the county Boards of</p> <p>2 Elections related to both unofficial and official returns.</p> <p>3 And then our staff begins to work on the compilation of the</p> <p>4 election results.</p> <p>5 Q. So when these came in from Berks, Lancaster, and</p> <p>6 Fayette Counties, did somebody input them onto a</p> <p>7 spreadsheet or electronically?</p> <p>8 A. So the counties actually -- the way our system</p> <p>9 works, we have a statewide election and campaign finance</p> <p>10 system. The vast majority of counties data enter them into</p> <p>11 that system directly, and then they print out the</p> <p>12 certification report. So if a county has done that and</p> <p>13 most counties do that, our staff it's a matter of just</p> <p>14 verifying that what's on the hard copy signed by the Board</p> <p>15 of Elections matches what was entered into the database.</p> <p>16 Q. Okay. So is that what happened when these three</p> <p>17 results came in? Were they inputted into the system?</p> <p>18 A. To the extent that the data was not already</p> <p>19 inputted into the system, yes, that's what would happen.</p> <p>20 That's what our staff would do.</p> <p>21 Q. What you want to do here I think -- you tell me</p> <p>22 if I'm wrong -- is you want to ask the Court to ask, to</p> <p>23 tell these counties, to mandate these counties to recertify</p> <p>24 these elections because they've already certified them</p> <p>25 once, right?</p>
<p style="text-align: right;">Page 88</p> <p>1 BY MR. KING:</p> <p>2 Q. All right. So the two-day you're not aware of</p> <p>3 anybody having done that in these three counties?</p> <p>4 A. I'm not aware of anyone doing that.</p> <p>5 Q. Are you aware of anybody having done the 20-day</p> <p>6 challenge?</p> <p>7 A. The election contest, no.</p> <p>8 Q. All right. So June 6, 7, and 8 I think Mr.</p> <p>9 Bukowski asked you this but I want to make sure it's clear.</p> <p>10 June 6, 7, 8 these three counties, I don't know which</p> <p>11 order, but the three of them -- it's in the stipulated</p> <p>12 facts -- those three counties on three consecutive days in</p> <p>13 early June certified the elections in their counties and</p> <p>14 they sent them to you, correct?</p> <p>15 A. Correct.</p> <p>16 Q. That's what happened here?</p> <p>17 A. Yes.</p> <p>18 Q. All right. So when you got them, you got these</p> <p>19 three certified results. What did you do with the forms</p> <p>20 that came in? Physically what did you do?</p> <p>21 A. Well, you know, as I said, ultimately we compile</p> <p>22 all the results and certify them once we compile them. So</p> <p>23 we put those -- a lot of what we're doing now we certainly</p> <p>24 have paper files, but a lot of files are now electronic.</p> <p>25 So we have a central repository where we store copies of</p>	<p style="text-align: right;">Page 90</p> <p>1 A. I believe that's fair. I think we're asking the</p> <p>2 Court. We believe that these three counties have not</p> <p>3 completed certification. They have not completed, you</p> <p>4 know, their duty in terms of certifying the election; and</p> <p>5 we're asking that the Court mandate that they do so.</p> <p>6 Q. But they have certified them. They've certified</p> <p>7 them to you on -- the stipulated facts say that. They were</p> <p>8 certified on the 6th, 7th, and 8th of June of 2022,</p> <p>9 correct?</p> <p>10 A. I mean, respectfully, I think that's why we're in</p> <p>11 this courtroom today. We do not believe that these three</p> <p>12 counties have completed certification, and that's really</p> <p>13 the issue before the Court.</p> <p>14 Q. I'd respectfully disagree and I'm going to ask</p> <p>15 you this. You say that they need to complete</p> <p>16 certification. Did you not receive certifications from</p> <p>17 each of these counties in hand?</p> <p>18 A. We received certifications from each of the three</p> <p>19 counties. Our position is that if those counties do not</p> <p>20 include vote totals from the undated ballots that those</p> <p>21 certifications are incomplete, and that's really the crux</p> <p>22 of this argument.</p> <p>23 Q. And so not a single voter, not a single</p> <p>24 candidate, no candidate filed any objection to this, did</p> <p>25 they?</p>

<p style="text-align: right;">Page 91</p> <p>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 22 not necessarily come to the Department of State. 23 Q. You mentioned guidance, and the stipulated facts 24 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</p>	<p style="text-align: right;">Page 93</p> <p>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</p>
<p style="text-align: right;">Page 92</p> <p>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? 15 MR. FISCHER: Objection, Your Honor. This 16 is legal territory again, and it's simply not relevant to 17 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 22 Deputy Secretary so it's important that he knows. He knows 23 what his powers are. I'm just asking him if he's aware 24 that -- 25 JUDGE COHN JUBELIRER: It's his</p>	<p style="text-align: right;">Page 94</p> <p>1 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 Zicarelli 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 Q. 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. 23 Q. Right. Thank you. That's your understanding. 24 The Judge knows what -- 25 A. That's my understanding.</p>

<p style="text-align: right;">Page 95</p> <p>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 14 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 18 certainly is the power of the Board of Elections to make 19 those determinations, and they're subject to judicial 20 review. 21 Q. And that judicial review -- so you went through 22 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</p>	<p style="text-align: right;">Page 97</p> <p>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 14 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?</p>
<p style="text-align: right;">Page 96</p> <p>1 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? 6 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 15 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. 22 MR. KING: If I might, Your Honor? 23 THE WITNESS: -- certainly subsequent to the 24 June 29th letter, early July. 25 MR. KING: You want to just stipulate the</p>	<p style="text-align: right;">Page 98</p> <p>1 A. Correct. 2 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 -- 15 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 19 relevant in making that determination. It's the date that 20 the county receives the ballot from the voter that is 21 relevant. 22 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?</p>

<p style="text-align: right;">Page 99</p> <p>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. 9 JUDGE COHN JUBELIRER: I'm going to -- is 10 there -- 11 MR. KING: I'll be brief. 12 JUDGE COHN JUBELIRER: Okay. I'm going to 13 allow him to answer this -- 14 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 19 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?</p>	<p style="text-align: right;">Page 101</p> <p>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,</p>
<p style="text-align: right;">Page 100</p> <p>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 13 for speculation. That has nothing -- 14 MR. KING: He said he knows reasons why. 15 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 22 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</p>	<p style="text-align: right;">Page 102</p> <p>1 though, is the relevant piece of information. It's the 2 date when the person is deceased. 3 Q. Well, in McCormick -- 4 A. It's the date of the election that is relevant. 5 Q. Yes. In the McCormick case, people argued to 6 Judge Cohn Jubelirer about this whether it was important or 7 not. So what you're talking about is you're going to know 8 whether somebody died or not as of Election Day, right? 9 A. Yes. 10 Q. But you're not going to know when that person 11 allegedly voted because we now have mail-in ballots that 12 get mailed in and they come in at various times before the 13 election. So in the case that I'm talking about out of 14 Lancaster County -- and I believe there's another one if 15 I'm not mistaken -- the date on the envelope was critically 16 important to determine whether the person was alive at the 17 time the ballot was cast. Not as of Election Day but when 18 the ballot was cast the date was significant, correct? 19 MR. FISCHER: Objection. I don't think 20 there's been any foundation established that this witness 21 knows the details of these cases. 22 MR. KING: I think he said he did. 23 MR. FISCHER: He said he's familiar with it 24 generally, but I don't think he said -- 25 MR. KING: Well, that's what he said.</p>

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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
14 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
24 the dating of the ballot would be significant with respect
25 to fraud, correct?

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1 A. I'll accept that argument that it may be relevant
2 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
10 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
15 the offices, but there's no ballot form that you distribute
16 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.
22 Q. Do you remember the Parnell case, Sean Parnell
23 case involving the --
24 A. I do.
25 Q. -- thousands of misprinted ballots?

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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,

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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.

<p style="text-align: right;">Page 107</p> <p>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</p>	<p style="text-align: right;">Page 109</p> <p>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</p>
<p style="text-align: right;">Page 108</p> <p>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,</p>	<p style="text-align: right;">Page 110</p> <p>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 19 definition of, quote, partial certification within the, end 20 of quote, 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 24 of quote? 25 A. It's not defined in the Election Code. I think</p>

<p style="text-align: right;">Page 111</p> <p>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 12 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. 18 I'm finished, Your Honor. Thank you. 19 JUDGE COHN JUBELIRER: Thank you very much, 20 counsel. 21 MR. FISCHER: Thank you, Your Honor. 22 JUDGE COHN JUBELIRER: Redirect. 23 REDIRECT EXAMINATION 24 BY MR. FISCHER: 25 Q. Mr. Marks, has the Department tried to</p>	<p style="text-align: right;">Page 113</p> <p>1 and deliver it that way. But, you know, typically if 2 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. 15 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 Q. How many did in the end? 21 A. Sixty-four. 22 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</p>
<p style="text-align: right;">Page 112</p> <p>1 unilaterally force these three counties to include undated 2 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 23 I pick up the phone and I try to talk through it. You 24 know, certainly, you know, when we're sending guidance out 25 to all the counties I'll e-mail that guidance, you know,</p>	<p style="text-align: right;">Page 114</p> <p>1 of counties who had not yet done that. 2 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 13 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 18 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</p>

<p style="text-align: right;">Page 115</p> <p>1 correct or if it was a clerical error.</p> <p>2 Q. So do you believe it is your responsibility or --</p> <p>3 JUDGE COHN JUBELIRER: Could you put the</p> <p>4 microphone --</p> <p>5 MR. FISCHER: Sorry.</p> <p>6 JUDGE COHN JUBELIRER: Thanks.</p> <p>7 BY MR. FISCHER:</p> <p>8 Q. Do you believe it is the Department's</p> <p>9 responsibility to certify what a county submits no matter</p> <p>10 what?</p> <p>11 A. No. I think we do have a duty to --</p> <p>12 MR. KING: I'm going to object. This is</p> <p>13 irrelevant. This is whether his opinion is whether they</p> <p>14 should certify it or not -- I beg your pardon -- whether</p> <p>15 it's his opinion that they can certify it or not. It's</p> <p>16 what you said to me earlier, Your Honor. It's what the law</p> <p>17 provides for.</p> <p>18 MR. FISCHER: I was going to ask about that</p> <p>19 process. I'm not asking for his legal opinion.</p> <p>20 JUDGE COHN JUBELIRER: Yes. I think I</p> <p>21 allowed you considerable latitude to ask him about his</p> <p>22 opinion or let me say his --</p> <p>23 MR. KING: Knowledge.</p> <p>24 JUDGE COHN JUBELIRER: Knowledge, right.</p> <p>25 Thank you.</p>	<p style="text-align: right;">Page 117</p> <p>1 ballot was counted, would that ballot count?</p> <p>2 A. Pursuant to the Election Code, no. If the voter</p> <p>3 casts a ballot and then dies before Election Day, the</p> <p>4 county Boards of Elections are directed to set that ballot</p> <p>5 aside.</p> <p>6 Q. And if somebody else fraudulently cast that</p> <p>7 voter's ballot and back-dated it to before the voter had</p> <p>8 died, would that ballot count?</p> <p>9 A. It would not, no.</p> <p>10 Q. And if the voter fraudulently cast a ballot but</p> <p>11 dated it on a date after the voter had died, would it</p> <p>12 count?</p> <p>13 A. No. Again the relevant date is the date the</p> <p>14 voter is deceased as compared to the date of the election.</p> <p>15 Q. So is there any situation in which the date</p> <p>16 written on the envelope would be relevant to whether that</p> <p>17 vote is counted?</p> <p>18 A. I don't believe so, no.</p> <p>19 Q. Now, I'd like to ask you a little bit about some</p> <p>20 of the dates involved here. So do you have Joint Exhibit</p> <p>21 6? Maybe I can hand you another copy. This involves your</p> <p>22 chronology.</p> <p>23 (Document handed to the witness.)</p> <p>24 THE WITNESS: I have it.</p> <p>25 BY MR. FISCHER:</p>
<p style="text-align: right;">Page 116</p> <p>1 -- his knowledge of the process. And so to</p> <p>2 the extent that this would call for any kind of legal</p> <p>3 conclusion, thank you for the objection; and I will clarify</p> <p>4 that whatever the witness answers is not at all a legal</p> <p>5 conclusion. Obviously questions of law, issues of law are</p> <p>6 for the Court to decide; but this is just his experience,</p> <p>7 within his experience.</p> <p>8 MR. FISCHER: I'll rephrase the question to</p> <p>9 make that clear.</p> <p>10 JUDGE COHN JUBELIRER: Yeah.</p> <p>11 BY MR. FISCHER:</p> <p>12 Q. Mr. Marks, does the Department tabulate and</p> <p>13 certify the statewide results using the certification</p> <p>14 submitted by the counties no matter what?</p> <p>15 A. No. There are occasions when we identify an</p> <p>16 error or what we believe to be an error or an omission as</p> <p>17 the case may be, and we'll contact the county to get</p> <p>18 clarification.</p> <p>19 Q. Thank you. You were asked about a hypothetical</p> <p>20 involving a voter who died before Election Day; do you</p> <p>21 recall those questions?</p> <p>22 A. I do, yes.</p> <p>23 Q. And let me just ask you about certain different</p> <p>24 scenarios. If a voter returned a mail-in ballot before the</p> <p>25 election and then subsequently died the next day before the</p>	<p style="text-align: right;">Page 118</p> <p>1 Q. Do you recall Mr. King asking you about the dates</p> <p>2 that the three counties involved in this litigation</p> <p>3 submitted their certifications to the Department?</p> <p>4 A. I do, yes.</p> <p>5 Q. And I believe he said they were on July 6th, 7th,</p> <p>6 and 8th; is that correct?</p> <p>7 A. I agreed that those dates sounded correct. I</p> <p>8 believe those are the dates that Mr. King provided, but</p> <p>9 those sounded correct based on my recollection.</p> <p>10 Q. And that was stipulated to, in fact?</p> <p>11 A. Correct.</p> <p>12 Q. So looking at your chronology, when did this</p> <p>13 Court issue its opinion in the McCormick case?</p> <p>14 A. On June 2nd.</p> <p>15 Q. June 2nd. So before those certifications were</p> <p>16 submitted.</p> <p>17 A. Correct.</p> <p>18 Q. And do you recall Mr. King asking you whether the</p> <p>19 McCormick case was voluntarily dismissed?</p> <p>20 A. I don't recall. I think he just asked whether</p> <p>21 the case was dismissed.</p> <p>22 Q. Thank you. I appreciate that clarification.</p> <p>23 Could you please look at Plaintiff's Exhibit 2 which -- I'm</p> <p>24 sorry, Petitioner's Exhibit 2 which I put in front of you.</p> <p>25 This is not Joint Exhibit 2. This is separate. Do you see</p>

<p style="text-align: right;">Page 119</p> <p>1 that this is an order entered by this Court?</p> <p>2 A. It is, yes.</p> <p>3 Q. And let me read it to you. It says, now, June</p> <p>4 10th, 2022, upon consideration of the Application for</p> <p>5 Relief in the Nature of Voluntary Discontinuance or,</p> <p>6 Alternatively, a Dismissal for Mootness, parentheses,</p> <p>7 Application for Discontinuance, filed by Dave McCormick for</p> <p>8 U.S. Senate and David H. McCormick, and the answers thereto</p> <p>9 filed by the Leigh M. Chapman as Acting Secretary of the</p> <p>10 Commonwealth, parentheses, Secretary, Intervenors Dr. Oz</p> <p>11 for Senate and Dr. Mehmet Oz, parentheses, Oz Intervenors,</p> <p>12 and Republican National Committee and Republican Party of</p> <p>13 Pennsylvania, Republican Intervenors, the Application for</p> <p>14 Discontinuance is granted. Do you see that?</p> <p>15 A. I do, yes.</p> <p>16 Q. And then the next two sentences say, the</p> <p>17 Prothonotary shall mark this matter closed. In addition,</p> <p>18 upon consideration of the Application to Vacate Memorandum</p> <p>19 Opinion and Order of June 2nd, 2022, Application to Vacate</p> <p>20 filed by Oz Intervenors in which Republican Intervenors</p> <p>21 joined, and the answer filed by the Secretary, the</p> <p>22 Application to Vacate is denied. Did I read that</p> <p>23 correctly?</p> <p>24 A. You did, yes.</p> <p>25 Q. And again what is the date of this order?</p>	<p style="text-align: right;">Page 121</p> <p>1 boils down to what, you know, we outlined or our counsel</p> <p>2 outlined in the June 29th letter why we believe the</p> <p>3 counties are required to certify vote totals that include</p> <p>4 undated ballots based on rulings from the Courts.</p> <p>5 BY MR. BUKOWSKI:</p> <p>6 Q. In the McCormick case, do you know what the</p> <p>7 Department's position was regarding the voluntary</p> <p>8 discontinuance of the case?</p> <p>9 A. I don't recall what the Department's position</p> <p>10 was, no.</p> <p>11 Q. Or what the Department's position was on vacating</p> <p>12 the June 2nd order or not?</p> <p>13 A. I don't recall, no.</p> <p>14 MR. BUKOWSKI: Nothing further, Your Honor.</p> <p>15 RE-CROSS-EXAMINATION</p> <p>16 BY MR. KING:</p> <p>17 Q. Mr. Marks, would you tell the Court is there a</p> <p>18 difference between the term because these things are</p> <p>19 defined in the Election Code? I think we agreed to that</p> <p>20 earlier. Is there a difference between the terms canvass</p> <p>21 and certify?</p> <p>22 A. You know, my layman's understanding, there is.</p> <p>23 You know, I believe the certification is basically the</p> <p>24 memorialization of the results of the canvass where they</p> <p>25 complete the canvass and then they certify the results of</p>
<p style="text-align: right;">Page 120</p> <p>1 A. This order is dated June 10th of 2022.</p> <p>2 MR. FISCHER: Your Honor, I have no further</p> <p>3 questions.</p> <p>4 JUDGE COHN JUBELIRER: Thank you.</p> <p>5 Any recross?</p> <p>6 MR. BUKOWSKI: Very briefly, Your Honor.</p> <p>7 RE-CROSS-EXAMINATION</p> <p>8 BY MR. BUKOWSKI:</p> <p>9 Q. During your counsel's questioning, he asked you</p> <p>10 about the 64 counties who had --</p> <p>11 JUDGE COHN JUBELIRER: Do you want to come</p> <p>12 to a microphone?</p> <p>13 BY MR. BUKOWSKI:</p> <p>14 Q. -- the 64 counties who had complied and you used</p> <p>15 the word complied, they complied. What were they complying</p> <p>16 with?</p> <p>17 A. Well, our request to certify vote totals and</p> <p>18 include undated ballots.</p> <p>19 Q. I mean the word comply to me means they were</p> <p>20 required to, and you can't point to anything and have not</p> <p>21 pointed to anything in response to Attorney King's question</p> <p>22 that, you know, requires them to follow the Secretary's</p> <p>23 interpretation of the cases; isn't that right?</p> <p>24 MR. FISCHER: I'll object.</p> <p>25 THE WITNESS: Correct. I mean ultimately it</p>	<p style="text-align: right;">Page 122</p> <p>1 that canvass.</p> <p>2 Q. Two different things, right?</p> <p>3 A. You can make an argument that they're two</p> <p>4 different things or the certification is an extension or</p> <p>5 the last step of the canvass.</p> <p>6 Q. It either is or it isn't. So the canvass,</p> <p>7 there's a definition of canvass in the Election Code,</p> <p>8 right?</p> <p>9 A. There is a definition in the Election Code of</p> <p>10 canvass, yes.</p> <p>11 Q. And there is a definition of certification?</p> <p>12 A. Correct.</p> <p>13 Q. Those are two different things?</p> <p>14 A. They are but one comes obviously after completion</p> <p>15 of the other.</p> <p>16 Q. I understand the chicken and the egg story, but</p> <p>17 they're two different things?</p> <p>18 A. They are. They're two different actions.</p> <p>19 Q. All right. Did you see in the opinion that you</p> <p>20 were asked that Her Honor wrote, did you see anything that</p> <p>21 mentioned the word certification or certify?</p> <p>22 A. If you're referring to the June 2nd order of the</p> <p>23 Court --</p> <p>24 Q. Yes, sir.</p> <p>25 A. -- the word certify was not used, correct.</p>

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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:

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1 Q. So, Mr. Marks, with respect to this question of

2 certification versus canvass, would you just tell us when

3 the counties canvass the ballots, what is the process?

4 What do they do?

5 A. Well, the counties -- I went into a little bit

6 earlier in my testimony -- but the counties will receive

7 the precinct-level results on election night; and when the

8 official canvass begins on Friday, they'll review all of

9 those results, compile those results. They also add to

10 those the results from the prec canvass and the canvass of

11 absentee and mail-in ballots.

12 The canvass also includes the adjudication of

13 provisional ballots and also a second canvass where they

14 canvass military and overseas ballots, so that entire

15 process where the county is reviewing and either reviewing

16 returns submitted by precinct election officials or

17 reviewing the tabulation that they've done centrally of

18 absentee and mail-in ballots as well as provisional

19 ballots.

20 Q And then the certification requires the calling

21 of a public meeting and then there's a vote to certify,

22 correct?

23 A. Correct. Yes.

24 Q. All right. So and we were talking earlier of the

25 two separate things that occur?

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1 A. Correct. Yes.

2 Q. All right.

3 MR. KING: I think that's all, Your Honor.

4 Thank you very much.

5 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

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.

14 MR. HOLLAND: Please raise your right hand.

15 Whereupon,

16 SCOTT DUNN,

17 having been duly sworn, testified as follows.

18 MR. HOLLAND: Please be seated.

19 DIRECT EXAMINATION (as on Cross)

20 BY MR. FISCHER:

21 Q. 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.

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1 Q. And as a result of that position, do you have

2 certain responsibilities with respect to the management of

3 elections in Fayette County?

4 A. Yes. I serve on the Board of Elections, and we

5 as Commissioners oversee the Election Bureau.

6 Q. And do you have any specific role on the Board of

7 Elections?

8 A. As far as?

9 Q. Chair? Vice-chair?

10 A. I think I'm the Secretary.

11 Q. Okay. Thank you. And could you briefly explain

12 the boards's role in the administration of elections in

13 Fayette County?

14 A. We're an overseer of the department. We have a

15 department head. Our Election Director, Marybeth Kuznik,

16 and she oversees all facets of the election including the

17 applications for mail-in ballots, sending out the mail-in

18 ballots, receiving the mail-in ballots, training poll

19 workers for the day-of operations.

20 Making sure that all of the equipment is prepared

21 and certified to go out to our 77 precincts, making sure

22 that all the equipment is delivered in a timely fashion,

23 set up, ready to go, and that the ballots are prepared in

24 such a way that they will -- there's a logic testing that

25 they make sure all the ballots are prepared that will be

<p style="text-align: right;">Page 127</p> <p>1 able to be read by the scanners.</p> <p>2 Q. So is it fair to say as a result of your role,</p> <p>3 you are very familiar with how elections in Fayette County</p> <p>4 are administered?</p> <p>5 A. Yeah. You could say, yeah, but I rely on the</p> <p>6 Election Director to make sure that all that happens.</p> <p>7 Q. You don't have day-to-day responsibility?</p> <p>8 A. I do not.</p> <p>9 Q. But you understand the processes --</p> <p>10 A. Correct.</p> <p>11 Q. -- generally? Thank you. And does the Board of</p> <p>12 Elections ever make decisions about whether a specific vote</p> <p>13 is or is not counted?</p> <p>14 A. We do have a meeting one week after the election</p> <p>15 to decide on provisional ballots, and I believe we've never</p> <p>16 had this under my -- this is my fifth election as</p> <p>17 Commissioner. I believe that if there were to be</p> <p>18 questionable ballots where there were challenges, then we</p> <p>19 would be in charge of that as well; but at this point I've</p> <p>20 never had that happen, just the provisional aspect.</p> <p>21 Q. And if there is a challenge to a provisional</p> <p>22 ballot, the board resolves those in the first instance;</p> <p>23 isn't that correct?</p> <p>24 A. If there's a challenge to a provisional ballot,</p> <p>25 then we decide that in the provisional ballot meeting.</p>	<p style="text-align: right;">Page 129</p> <p>1 A. That is correct.</p> <p>2 Q. So if a voter drops it in the mail at 7:00 p.m.</p> <p>3 on Election Day, it's probably not going to be --</p> <p>4 A. It's not going to be at the Election Bureau in</p> <p>5 time.</p> <p>6 Q. Now, were you on the board in 2020?</p> <p>7 A. Yes.</p> <p>8 Q. And you would agree with Mr. Marks that the</p> <p>9 deadline was extended for three days in that race?</p> <p>10 A. Yes.</p> <p>11 Q. But that has not happened in any subsequent</p> <p>12 election?</p> <p>13 A. Correct.</p> <p>14 Q. And you take or Fayette County takes certain</p> <p>15 steps to verify that their ballots are received on a timely</p> <p>16 basis, correct?</p> <p>17 A. Yes. As the ballots are received, there is a</p> <p>18 time and date stamp, and so the outer ballot envelope will</p> <p>19 be stamped with that time and date.</p> <p>20 Q. And do you also enter information about the</p> <p>21 ballots -- I'm sorry. Let me withdraw that. Do the</p> <p>22 election administrators, do they enter information about the</p> <p>23 ballot in the SURE system when they receive it?</p> <p>24 A. Yes. Once received there is a scanning.</p> <p>25 Actually we call it binking for some reason -- I'm not</p>
<p style="text-align: right;">Page 128</p> <p>1 Q. And typically you decide that by a vote of the</p> <p>2 members of the board, correct?</p> <p>3 A. Correct.</p> <p>4 Q. And the board's decisions with respect to</p> <p>5 inclusion of any ballots are subject to review by Courts;</p> <p>6 is that correct?</p> <p>7 A. I'll leave that up to the Court. I'm not sure.</p> <p>8 If you can re-ask that question another way, I'm not sure</p> <p>9 exactly what you're asking.</p> <p>10 Q. If you vote to include or not to include a</p> <p>11 particular ballot -- and I'm not asking for your legal</p> <p>12 assessment -- but is it your understanding that parties can</p> <p>13 challenge that decision?</p> <p>14 A. Yes.</p> <p>15 Q. And the board tries to comply with all relevant</p> <p>16 orders issued by Courts, correct?</p> <p>17 A. Yes.</p> <p>18 Q. So I'd like to just focus on absentee and mail-in</p> <p>19 ballots. Do you agree with Mr. Marks that the deadline to</p> <p>20 submit an absentee ballot is 8:00 p.m. on Election Day?</p> <p>21 A. The deadline for an absentee ballot is 8:00 p.m.</p> <p>22 on Election Day. That's correct.</p> <p>23 Q. Thank you. And just to clarify, that's the</p> <p>24 deadline that the ballot must be received by the county,</p> <p>25 correct?</p>	<p style="text-align: right;">Page 130</p> <p>1 exactly sure why -- but it is scanned as received.</p> <p>2 Q. And you don't use the date written on the outer</p> <p>3 envelope to determine when the ballot was received,</p> <p>4 correct?</p> <p>5 A. That is correct.</p> <p>6 Q. And you don't use that date written, assuming</p> <p>7 there is a date, to exclude ballots?</p> <p>8 A. We do not.</p> <p>9 Q. Now, I'd like to focus specifically on what we're</p> <p>10 referring to as undated ballots which are ballots, mail-in</p> <p>11 or absentee ballots, where the voter has omitted the date</p> <p>12 on the outer envelope but otherwise signed and otherwise</p> <p>13 complied with the Election Code as far as --</p> <p>14 MR. FISCHER: Can I use that phrase?</p> <p>15 MR. KING: That's fine.</p> <p>16 BY MR. FISCHER:</p> <p>17 Q. -- Fayette County did not include undated ballots</p> <p>18 in the totals it submitted to the Secretary as its</p> <p>19 certification, correct?</p> <p>20 A. That is correct.</p> <p>21 Q. And, in fact, Fayette County did not even open</p> <p>22 undated ballots, correct?</p> <p>23 A. That is correct.</p> <p>24 Q. And are you familiar with the litigation brought</p> <p>25 by Mr. McCormick relating to the republican primary for</p>

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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

15 was not one that was omitted.

16 A. Okay.

17 Q. Are you aware that on June 2nd this Court entered

18 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

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1 decide how to proceed from there.

2 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

10 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

15 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

18 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

23 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

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1 that's where it started. So actually it started before the

2 June 2nd date. It started May 24th with this guidance that

3 said, you know, submit and we will tell you the next steps.

4 Q. At that meeting you just discussed, did the board

5 take a vote on this question?

6 A. We did not. The meeting was adjourned, and we

7 never reconvened a meeting of the board of election to take

8 up this matter.

9 Q. So even after this Court issued its order on June

10 2nd, you did not reconvene the board to address its

11 implications?

12 A. No. Our opinion --

13 MR. KING: Your Honor, this is beyond the

14 proffer. The proffer is pretty simple what the Attorney

15 General said they were going to ask this witness about.

16 And because I was granted great latitude, I've let this go

17 somewhat.

18 But at page 2 of the proffer the county

19 commissioner witnesses will be questioned about the

20 Respondent board's practices for the 2022 general primary

21 election with respect to determining the timeliness of an

22 absentee or mail-in ballot with respect to recording the

23 date that absentee and mail-in ballots are received and

24 with respect to assessing the sufficiency of the

25 declaration on a ballot return envelope.

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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

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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

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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
12 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
14 votes should not count; and that's kind of where I was
15 going.

16 As a Commissioner and as a member of the board of
17 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
22 saying do another thing or, you know, the Constitution
23 doesn't even cover mail-in ballots. Act 77 says one thing.

24 Now I have a Court order saying, you know, forget
25 Act 77 which was found unconstitutional in January. So the

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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.
(Discussion between counsel.)

21 MR. FISCHER: Your Honor, I have nothing
22 further for this witness.

23 MR. BUKOWSKI: I have nothing.

24 MR. KING: Your Honor?

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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.

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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
14 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.
22 Q. So I'm not sure whether -- I think Berks was 6
23 and Fayette was 7 and Lancaster was 8. Of course, I have
24 them reversed.
25 MR. KING: Since I'm only Fayette, I know

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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.

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1 MR. HOLLAND: Please raise your right hand.
2 Whereupon,
3 RAY D'AGOSTINO,
4 having been duly sworn, testified as follows.
5 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.
23 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

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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
20 absentee and mail-in ballots is 8:00 p.m. on Election Day?
21 A. Correct.
22 Q. And does Lancaster County time-stamp ballots when
23 they are received?
24 A. We do time-stamp ballots.
25 Q. And do you use that time stamp to determine

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1 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.
 14 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 Q. 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

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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
 12 is material, that it could go to the validity and
 13 authenticity of the ballot received. And so depending on
 14 the date, it may be set aside for further research and
 15 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
 23 case that we did not count the ballot because of the date.
 24 It was determined -- it was found out that the voter fraud
 25 occurred because of that date.

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1 Q. Explain to me the circumstances of that voter
 2 fraud case.
 3 A. Sure. So we received mail ballots or absentee
 4 ballots. When I say mail ballots, I mean absentee and no
 5 excuse mail ballots. We receive them. They are
 6 date-stamped and then they are scanned to go into the SURE
 7 system.
 8 In this one case it happened to be our Chief
 9 Clerk of the Board of Elections that scanned this
 10 particular ballot that came in the outer envelope, the
 11 declaration; and the SURE system popped up and said that
 12 the person was deceased. Our Chief Clerk put that aside to
 13 then look at later; and when the Chief Clerk looked at it
 14 again, realized that the date that someone put on that
 15 declaration was a date after the person had died.
 16 And so at that point she did more research and
 17 actually pulled up the obituary and found out that person
 18 was deceased, referred it to our District Attorney's
 19 office. Our District Attorney's office is now prosecuting
 20 that person and that person has admitted to voter fraud.
 21 Q. So in that case it led to a criminal
 22 investigation, correct?
 23 A. That is correct.
 24 Q. But it did not affect whether you counted that
 25 ballot, correct?

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1 A. Not that one but there can be instances where it
 2 could be. So, for instance, if it was a person who moved
 3 and is alive, we may not count that ballot because we've
 4 determined that the date is different than the date they
 5 may have moved out. So it is material to us, and we do
 6 treat it as such.
 7 The plain language of the law says that obviously
 8 if -- I say obviously -- that if there's no date, you set
 9 them aside. We treat those that have dates as potentially
 10 ones that can be processed; but depending on the date
 11 that's put in there, it may not be.
 12 Q. So just so I understand, Lancaster County
 13 election officials review every date on every mail-in
 14 ballot that you receive?
 15 A. There's instances where it depends on whether the
 16 date looks to be something that makes sense like within the
 17 time period of the election. It might cause our staff to
 18 then take another look.
 19 Q. But just to clarify my question was, you look at
 20 every date on every mail-in ballot; is that correct?
 21 A. I'm not the one that does it, but I understand
 22 the staff does take it seriously. It does look at the
 23 dates, but I can't say for certain whether every single
 24 one.
 25 Q. And with respect to a voter who moves, is it your

<p style="text-align: right;">Page 147</p> <p>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. 14 Q. So you testified that a voter could move before 15 Election Day, and you could use the date to determine 16 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?</p>	<p style="text-align: right;">Page 149</p> <p>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 15 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 Q. 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</p>
<p style="text-align: right;">Page 148</p> <p>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 14 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 18 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. 23 Q. And Lancaster County submitted a list of 24 certified returns in early June; is that correct, to the 25 Secretary?</p>	<p style="text-align: right;">Page 150</p> <p>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 15 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 Q. Good afternoon, Mr. D'Agostino. The case of the 22 voter fraud that you were referring to, is that the case 23 that's now pending, Commonwealth of Pennsylvania versus 24 Cheryl Mihaliak? 25 A. Correct.</p>

<p style="text-align: right;">Page 151</p> <p>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</p>	<p style="text-align: right;">Page 153</p> <p>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 13 dates that may or may not be correct, those are subject to 14 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 Q. 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 23 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</p>
<p style="text-align: right;">Page 152</p> <p>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</p>	<p style="text-align: right;">Page 154</p> <p>1 State? 2 A. Yes. 3 Q. And I think you said that the dates -- the 4 undated ballots are not counted; is that right? 5 A. That is correct. 6 Q. And why is that? 7 A. Again, the plain reading of the language of the 8 Code, the Election Code is that it should not be counted. 9 Q. As a member of the Lancaster -- 10 MR. FISCHER: I have an objection. This is 11 a legal opinion. I mean if that's his understanding, 12 that's fine. But that's -- 13 JUDGE COHN JUBELIRER: And thank you for the 14 clarification. 15 I don't think you intended to ask him for 16 his legal opinion. 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 20 wasn't trying to elicit a legal opinion. We'll save that 21 for argument. 22 MR. FISCHER: Your Honor? 23 THE WITNESS: I would say, though, that as 24 my role as a Board of Commissioner and Board of Elections 25 member that I can be called upon to interpret the Code.</p>

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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.
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
21 give you the numbers.
22 A. I don't know the breakdown. I'm pretty sure it
23 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.

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1 A. That sounds familiar.
2 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
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.
22 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?

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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
6 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.
9 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
19 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.

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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.
23 Q. So that's two weeks before the date the ballot
24 was received?
25 A. Correct.

<p style="text-align: right;">Page 159</p> <p>1 Q. Christa Miller said this was confirmed by an 2 obituary and records for the Department of Health. She 3 said Teresa J. Mihaliak was removed from the voter rolls on 4 April 25th, 2022; is that correct? 5 A. That's correct. 6 MR. FISCHER: Nothing further, Your Honor. 7 MR. BUKOWSKI: I just have one brief 8 redirect based on Mr. King's question which was Mr. 9 D'Agostino because I wasn't sure if your answer included 10 this. 11 RE-CROSS-EXAMINATION (as on Further Redirect) 12 BY MR. BUKOWSKI: 13 Q. As you know, the Secretary has refused to certify 14 the statewide election results that include votes from 15 Berks, Lancaster, and Fayette Counties. Do you have an 16 understanding of whether any of those elections would be 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 undated 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 MR. BUKOWSKI: That's all I have. 24 MR. FISCHER: Nothing further, Your Honor. 25 JUDGE COHN JUBELIRER: Thank you.</p>	<p style="text-align: right;">Page 161</p> <p>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 19 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. 23 Q. Okay. And that includes adjudication about 24 whether certain ballots meet the statutory requirements for 25 canvassing for example?</p>
<p style="text-align: right;">Page 160</p> <p>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</p>	<p style="text-align: right;">Page 162</p> <p>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 11 and mail-in ballots must be received by the county in order 12 to be counted in an election? 13 A. 8:00 p.m. on Election Day with the exception of 14 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 19 members and their families, will the county board receive 20 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</p>

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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

12 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

19 disqualify that ballot based on the date that's written?

20 A. Absolutely not.

21 Q. Okay. Would you investigate what the voter meant

22 by May 10th meaning, for example, would you have any means

23 to determine if the voter who wrote May 10th, in fact,

24 signed the ballot on May 10th?

25 A. That would only be investigated if there were

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1 other circumstances that caused us to look at that date.

2 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

11 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.

22 Q. Okay. I don't believe I asked you. When Berks

23 receives absentee or mail-in ballots, does it date-stamp

24 the outer envelope to indicate when that ballot was

25 received?

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1 A. There are two ways that it can be determined

2 relative to date. One is the outer envelope of the ballot

3 has a unique bar code unique to the election and unique to

4 Berks County. If someone uses some other or an older outer

5 envelope, it will not be accepted. That is the first test

6 of timeliness. It only relates to that election.

7 When it's received in the office, whether from a

8 drop box, from the mail, or by the voters themselves, it is

9 dated and time-stamped upon receipt.

10 Q. Sorry. I want to make sure I understand the

11 first part of your answer. With respect to the scanning,

12 is what you're saying the bar code that appears on the

13 return envelope is scanned upon the county's receipt of the

14 envelope?

15 A. It is and it is unique to that specific election

16 and to Berks County.

17 Q. 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 A. It does and it also generates information to the

21 voter. So when it is scanned in, it notifies the system

22 that the absentee and/or mail-in ballot has been received;

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

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1 if it's not signed that it's not signed letting them know

2 that that is the case.

3 Q. Okay. And is one of the pieces of information

4 that appears after the envelope is scanned the date on

5 which the ballot was received?

6 A. Please repeat that question.

7 Q. Certainly. Yes. You said that scanning the

8 ballot or, excuse me, scanning the return envelope, the

9 unique bar code on the return envelope generates certain

10 information. Is one piece of information generated by --

11 A. It does not gener -- that is a manual process.

12 So when the ballots are received in the election office,

13 the first thing that happens is they're viewed. If there's

14 a missing date or a missing signature, they are set aside.

15 If everything is there, they are immediately scanned. The

16 ones that are missing -- into SURE. The ones that are --

17 and I might add when they're scanned into SURE, they look

18 again. So that's a second look to make sure they're signed

19 and dated. If they are signed and dated, they go into the

20 SURE system.

21 If for some reason, there's a third check

22 and that's prec canvassing that begins on 7:00 a.m. on

23 Election Day. As part of the prec canvassing process in

24 Berks County, before they are opened they're determined

25 again is there a missing date or signature. In the rare

<p style="text-align: right;">Page 167</p> <p>1 case that that would happen, in that case they're set aside</p> <p>2 and the information in the SURE system would be reversed</p> <p>3 indicating that it lacked either a signature or a date.</p> <p>4 Q. Understood. And I believe for the 2022 primary</p> <p>5 election Berks had sent to the Acting Secretary a</p> <p>6 certification of results; is that correct?</p> <p>7 A. That is correct.</p> <p>8 Q. Okay. And what date was that?</p> <p>9 A. Actually I believe two dates. I'm not going to</p> <p>10 stipulate exactly, but I believe the second date which</p> <p>11 included the provisionals I believe was June 8th.</p> <p>12 Q. Okay. But that did not include any ballot for</p> <p>13 which the voter had omitted a date on the return envelope;</p> <p>14 is that correct?</p> <p>15 A. It did not.</p> <p>16 Q. Okay.</p> <p>17 MR. BOYER: Nothing further, Your Honor.</p> <p>18 CROSS-EXAMINATION (as on Redirect)</p> <p>19 BY MR. BUKOWSKI:</p> <p>20 Q. Good afternoon, Mr. Leinbach.</p> <p>21 A. Good afternoon.</p> <p>22 Q. Why does Berks County and the Berks County Board</p> <p>23 of Elections require that absentee and mail-in ballots be</p> <p>24 both signed and dated in order to be canvassed and counted?</p> <p>25 A. Because we believe the statute is quite clear in</p>	<p style="text-align: right;">Page 169</p> <p>1 missing a signature or a date?</p> <p>2 A. A voter has the opportunity to come in to the</p> <p>3 election department and voluntarily fill in their signature</p> <p>4 or the date prior to the election.</p> <p>5 Q. Do you know whether that happened in the May,</p> <p>6 2022 primary election?</p> <p>7 A. I cannot say with certainty.</p> <p>8 Q. Okay. For ballots that had the date, for</p> <p>9 example, May 10th, I don't think there's any issue that</p> <p>10 that would look odd, a May 10th signature or a ballot dated</p> <p>11 May 10th. But if there's a ballot that had an incorrect</p> <p>12 date, you know, I think counsel pointed out you don't know</p> <p>13 whether the person signed it on May 9th and dated it May</p> <p>14 10th or vice versa. Why are those ballots -- if there's a</p> <p>15 belief that there's an incorrect date on the ballot, how</p> <p>16 does Berks County process that?</p> <p>17 A. If there's something that would cause us to</p> <p>18 believe there is an irregularity and it involves the date</p> <p>19 or involves the signature or both, we would set that aside.</p> <p>20 And in setting it aside initially the Director of Elections</p> <p>21 would look at it to see if she is able to make a</p> <p>22 determination, and if not that would come before the Board</p> <p>23 of Elections to adjudicate.</p> <p>24 Q. And in the May, 2022 primary election, were any</p> <p>25 absentee or mail-in ballots submitted to the Board of</p>
<p style="text-align: right;">Page 168</p> <p>1 requiring that the outer envelope must be or shall be</p> <p>2 signed and dated. And we act on the clear direction of the</p> <p>3 statute as well as the prior direction of the Secretary of</p> <p>4 the Commonwealth.</p> <p>5 MR. BOYER: Objection, just to the extent as</p> <p>6 all previous objections. This is just his opinion of the</p> <p>7 law.</p> <p>8 JUDGE COHN JUBELIRER: Thank you.</p> <p>9 THE WITNESS: It's my clear reading of the</p> <p>10 law.</p> <p>11 BY MR. BUKOWSKI:</p> <p>12 Q. Okay. As of Election Day for the May, 2022</p> <p>13 primary election, what was the guidance from the Department</p> <p>14 of State on counting undated ballots?</p> <p>15 A. The guidance was undated ballots should not be</p> <p>16 counted.</p> <p>17 Q. And is that what Berks County did when it</p> <p>18 processed mail-in and absentee ballots for the May, 2022</p> <p>19 primary?</p> <p>20 A. That is correct. We did not count undated</p> <p>21 ballots.</p> <p>22 Q. You had mentioned information going into the SURE</p> <p>23 system and then notifications being sent to voters about</p> <p>24 how their mail-in or absentee ballot was being processed.</p> <p>25 Does a voter have an opportunity to cure a ballot if it's</p>	<p style="text-align: right;">Page 170</p> <p>1 Elections of Berks County to be adjudicated where the date</p> <p>2 was -- where the question to be adjudicated was the</p> <p>3 accuracy of the date?</p> <p>4 A. I'm not aware of any.</p> <p>5 Q. Okay. Do you feel in your role as a member of</p> <p>6 the Berks County Board of Elections you can ignore the</p> <p>7 language of the Election Code that states that the</p> <p>8 declaration of a voter shall be signed and dated?</p> <p>9 A. No. And I stated to that fact when the McCormick</p> <p>10 and Oz campaign came before the Board of Commissioners, one</p> <p>11 calling for us not to count undated ballots, the other</p> <p>12 calling for the board to count undated ballots; and I made</p> <p>13 it very clear that I don't have the leeway or discretion to</p> <p>14 determine what I think the law should say.</p> <p>15 I don't have the discretion to determine whether</p> <p>16 or not a date is material or immaterial. I simply am</p> <p>17 obligated to follow the clear and plain language of the law</p> <p>18 that says undated and/or unsigned ballots shall not be</p> <p>19 counted.</p> <p>20 Q. And did the McCormick campaign appeal any</p> <p>21 determination by the Berks County Board of Elections with</p> <p>22 respect to handling either of the issues adjudicated by the</p> <p>23 board?</p> <p>24 A. They did.</p> <p>25 Q. What did the McCormick campaign appeal?</p>

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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.
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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.
25	A. Yes, I do.	25	Q. And was the next communication from the

<p style="text-align: right;">Page 175</p> <p>1 Department of State the letter from Attorney Gates dated 2 June 29th, 2022, addressed to the Berks County Director of 3 Elections Services, Paige Riegner? 4 A. That is correct. 5 Q. And that is what is marked as Joint Exhibit 11, 6 correct? 7 A. That is correct. 8 Q. After receiving the June 29th letter from 9 Attorney Gates and your exchange with Mr. Marks, did the 10 Berks County Board of Elections have another meeting? 11 A. We did on July the 1st. 12 Q. What happened at that meeting? 13 A. Well, I did my best to get additional information 14 prior to any vote on this important decision. I did not 15 receive a response from Jonathan Marks. The only response 16 was, as noted, from counsel for the Department of State. 17 And so at that meeting I reiterated my clear reading of the 18 current statute that ballots, outer envelopes of the 19 ballots that are either undated or not signed shall not be 20 counted. 21 And I also noted that the two decisions cited, 22 neither one of them dealt with certification. Both of them 23 occurred -- the one where we abided by the Commonwealth 24 Court, this Court, we did exactly what the Court asked us 25 to do. And based on the lack of clear judicial guidance</p>	<p style="text-align: right;">Page 177</p> <p>1 Q. I wanted to ask you, in Berks County according to 2 the stipulated facts, we show 507 democratic ballots and 3 138 republican ballots that were undated and not counted, 4 correct? 5 A. Total of 645, that is correct. 6 Q. And are you familiar enough with the results in 7 Berks County to know down-ballot whether the state 8 committee posts in either party, republican or democrat, 9 local county committee posts, if any of those might be 10 affected by 507 democratic ballots and 138 republicans if 11 you're ordered to recertify this election? 12 A. That's a fairly substantial number of undated 13 ballots, 645. Obviously it would change the results in any 14 elections where votes were cast for a particular race. 15 Based on the number of races down-ballot, committee slots 16 in particular, that were ties or extremely close, I would 17 not be surprised to understand that it would impact the 18 outcome of some of those races. 19 Q. And do you know whether the Berks County 20 republican party, the Berks County democratic party, the 21 Pennsylvania republican party, or the democratic party of 22 Pennsylvania, do you know if they've had meetings after 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?</p>
<p style="text-align: right;">Page 176</p> <p>1 and the plain language of the statute, I could not in good 2 conscience vote to certify undated ballots. 3 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 6 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 15 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. 19 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.</p>	<p style="text-align: right;">Page 178</p> <p>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. 22 Q. Now, you're familiar at least a little bit 23 because you all were deeply involved in the McCormick and 24 Oz election debate? 25 A. Yes.</p>

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1 Q. And so are you aware of whether the Secretary
2 herself was, in fact, a participant in that case before
3 Judge Cohn Jubelirer?
4 A. I can only speak to my experience, and the
5 individuals that appeared before our election board were
6 representatives of the McCormick campaign and
7 representatives of the Oz campaign. I was not -- we had no
8 one from the Secretary of the Commonwealth weigh in in our
9 hearing or in the meeting where we made subsequent
10 decisions.
11 Q. Now, of course, the Attorney General himself is
12 on the ballot this year, correct?
13 A. He is not.
14 MR. BOYER: Objection to relevance.
15 THE WITNESS: Yes, I take it back.
16 JUDGE COHN JUBELIRER: He is.
17 THE WITNESS: Yes, not as the Attorney
18 General.
19 JUDGE COHN JUBELIRER: Just --
20 MR. KING: I'm sorry. The sitting Attorney
21 General is on the ballot running for Governor of
22 Pennsylvania. I just want to know whether he filed an
23 appeal.
24 MR. BOYER: And my objection is to
25 relevance, Your Honor.

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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.

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1 MR. KING: Yes, ma'am.
2 Thank you very much, Commissioner.
3 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
10 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.
22 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

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1 understand it on June the 8th.
2 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.
19 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
22 argument in your papers? Is that before the Court? I
23 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

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1 raised equitable defenses.

2 JUDGE COHN JUBELIRER: I know you did. I

3 wasn't sure if unclean hands was one of them.

4 MR. KING: I'm not sure either.

5 JUDGE COHN JUBELIRER: If you did and there

6 are factual questions that would assist you obviously in a

7 defense that you've raised to this action, I don't want to

8 preclude that.

9 MR. KING: I appreciate that. I don't think

10 it's necessary at this point.

11 JUDGE COHN JUBELIRER: Okay.

12 MR. KING: Thank you, Your Honor.

13 JUDGE COHN JUBELIRER: Thank you.

14 MR. BUKOWSKI: Just one last follow-up

15 question, Commissioner Leinbach.

16 RE-CROSS-EXAMINATION (as on Further Redirect)

17 BY MR. BUKOWSKI:

18 Q. In response to the last question about following

19 clear Court guidance, is it the -- is it your understanding

20 that the November, 2020 Pennsylvania Supreme Court decision

21 in In Re: Canvass is clear guidance stating that undated

22 absentee and mail-in ballots should not be counted for all

23 elections after November, 2020?

24 A. It is based on my consultation with our

25 solicitor, our county solicitor, our election board

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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

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1 first. Well, wait. Let me just clarify.

2 The Respondents here do have some legal

3 arguments that are threshold issues. Do you want to begin

4 with those or do you want to argue about them in the normal

5 course when you would otherwise be arguing as Respondents?

6 MR. KING: I think that in the interest of

7 the Court's time and our time, that we just roll that all

8 in one. I think your suggestion that the Petitioners go

9 first would be fine, and we would respond in kind even

10 though some of our arguments are going to relate to

11 preliminary objections which otherwise would normally be

12 heard first. So we're --

13 JUDGE COHN JUBELIRER: Well, the preliminary

14 objections themselves to the PFR are not technically before

15 the Court because the PFR isn't before the Court yet;

16 however, you did raise many of the legal arguments that are

17 in your preliminary objections in response to this

18 emergency application. And so the legal issues are before

19 the Court. They have the effect of a kind of threshold

20 position but technically are not --

21 MR. KING: Per se.

22 JUDGE COHN JUBELIRER: Right. So I think

23 then that will work well. If we start with the

24 Petitioners, Respondents, you will have the opportunity to

25 make your arguments and then if there's any rebuttal.

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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

<p style="text-align: right;">Page 187</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>24 And as I will get to momentarily, we readily 25 acknowledge that the Court's order does not use the word</p>	<p style="text-align: right;">Page 189</p> <p>1 If a ballot, for example, is undated and unsigned, we're 2 not contesting that. So I do --</p> <p>3 JUDGE COHN JUBELIRER: Without a handwritten 4 date?</p> <p>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.</p> <p>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.</p> <p>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</p>
<p style="text-align: right;">Page 188</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p>	<p style="text-align: right;">Page 190</p> <p>1 ballots to be counted.</p> <p>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.</p> <p>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?</p> <p>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.</p> <p>19 And I will walk --</p> <p>20 JUDGE COHN JUBELIRER: Okay. And you're 21 going to walk me through that analysis?</p> <p>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</p>

<p style="text-align: right;">Page 191</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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</p>	<p style="text-align: right;">Page 193</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>14 JUDGE COHN JUBELIRER: And so how do you 15 define certification? Is there a provision in the statute?</p> <p>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.</p> <p>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</p>
<p style="text-align: right;">Page 192</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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</p>	<p style="text-align: right;">Page 194</p> <p>1 is directory. The ballots that have been canvassed and 2 computed shall be certified.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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</p>

<p style="text-align: right;">Page 195</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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</p>	<p style="text-align: right;">Page 197</p> <p>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 --</p> <p>6 MR. BOYER: Correct.</p> <p>7 JUDGE COHN JUBELIRER: -- because they're 8 two separate things? Okay.</p> <p>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.</p> <p>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.</p> <p>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</p>
<p style="text-align: right;">Page 196</p> <p>1 existing process for that because that is not how the 2 Election Code works.</p> <p>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.</p> <p>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.</p> <p>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 --</p> <p>25 JUDGE COHN JUBELIRER: So your point is that</p>	<p style="text-align: right;">Page 198</p> <p>1 certified.</p> <p>2 I'd like to move now to our second count 3 which is the count for declaratory and injunctive relief 4 and walk through a bit more broadly what it is that the 5 Election Code requires, not just this Court's June 2nd 6 order but stepping back what it is that the Election Code 7 requires with respect to ballots that a voter has failed to 8 write a date on the return envelope but otherwise are 9 timely and otherwise have no deficiencies or irregularities 10 as Your Honor described in the June 2nd order.</p> <p>11 Now, there's been a great deal of attention 12 paid to Section 3146.6 which is the section that describes 13 the process by which a voter completes an absentee. That 14 one is specific to absentee ballots. There is a parallel 15 section with substantively identical language for mail-in 16 ballots, and that's the section that's been alluded to that 17 says a voter shall date the return envelope. That section 18 alone does not dictate whether a ballot that's missing or a 19 return envelope that's missing a date meets the conditions 20 for canvassing.</p> <p>21 As I mentioned earlier, the process that 22 describes canvassing or rather the section that describes 23 canvassing is not 3146.6, but instead is 3146.8 and 24 specifically paragraph (g)(3) and that section says that a 25 declaration -- excuse me, a ballot may be canvassed if the</p>

<p>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 Bookvar 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,</p>	<p>Page 199</p> <p>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</p>
<p>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. Bookvar, 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</p>	<p>Page 200</p> <p>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</p>
	<p>Page 201</p> <p>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</p>

<p style="text-align: right;">Page 203</p> <p>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,</p>	<p style="text-align: right;">Page 205</p> <p>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</p>
<p style="text-align: right;">Page 204</p> <p>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</p>	<p style="text-align: right;">Page 206</p> <p>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</p>

<p style="text-align: right;">Page 207</p> <p>1 generally thought to moot election [inaudible].</p> <p>2 For example, the Migliori petition that's</p> <p>3 been mentioned a number of times and there are arguments</p> <p>4 being made that no matter whether the Third Circuit</p> <p>5 decision was right or wrong and whether the Supreme Court</p> <p>6 might otherwise have granted review, the candidates have</p> <p>7 conceded the election result was certified. The case is</p> <p>8 moot.</p> <p>9 JUDGE COHN JUBELIRER: Is the case moot?</p> <p>10 Has one of those candidates taken a position in Lehigh</p> <p>11 County Court?</p> <p>12 MR. BOYER: One of the candidates there did</p> <p>13 concede the election, yes. And I am not saying the</p> <p>14 Department's position right now is the case is moot.</p> <p>15 JUDGE COHN JUBELIRER: Correct.</p> <p>16 MR. BOYER: I'm saying there is a petition</p> <p>17 from the candidate who did concede saying this petition is</p> <p>18 moot.</p> <p>19 JUDGE COHN JUBELIRER: I see.</p> <p>20 MR. BOYER: So I'd like to conclude for now</p> <p>21 with where I started which is what this case is about. As</p> <p>22 I mentioned at the outset, this is not a case where the</p> <p>23 Secretary believes she can order the counties to do certain</p> <p>24 things. If she had that power, we would not be before Your</p> <p>25 Honor asking for an order that the counties do certain</p>	<p style="text-align: right;">Page 209</p> <p>1 Unless there are further questions now, I'll</p> <p>2 save the rest of my points for rebuttal.</p> <p>3 JUDGE COHN JUBELIRER: Okay.</p> <p>4 MR. BOYER: Thank you, Your Honor.</p> <p>5 MR. BUKOWSKI: May it please the Court, Your</p> <p>6 Honor. It's been my pleasure to represent the Berks County</p> <p>7 Board of Elections and the Lancaster County Board of</p> <p>8 Elections before Your Honor today.</p> <p>9 We're here under circumstances where no</p> <p>10 candidate and no voter is challenging the final certified</p> <p>11 results timely submitted by the Berks County Board of</p> <p>12 Elections, the Lancaster County Board of Elections, and the</p> <p>13 Fayette County Board of Elections; and yet Petitioners are</p> <p>14 seeking a writ of mandamus and declaratory and injunctive</p> <p>15 relief from this Court to enforce what I understood until</p> <p>16 today to be the Petitioners' directive based on no</p> <p>17 statutory authority.</p> <p>18 But now I understand that Petitioners are</p> <p>19 not trying to enforce their directives to the county Boards</p> <p>20 of Elections but trying to enforce this Court's June 2nd,</p> <p>21 2020 [sic] order in the McCormick challenge, and I'll</p> <p>22 address that as we get into the elements of Petitioners'</p> <p>23 claim for emergency relief.</p> <p>24 There's no dispute about the timeline, but</p> <p>25 you would have thought from counsel's argument that the In</p>
<p style="text-align: right;">Page 208</p> <p>1 things.</p> <p>2 The testimony that's been elicited, the</p> <p>3 arguments that have been made about the primacy of the</p> <p>4 counties relative to the Secretary is all beside the point.</p> <p>5 The Secretary, the county, we are all subject to the</p> <p>6 Election Code as finally interpreted by this Court and the</p> <p>7 Supreme Court of Pennsylvania and, of course, federal law</p> <p>8 ultimately as determined by the federal courts.</p> <p>9 At the same time the Secretary, even if she</p> <p>10 has no independent authority to receive elections and say</p> <p>11 those ballots are null and void, she is not a rubber stamp.</p> <p>12 When the Secretary receives certifications, whether there's</p> <p>13 clerical errors where it's clear a county has excluded</p> <p>14 certain ballots maybe inadvertently or inadvertently, the</p> <p>15 Secretary returns to the counties and addresses that and</p> <p>16 raises that point.</p> <p>17 Where there is clear case law saying ballots</p> <p>18 are being excluded that are lawful and, in fact, an order</p> <p>19 that says the very ballots at issue here must be canvassed</p> <p>20 and there is no further discretion under the Election Code,</p> <p>21 the Secretary simply has not received from the counties the</p> <p>22 certifications that they are required to provide to her</p> <p>23 under 3154 and the following statutes and in turn she</p> <p>24 cannot complete her own statutory duties to certify the</p> <p>25 accurate election results.</p>	<p style="text-align: right;">Page 210</p> <p>1 re: Canvass decision in November, 2020, never occurred. I</p> <p>2 didn't hear him mention that one time during his argument</p> <p>3 to this Court and that case at least on the issues before</p> <p>4 the Court is binding on this Court and the county Boards of</p> <p>5 Elections.</p> <p>6 In that case there clearly was a</p> <p>7 four-to-three majority of the Pennsylvania Supreme Court</p> <p>8 that concluded under the plain language of the Pennsylvania</p> <p>9 Election Code that undated ballots, undated absentee and</p> <p>10 mail-in ballots with no other defects shall not be counted</p> <p>11 in any election after November, 2020.</p> <p>12 JUDGE COHN JUBELIRER: Well, would you agree</p> <p>13 that it is a plurality decision?</p> <p>14 MR. BUKOWSKI: Not on that issue, Your</p> <p>15 Honor. There was a three -- it's three, three, one; and if</p> <p>16 you take the three Justices and the Justice Dougherty's</p> <p>17 opinion --</p> <p>18 JUDGE COHN JUBELIRER: Well, I understand</p> <p>19 but what you're doing -- I mean, and my question let's take</p> <p>20 it in steps.</p> <p>21 MR. BUKOWSKI: Sure.</p> <p>22 JUDGE COHN JUBELIRER: It is a -- do you</p> <p>23 disagree that in the opinion announcing the judgment of the</p> <p>24 Court in that case it states, we conclude the dating, the</p> <p>25 declaration is a directory rather than a mandatory</p>

<p style="text-align: right;">Page 211</p> <p>1 instruction, and thus the inadvertent failure to comply</p> <p>2 does not require that ballots lacking a date be excluded</p> <p>3 from counting?</p> <p>4 MR. BUKOWSKI: I agree that that opinion</p> <p>5 announcing the judgment of the Court says that.</p> <p>6 JUDGE COHN JUBELIRER: Okay.</p> <p>7 MR. BUKOWSKI: And that was signed on by</p> <p>8 three Justices. Justice Wecht signed on to that opinion</p> <p>9 for the limited purpose of applying --</p> <p>10 JUDGE COHN JUBELIRER: Right.</p> <p>11 MR. BUKOWSKI: -- it to that election.</p> <p>12 JUDGE COHN JUBELIRER: But that doesn't</p> <p>13 change then that it was a plurality opinion that then -- I</p> <p>14 mean I think it at least is and I believe that there's been</p> <p>15 some comments that the -- it's, well, a bit confusing.</p> <p>16 MR. BUKOWSKI: I think it's not confusing,</p> <p>17 Your Honor, if you look at -- if you look at Justice</p> <p>18 Wecht's opinion, his opinion concurring in the result where</p> <p>19 he says, I agree this election I agree but going forward --</p> <p>20 and I'll quote from that.</p> <p>21 JUDGE COHN JUBELIRER: Yes. And I mean</p> <p>22 that's fine and Justice Dougherty, I've read, of course,</p> <p>23 all of their opinions. But there is also case law that</p> <p>24 sort of cautions if you will against overly interpreting</p> <p>25 should I say the effect of plurality opinions that they --</p>	<p style="text-align: right;">Page 213</p> <p>1 I'm only talking the narrow issue on whether the statute</p> <p>2 says -- whether the statute requires that an undated ballot</p> <p>3 be rejected.</p> <p>4 There is a sliver of light certainly on the</p> <p>5 federal statute question that In Re: Canvass left open;</p> <p>6 and the opinions, you know, Justice Wecht's opinion, you</p> <p>7 know, mentioned it but said I'm not going to step into that</p> <p>8 without the benefit of full advocacy and I think that was</p> <p>9 wise. But I didn't hear really any thorough analysis or</p> <p>10 argument from opposing counsel on that point.</p> <p>11 But so on that narrow issue I do -- and</p> <p>12 ironically I guess the opinion in Ritter, the unreported,</p> <p>13 unpublished opinion in Ritter by Judge McCullough was</p> <p>14 January of 2022. It involved the same election as Migliori</p> <p>15 which was the federal court case which reached a different</p> <p>16 result, and I will address briefly what's before the</p> <p>17 Supreme Court now because I think the timeline is pretty</p> <p>18 clear though that we established through the record today</p> <p>19 and the stipulated facts.</p> <p>20 You know, the guidance from the Department</p> <p>21 all the way up through Election Day was don't count undated</p> <p>22 ballots. You know, the timing being what it is, May 20th</p> <p>23 was three days after Election Day, the Migliori Third</p> <p>24 Circuit opinion comes out. That mandate never takes</p> <p>25 effect. The Supreme Court stay took effect on May 31st</p>
<p style="text-align: right;">Page 212</p> <p>1 to the extent that we interpret them to establish binding</p> <p>2 precedent going forward. I think we have to proceed with</p> <p>3 caution.</p> <p>4 MR. BUKOWSKI: I don't --</p> <p>5 JUDGE COHN JUBELIRER: That's all I would</p> <p>6 say with that, and I'm fine for you to quote the language</p> <p>7 of what is not a majority opinion but what is a concurring</p> <p>8 opinion.</p> <p>9 MR. BUKOWSKI: And I think what -- I</p> <p>10 understand what Your Honor is saying; and I would commend</p> <p>11 Your Honor to review, although it's not binding on this</p> <p>12 Court, two of Your Honor's colleagues on this Court.</p> <p>13 JUDGE COHN JUBELIRER: In the Ritter?</p> <p>14 MR. BUKOWSKI: In the Ritter case.</p> <p>15 JUDGE COHN JUBELIRER: Right.</p> <p>16 MR. BUKOWSKI: Came to the exact result I'm</p> <p>17 urging you to come to today. And so I adopt wholesale</p> <p>18 their analysis of In Re: Canvass and urge you to do the</p> <p>19 same, and that would make three of you and who knows what</p> <p>20 the rest of the Court would do. Obviously Judge Wojcik had</p> <p>21 his own view on that and set it forth there.</p> <p>22 But I do believe that Judge McCullough's</p> <p>23 opinion in Ritter is persuasive and that this Court should</p> <p>24 take a hard look at that analysis. And they concluded</p> <p>25 there that there's a majority as to the narrow issue, and</p>	<p style="text-align: right;">Page 214</p> <p>1 before the mandate became effective. The stay was lifted</p> <p>2 June 9th.</p> <p>3 Meanwhile these county Boards of Elections</p> <p>4 are facing deadlines trying to timely certify the results</p> <p>5 of this election which Migliori really doesn't address</p> <p>6 because it's a different election, and I think the opinion</p> <p>7 makes it clear that that decision applies only to that 2021</p> <p>8 judicial race in Lehigh County although certainly the</p> <p>9 analysis, you know, one could argue would apply.</p> <p>10 JUDGE COHN JUBELIRER: How could you argue</p> <p>11 that it would not apply?</p> <p>12 MR. BUKOWSKI: Well, I would argue that it's</p> <p>13 wrong.</p> <p>14 JUDGE COHN JUBELIRER: Well, I mean but</p> <p>15 that's arisen and I'm sure that, you know, that there could</p> <p>16 be disagreement and I respect that with regard to the June</p> <p>17 2nd order and the opinion that went with that that, you</p> <p>18 know, you thought that was incorrect, too.</p> <p>19 MR. BUKOWSKI: Right.</p> <p>20 JUDGE COHN JUBELIRER: So there are I don't</p> <p>21 think -- well, certainly at the time I don't want to</p> <p>22 prejudice. So there's always a question as to whether a</p> <p>23 judicial decision when you look back on it you might</p> <p>24 whatever. But otherwise what we think of in, you know,</p> <p>25 stare decisis has particularly I think if not stare decisis</p>

<p style="text-align: right;">Page 215</p> <p>1 let's say that certainty --</p> <p>2 MR. BUKOWSKI: Sure.</p> <p>3 JUDGE COHN JUBELIRER: -- that opinions that</p> <p>4 can be read, understood, and applied in the future so that</p> <p>5 all of these hardworking people who are trying to make</p> <p>6 decisions now how to apply the statutes and the law when</p> <p>7 they're counting votes and so the voters know what's</p> <p>8 required of them is really important.</p> <p>9 And so to that end, I wonder why or if you</p> <p>10 would agree that having a decision on the merits in a case</p> <p>11 like this where probably with any decisions in our original</p> <p>12 jurisdiction here appealed as of right to our Supreme Court</p> <p>13 might provide a decision that could be then applied with</p> <p>14 more certainty in these upcoming elections?</p> <p>15 MR. BUKOWSKI: I was hoping you didn't ask</p> <p>16 that question because thinking about coming in here today,</p> <p>17 but I knew you would. And let me answer it to say</p> <p>18 certainly, certainly if this Court issued a decision on the</p> <p>19 merits in this case which is subject obviously to appeal as</p> <p>20 of right to the Supreme Court, as the Court indicated would</p> <p>21 provide some clarity and at least a means by which Boards</p> <p>22 of Elections could, you know, hopefully sooner rather than</p> <p>23 later get clearer guidance on all the relevant issues.</p> <p>24 What my response to your question, however,</p> <p>25 is, we're not here -- unfortunately I think probably the</p>	<p style="text-align: right;">Page 217</p> <p>1 the same oath or at least an oath that the county board</p> <p>2 officials take to protect, obey, and defend the</p> <p>3 Constitution and the laws. So as she's certifying her</p> <p>4 results, she has as well a duty arguably, or we can see if</p> <p>5 you disagree.</p> <p>6 But anyway the concern about uniformity and</p> <p>7 whether there's a concern if in three counties or five</p> <p>8 counties or ten counties certain ballots are not counted</p> <p>9 and in the remaining counties those ballots are counted and</p> <p>10 does that create an issue either under the Election Code or</p> <p>11 the Constitution?</p> <p>12 MR. BUKOWSKI: I think my answer to that is</p> <p>13 this Court should not take on and issue a declaratory</p> <p>14 judgment. This is an advisory opinion that there's no</p> <p>15 candidate challenging, there's no voter challenging.</p> <p>16 JUDGE COHN JUBELIRER: Are candidates and</p> <p>17 voters the only parties that can challenge?</p> <p>18 MR. BUKOWSKI: I don't believe that's -- the</p> <p>19 language in the statute says an aggrieved person. I don't</p> <p>20 know whether --</p> <p>21 JUDGE COHN JUBELIRER: The language in which</p> <p>22 statute?</p> <p>23 MR. BUKOWSKI: In the statute that allows</p> <p>24 for appeals from -- let me get it -- appeals from the</p> <p>25 decisions of Boards of Elections. I have it here.</p>
<p style="text-align: right;">Page 216</p> <p>1 best chance for that decision on the merits to have been</p> <p>2 made was the McCormick case because it was a real challenge</p> <p>3 by a real voter, a real candidate who -- there's no issue</p> <p>4 on timeliness. All the Boards of Elections were parties.</p> <p>5 The Acting Secretary was a party.</p> <p>6 And I understand what happened and the</p> <p>7 voluntary discontinuance, but so therefore I believe this</p> <p>8 is not an actual case or controversy. It's I'll use the</p> <p>9 vernacular a ginned up case or controversy, and I don't</p> <p>10 mean that in a pejorative way. I'll assume good faith on</p> <p>11 the part of the Acting Secretary that she's trying to, you</p> <p>12 know, provide some clarity, too.</p> <p>13 If I were bringing the action, I would have</p> <p>14 teed it up a little differently and said maybe for</p> <p>15 declaratory judgment and said, you know, 64 counties ruled</p> <p>16 one way, three ruled another way. We need clarity.</p> <p>17 JUDGE COHN JUBELIRER: Well, then I was</p> <p>18 going to ask because there is a request for declaratory</p> <p>19 relief and one of the requirements in the Election Code --</p> <p>20 or let me just ask how you interpret in the Section 2642,</p> <p>21 Powers and Duties of County Boards, it says, you know, to</p> <p>22 the end that primaries and elections may be honestly,</p> <p>23 efficiently, and uniformly conducted and whether you</p> <p>24 perceive there to be a concern?</p> <p>25 I mean and the Secretary, of course, takes</p>	<p style="text-align: right;">Page 218</p> <p>1 JUDGE COHN JUBELIRER: I think you're</p> <p>2 looking at 3146.8 which refers to canvassing.</p> <p>3 MR. BUKOWSKI: I think 3157 is what I was --</p> <p>4 JUDGE COHN JUBELIRER: 3157, yes, and it was</p> <p>5 from decisions of the county board. But it still says</p> <p>6 regarding the computation or canvassing of the returns.</p> <p>7 MR. BUKOWSKI: I agree.</p> <p>8 JUDGE COHN JUBELIRER: How would you read</p> <p>9 that? Maybe I should ask your colleague because I think he</p> <p>10 made a very clear distinction when questioning Mr. Marks</p> <p>11 about the distinction between canvassing and certification.</p> <p>12 MR. BUKOWSKI: I think canvassing, you know,</p> <p>13 counting votes, whether or not to count votes as part of</p> <p>14 the canvass is a decision. So the decision not to count</p> <p>15 the undated ballots in my view is a decision by the Board</p> <p>16 of Elections with respect to canvassing. That decision,</p> <p>17 you know, the statute provides there's two days for any</p> <p>18 aggrieved person to challenge that decision.</p> <p>19 I argue that June 6, 7th, and 8th,</p> <p>20 respectively, were the dates when those decisions were made</p> <p>21 final when these county Boards of Elections submitted their</p> <p>22 certified results to the Secretary and that, within two</p> <p>23 days if somebody was going to challenge that including the</p> <p>24 Secretary -- and I'll assume without conceding that the</p> <p>25 Acting Secretary could be an aggrieved person under the</p>

<p style="text-align: right;">Page 219</p> <p>1 statute.</p> <p>2 But assuming that to be true, then by June</p> <p>3 10th then she would have had to have filed an action to</p> <p>4 this Court because this Court's May 27th administrative</p> <p>5 order said because there is a statewide recount now all</p> <p>6 appeals, even though it's original jurisdiction, all</p> <p>7 appeals will come to this Court.</p> <p>8 I guess I alternatively argue that the</p> <p>9 appropriate date would have been the date on which the July</p> <p>10 1st date on which -- I mean you could argue serially the</p> <p>11 first time Berks County said we're not going to do it, you</p> <p>12 know, because it didn't need to be committed to writing or</p> <p>13 the first time Lancaster or Fayette County said we're not</p> <p>14 going to recertify, that would have been a decision of the</p> <p>15 respective boards from which such an appeal would have been</p> <p>16 required to be filed within two days.</p> <p>17 And lastly I think at least as to Lancaster</p> <p>18 and Berks they sent correspondence July 1st for Berks, July</p> <p>19 5th each from one of -- the solicitor in Lancaster was July</p> <p>20 5th, the first assistant deputy in Berks was July 1st. And</p> <p>21 even if you extended grace to those dates -- I think</p> <p>22 Fayette's might have been earlier -- but even if you said</p> <p>23 okay, two days from those dates, you know, we're at July</p> <p>24 11th and it's not timely.</p> <p>25 So even a lot of assumptions in favor of the</p>	<p style="text-align: right;">Page 221</p> <p>1 received the certified results from these county Boards of</p> <p>2 Elections, the Secretary had an option at that point,</p> <p>3 certify; or if she believes what she's asserting now,</p> <p>4 appeal to this Court within two days not a month and a week</p> <p>5 or so after those results were received.</p> <p>6 So it's not timely and it's not an actual</p> <p>7 case or controversy because there's no -- I still think</p> <p>8 there has to be a candidate or, you know, some outcome that</p> <p>9 would be hanging in the balance for this.</p> <p>10 JUDGE COHN JUBELIRER: Did all of the</p> <p>11 counties do what Berks County did and notify the people who</p> <p>12 voted by mail or absentee that their ballot was received</p> <p>13 but without a signature or date so that they had an</p> <p>14 opportunity to cure?</p> <p>15 MR. BUKOWSKI: I believe what Commissioner</p> <p>16 Leinbach was testifying to was that when --</p> <p>17 JUDGE COHN JUBELIRER: Oh, was it --</p> <p>18 MR. BUKOWSKI: It was Berks.</p> <p>19 JUDGE COHN JUBELIRER: It was Berks, okay.</p> <p>20 MR. BUKOWSKI: It was Berks. But when the</p> <p>21 SURE system itself puts, sends the notices when those are</p> <p>22 scanned in, then that will --</p> <p>23 JUDGE COHN JUBELIRER: So the SURE system.</p> <p>24 MR. BUKOWSKI: Notifies voters as to what</p> <p>25 the status -- it will send an e-mail if they included an</p>
<p style="text-align: right;">Page 220</p> <p>1 Acting Secretary and Department make this case untimely</p> <p>2 filed, but I think it also has the hallmarks of that we've</p> <p>3 argued a lack of an actual case or controversy. And I'll</p> <p>4 come back to the mandamus later, but because the Court is</p> <p>5 focused on the declaratory judgment --</p> <p>6 JUDGE COHN JUBELIRER: But we can look at</p> <p>7 both. I just mentioned declaratory so --</p> <p>8 MR. BUKOWSKI: What I'll say is that the</p> <p>9 Declaratory Judgments Act precludes, you know, relief when</p> <p>10 there's not an actual case or controversy. And I guess the</p> <p>11 Secretary's arguing that she's aggrieved somehow; but she's</p> <p>12 really not because when you look at the Code, the certified</p> <p>13 results were submitted. She has no discretion.</p> <p>14 If anybody doesn't have discretion at this</p> <p>15 stage of the 2022 May primary it's the Acting Secretary</p> <p>16 because these three boards have sent her the certified</p> <p>17 results, and Mr. Marks did testify when the Secretary gets</p> <p>18 certified results from the county boards she has no</p> <p>19 discretion. She has the ministerial duty to certify the</p> <p>20 election.</p> <p>21 JUDGE COHN JUBELIRER: I think that's a</p> <p>22 legal question.</p> <p>23 MR. BUKOWSKI: No. And I'm not suggesting</p> <p>24 that that's an admission, but that's the argument is that</p> <p>25 the statute says that and provides for that. And having</p>	<p style="text-align: right;">Page 222</p> <p>1 e-mail address.</p> <p>2 JUDGE COHN JUBELIRER: Correct.</p> <p>3 MR. BUKOWSKI: And then also there's a way</p> <p>4 for voters to check the status of their ballot, and then</p> <p>5 they can come in.</p> <p>6 JUDGE COHN JUBELIRER: But that status is</p> <p>7 more than just it was received?</p> <p>8 MR. BUKOWSKI: Correct.</p> <p>9 JUDGE COHN JUBELIRER: It will tell them if</p> <p>10 it was -- if it did not have a date or did not have a</p> <p>11 signature?</p> <p>12 MR. BUKOWSKI: Yeah. The answer to your</p> <p>13 question is I see Mr. King nodding no. I know it is for</p> <p>14 Berks. I believe it is for Lancaster, but I don't want to</p> <p>15 swear to it and those folks have left.</p> <p>16 JUDGE COHN JUBELIRER: Yes. And he maybe</p> <p>17 can answer later and that wasn't put on the record, but I</p> <p>18 was not aware of that if it does exist.</p> <p>19 MR. BUKOWSKI: And then going back to -- let</p> <p>20 me shift because I want to come back to this Court's order</p> <p>21 on June 2nd --</p> <p>22 JUDGE COHN JUBELIRER: Yes.</p> <p>23 MR. BUKOWSKI: -- because I was left -- my</p> <p>24 first thought and then my second thought was, wow, after</p> <p>25 hearing the way the Secretary interpreted this Court's June</p>

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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

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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.

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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.

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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

<p style="text-align: right;">Page 227</p> <p>1 stand by my opinion and order of course.</p> <p>2 MR. BUKOWSKI: Of course. And I think</p> <p>3 clarity in this case as to what that meant --</p> <p>4 JUDGE COHN JUBELIRER: Well, every opinion</p> <p>5 and order of a Court in a sense takes on a life of its own</p> <p>6 as it is interpreted and applied in the future.</p> <p>7 MR. BUKOWSKI: Right.</p> <p>8 JUDGE COHN JUBELIRER: And --</p> <p>9 MR. BUKOWSKI: And I do think it's helpful</p> <p>10 that it was a preliminary order only because --</p> <p>11 JUDGE COHN JUBELIRER: Although it was an</p> <p>12 extensive analysis of the likelihood of success on the</p> <p>13 merits.</p> <p>14 MR. BUKOWSKI: It was. It was. And what I</p> <p>15 would say is at that point in time, again June 2nd, the</p> <p>16 Court did not have the benefit of Justice Alito's</p> <p>17 dissenting opinion in the --</p> <p>18 JUDGE COHN JUBELIRER: Although isn't his</p> <p>19 dissenting opinion also qualified with the fact that it was</p> <p>20 preliminary, that he was essentially relying on the request</p> <p>21 for stay that had been given which expressed what</p> <p>22 Pennsylvania law was at the time and he was relying on that</p> <p>23 interpretation?</p> <p>24 MR. BUKOWSKI: I do think what he -- and I</p> <p>25 looked at it very closely. I read that dissenting opinion</p>	<p style="text-align: right;">Page 229</p> <p>1 in McCormick as it contemplates where it will come down on</p> <p>2 that because I think if it does so the analysis is such</p> <p>3 that it becomes clear that the federal statute does not</p> <p>4 apply to abrogate the dating requirement on those absentee</p> <p>5 ballots.</p> <p>6 JUDGE COHN JUBELIRER: Well, I'm not sure</p> <p>7 that anything required the abrogation. It's an</p> <p>8 interpretation if you will of the statutory requirement and</p> <p>9 whether it's, you know -- well, we can --</p> <p>10 MR. BUKOWSKI: That's right. It was a</p> <p>11 suggestion that that was not material to the qualification,</p> <p>12 and what Justice Alito points out and I agree and urge the</p> <p>13 Court to consider and agree as well is that that dating</p> <p>14 requirement doesn't go to the qualification to vote. It</p> <p>15 goes to whether the vote that was cast will be counted.</p> <p>16 It's not disenfranchising.</p> <p>17 It's not saying the voter, you know, was not</p> <p>18 qualified to vote; and, therefore, it doesn't have the</p> <p>19 effect -- let me just say that -- it doesn't have the</p> <p>20 effect that the Third Circuit concluded it does. And,</p> <p>21 therefore, the result is that that statute should not</p> <p>22 result in county Boards of Elections being required to</p> <p>23 count undated ballots.</p> <p>24 I guess I'll leave -- conclude really with</p> <p>25 and obviously we've filed extensive papers, but I think I'd</p>
<p style="text-align: right;">Page 228</p> <p>1 and compared it to the Third Circuit's opinion. It's</p> <p>2 certainly -- I was shocked when I reread preparing for</p> <p>3 today how little the Third Circuit opinion breaks down the</p> <p>4 elements of the statute in question the way Justice Alito</p> <p>5 did in, you know, the elements one through five. There's</p> <p>6 no discussion like that at all in the Third Circuit</p> <p>7 opinion.</p> <p>8 And so I do think for having it a few days</p> <p>9 even Justice Alito's preliminary analysis and I think he</p> <p>10 left some room there, but I think he's spot on when it</p> <p>11 comes to analyzing elements I think it's two and five of</p> <p>12 the federal statute in describing that you can't possibly</p> <p>13 -- that statute does not really go to the qualifications of</p> <p>14 a voter to vote.</p> <p>15 It is the or this statute the dating</p> <p>16 requirement is the act of voting itself and doesn't affect</p> <p>17 the qualifications of the voter to vote, and therefore it's</p> <p>18 kind of a circular argument that the Appellant in Migliori</p> <p>19 and the Third Circuit adopted. And I think the concurring</p> <p>20 opinion in Migliori I think was quite candid in pointing</p> <p>21 out that Ritter conceded a couple points that he didn't</p> <p>22 argue that really left no room.</p> <p>23 But I think the statutory analysis that</p> <p>24 Justice Alito did applies here, and this Court should take</p> <p>25 that into account and revisit its preliminary analysis of</p>	<p style="text-align: right;">Page 230</p> <p>1 like to conclude with what I think is the key language in</p> <p>2 the In re: Canvass decision from Justice Wecht's opinion.</p> <p>3 And he goes back time and time again to the Court's</p> <p>4 decision in the PDP case.</p> <p>5 JUDGE COHN JUBELIRER: Before you conclude</p> <p>6 just one final question and that is the difference between</p> <p>7 and we can call them, you know, wrongly dated ballots or I</p> <p>8 hate to -- let's say ballots that contain handwritten dates</p> <p>9 on the envelopes that are incorrect --</p> <p>10 MR. BUKOWSKI: Okay.</p> <p>11 JUDGE COHN JUBELIRER: -- or wrong --</p> <p>12 MR. BUKOWSKI: Sure.</p> <p>13 JUDGE COHN JUBELIRER: -- and ballots that</p> <p>14 do not contain handwritten dates on them on the outside</p> <p>15 envelope.</p> <p>16 MR. BUKOWSKI: Understood.</p> <p>17 JUDGE COHN JUBELIRER: Is that what you</p> <p>18 believe the Legislature intended in the dating requirement</p> <p>19 and, if so, how is that helpful?</p> <p>20 For example, let's say the Lancaster County</p> <p>21 case and if the person there, if the daughter had put her</p> <p>22 birth date, her mother's birth date on there, that wouldn't</p> <p>23 have helped; but it wouldn't have been -- let me just say</p> <p>24 this -- it wouldn't have been found not to be counted,</p> <p>25 right? But it would not have enabled anybody to determine</p>

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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

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1 the Commissioners, you know, all those ballots that are

2 incorrectly dated as they're processed they're subject to

3 challenge.

4 And I'm going to make a prediction here I

5 guess -- maybe that's dangerous -- but because the Courts

6 keep saying, you know, that we, that counting the undated

7 ballots somehow means we should count -- or counting the

8 incorrectly dated ballots means we shouldn't, you know,

9 enforce the date requirement that's plainly written in the

10 statute, I suggest that's probably the next set of cases

11 that candidates are going to start challenging ballots that

12 have incorrect dates.

13 And then we're going to have hearings at

14 county Boards of Elections on that issue because I don't

15 think that's what the Legislature intended, and I think

16 what it intended is that it would be the date that the

17 ballot was signed. The instructions say that. The ballot

18 itself says today's date trying to comply with Justice

19 Wecht's concern or satisfy his concern that there be clear

20 language so the voter knows what's required and what the

21 consequences of not complying are.

22 And I think that ballot that's Joint Exhibit

23 1 does that. The instructions, we stipulated the

24 instructions are not in dispute here, that those do that.

25 I'm more familiar with the Berks instructions than

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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

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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.

<p style="text-align: right;">Page 235</p> <p>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.</p> <p>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.</p> <p>17 JUDGE COHN JUBELIRER: And so essentially 18 you would ask us to issue an order dismissing --</p> <p>19 MR. BUKOWSKI: Correct.</p> <p>20 JUDGE COHN JUBELIRER: -- the action?</p> <p>21 MR. BUKOWSKI: Correct.</p> <p>22 JUDGE COHN JUBELIRER: Okay. Thank you very 23 much.</p> <p>24 MR. BUKOWSKI: And then I guess I would also 25 clarify that in doing so I would ask that the Secretary be</p>	<p style="text-align: right;">Page 237</p> <p>1 will be somebody there soon with respect to this issue. 2 3 This case is not the case, respectfully, 4 that should go up because this case in particular has other 5 problems with it. It has problems with respect to the fact 6 that Your Honor entered an order that didn't say to 7 certify. And so now what we have is we have a month and a 8 half later, almost two months later we have an action here 9 that is nothing more than a thinly veiled attempt to ask 10 you to modify your order beyond the Judicial Code's 11 provisions for the modification of an order. 12 13 So that case was discontinued. The case was 14 no longer pending. No one came back in that case. In the 15 McCormick Oz case, no one came back in that case and said 16 to Your Honor, Your Honor, would you please modify this and 17 require the certification of these results. 18 19 And so when you look at, for example, 20 there's a recent case in the Pennsylvania Superior Court 21 which I understand is not binding but it's illustrative and 22 also by Judge King in that Court that talks about this 23 30-day requirement. It had to do -- you've probably seen 24 it. It's a recent decision. It's published. It has to do 25 with someone asking for counsel fees after the conclusion of a case, and it cites correctly the 30-day requirement, the 30-day provision even though counsel fees seem to be whether they're directly related to the case or not.</p>
<p style="text-align: right;">Page 236</p> <p>1 ordered to, you know, certify the results of the election. 2 3 JUDGE COHN JUBELIRER: Thank you. 4 5 MR. BUKOWSKI: Thank you, Your Honor. 6 7 MR. KING: May it please the Court. I'll 8 try not to repeat the excellent argument that my colleague 9 just made. I will say that with respect to this action, we 10 join in the request that this action be terminated, be 11 dismissed. 12 13 I think it's pretty clear what this action 14 is, Your Honor. It's simply an attempt to ask this Court 15 to modify the order that you entered in McCormick. The 16 order in McCormick did not and certainly Your Honor could 17 have included an order to certify those results. Had Your 18 Honor ordered the certification of those results, I would 19 suggest respectfully that there would have been -- that the 20 appeal that was taken and later discontinued and other 21 appeals would have been taken and that that matter with 22 respect to certification would have been in front of the 23 Court. 24 25 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</p>	<p style="text-align: right;">Page 238</p> <p>1 And that's exactly what's happening here. 2 3 This is an attempt by the Secretary, and she was the named 4 Respondent in the McCormick case. It's McCormick versus 5 Chapman, and then we have all these other, you know, Boards 6 of Elections. But she had every opportunity in that case 7 to do exactly what she's trying to do here. She could have 8 asked you to modify your order. She could have said order 9 them to certify it. She could have done all those things. 10 She didn't do that. 11 12 And in the absence of doing it, what she's 13 doing is she's doing it here; and this isn't the place to 14 do it. And this case has the great potential to expand the 15 powers of the Secretary of the Commonwealth beyond that 16 contemplated by the Legislature or even that addressed by 17 the Courts. So in this Court we've addressed in the past, 18 in the Fulton County case we've addressed the Secretary's 19 exercising powers that are beyond those granted by the 20 Legislature; and that's exactly what this is an attempt to 21 do. 22 23 The Secretary's duties are -- and this is 24 the reason why we asked that this matter be dismissed among 25 others. The Secretary's duties are much like in my hockey analogy which didn't get too far earlier, but I'll try it again. She is much like in a hockey game. She is the scorekeeper. She is not the referee. She is not an</p>

<p style="text-align: right;">Page 239</p> <p>1 aggrieved party. She is the Commonwealth.</p> <p>2 When she comes here -- and I'm telling the</p> <p>3 Court something that you know better than I. When the</p> <p>4 Secretary comes here as the Acting Secretary, she comes as</p> <p>5 the Commonwealth. She doesn't come as Leigh Chapman. She</p> <p>6 comes as the Honorable Leigh Chapman, the Secretary of the</p> <p>7 Commonwealth, which means she's invoking the Commonwealth.</p> <p>8 She's not an aggrieved person.</p> <p>9 There is no aggrieved person in this matter.</p> <p>10 There is no case or controversy here. This is asking for</p> <p>11 an advisory opinion. It's asking even worse to seek to</p> <p>12 modify your opinion in the McCormick case which I would</p> <p>13 suggest at this point is res judicata with respect to this</p> <p>14 matter and certainly is the rule or law of the case, and no</p> <p>15 one asked in that case to modify it to include</p> <p>16 certification. It never happened.</p> <p>17 JUDGE COHN JUBELIRER: But let me give you</p> <p>18 just a hypothetical.</p> <p>19 MR. KING: Yes, ma'am.</p> <p>20 JUDGE COHN JUBELIRER: Assume that one of</p> <p>21 the counties certified results that are not consistent with</p> <p>22 the law for whatever reason and nobody, you know, there was</p> <p>23 no challenge but left out a municipality. Or I mean I'm</p> <p>24 trying to think of something where it's clear to the</p> <p>25 Secretary and it would be clear that what they've done is</p>	<p style="text-align: right;">Page 241</p> <p>1 Supreme Court addressed it only in passing. And so there</p> <p>2 is a mention in the Boockvar case that there is no</p> <p>3 provision in the Election Code for curing. There is none.</p> <p>4 So in the 2020 election people were talking</p> <p>5 about all sorts of curing. They were talking about they</p> <p>6 might have voted for the wrong person. They wanted to come</p> <p>7 in after the mail ballot came in. They want to come in and</p> <p>8 get their mail ballot back and vote for the other guy. And</p> <p>9 so there was that sort of curing.</p> <p>10 There is also this curing which is of great</p> <p>11 controversy over all these counties. Some counties allow</p> <p>12 curing. Some counties don't allow curing. Some counties</p> <p>13 like Montgomery put the ballots out on a card table out in</p> <p>14 the hall and allow people from political parties to come in</p> <p>15 and bring people in to try to cure the ballots. Some</p> <p>16 people --</p> <p>17 JUDGE COHN JUBELIRER: They don't allow for</p> <p>18 opening, but you mean allow them to come in. I mean I'm</p> <p>19 asking. I wouldn't imagine they would be allowed to open</p> <p>20 them; but if somebody forgets to put a date on --</p> <p>21 MR. KING: Yes.</p> <p>22 JUDGE COHN JUBELIRER: -- they can come in</p> <p>23 and put a date on.</p> <p>24 MR. KING: That's what I --</p> <p>25 JUDGE COHN JUBELIRER: Is that what you're</p>
<p style="text-align: right;">Page 240</p> <p>1 not consistent.</p> <p>2 Is she still required by law then, she has</p> <p>3 no discretion, she must certify that or would she be able</p> <p>4 to in that case file a mandamus saying no, you have to</p> <p>5 certify, you have to include in your totals what is</p> <p>6 required under the law?</p> <p>7 MR. KING: In our opinion, since you asked,</p> <p>8 in our opinion, she is already certifying results which are</p> <p>9 inconsistent from county to county. I spoke about the</p> <p>10 Zicarelli case. Clearly the Zicarelli case is a</p> <p>11 startling result to me that two counties can count the</p> <p>12 votes differently. That's exactly what they did in</p> <p>13 Zicarelli, and we have a Senator Brewster sitting in the</p> <p>14 Pennsylvania Senate right now as a result of the largesse</p> <p>15 of the federal court in not invoking the Bush Gore doctrine</p> <p>16 which should have applied.</p> <p>17 And so I would also suggest, Your Honor,</p> <p>18 since you asked me, I would also suggest that this is</p> <p>19 happening as we sit here, as we stand here because what's</p> <p>20 happening with respect -- you asked about the SURE system</p> <p>21 and the signatures and the curing. That's commonly</p> <p>22 referred to as curing. Somebody sends it in and it needs</p> <p>23 to be fixed.</p> <p>24 And so there is a great debate in this</p> <p>25 Commonwealth about whether curing -- and the Court, the</p>	<p style="text-align: right;">Page 242</p> <p>1 talking about curing?</p> <p>2 MR. KING: It is what I'm talking about</p> <p>3 curing. However, there are also -- what also happens is</p> <p>4 that people have been advised that it's okay to vote</p> <p>5 provisionally after they've already voted by this mail-in</p> <p>6 system. So then they vote by the mail-in system. It goes</p> <p>7 into the SURE system, and somebody shows up and votes</p> <p>8 provisionally afterwards. We have --</p> <p>9 JUDGE COHN JUBELIRER: But they have a</p> <p>10 method of checking that, right? Everybody has their --</p> <p>11 MR. KING: Yes.</p> <p>12 JUDGE COHN JUBELIRER: Right.</p> <p>13 MR. KING: But --</p> <p>14 JUDGE COHN JUBELIRER: So and this isn't</p> <p>15 really of record. You know, we're talking about evidence</p> <p>16 --</p> <p>17 MR. KING: You asked.</p> <p>18 JUDGE COHN JUBELIRER: -- that wasn't</p> <p>19 presented. Yes. And thank you. I appreciate your answer</p> <p>20 but --</p> <p>21 MR. KING: I was getting back to your</p> <p>22 question.</p> <p>23 JUDGE COHN JUBELIRER: Yes.</p> <p>24 MR. KING: I was getting back to your</p> <p>25 question which was, well, what would the Secretary do if</p>

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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

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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

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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

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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

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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

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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

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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.

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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

<p style="text-align: right;">Page 251</p> <p>1 advisory opinion that they seek.</p> <p>2 And by the way, if they want such an</p> <p>3 opinion, when you read the King's Bench rules -- which I</p> <p>4 know Your Honor has read many times -- when you read the</p> <p>5 King's Bench rules, you can likely take that issue up with</p> <p>6 the Supreme Court and you'll likely get some decision on</p> <p>7 it. And so that would be the appropriate place for them to</p> <p>8 take this, not by using this vehicle.</p> <p>9 There are so many -- you know, we filed</p> <p>10 preliminary objections. I'm not going to go into all those</p> <p>11 details. I think we've raised all the things I talked</p> <p>12 about. We incorporated them into our response here, but</p> <p>13 there are so many issues. This is not a great case to</p> <p>14 ultimately decide this issue, and they have other means to</p> <p>15 do it.</p> <p>16 So thank you very much for your time, Your</p> <p>17 Honor. Glad to answer any other questions if you have any.</p> <p>18 JUDGE COHN JUBELIRER: I don't believe I</p> <p>19 have any other. You've answered them all.</p> <p>20 MR. KING: Thank you very much. It's my</p> <p>21 honor to be here.</p> <p>22 JUDGE COHN JUBELIRER: Thank you.</p> <p>23 MR. BOYER: Thank you, Your Honor. I know</p> <p>24 it's been a long day, so I will endeavor to keep this brief</p> <p>25 and just make a few what I believe to be important points.</p>	<p style="text-align: right;">Page 253</p> <p>1 JUDGE COHN JUBELIRER: I know.</p> <p>2 MR. BOYER: -- but I will slow down.</p> <p>3 JUDGE COHN JUBELIRER: Thank you.</p> <p>4 MR. BOYER: We have made our points on</p> <p>5 McCormick clear. I'll add a few additional ones. I</p> <p>6 recognize that it was a preliminary injunction, but the</p> <p>7 order is the order and it says what it says.</p> <p>8 And we have laid out our belief of the</p> <p>9 consequences of what follows from that order and our</p> <p>10 understanding of, you know, the direction to separately</p> <p>11 tally ballots that -- excuse me, votes that -- separately</p> <p>12 tally a count that excludes undated ballots was to preserve</p> <p>13 the opportunity for a different decision and final judgment</p> <p>14 on appeal. Of course that never same.</p> <p>15 JUDGE COHN JUBELIRER: So what is the effect</p> <p>16 of that? Did the order to separately tally the ballots the</p> <p>17 way it was written you think then what happened convert to</p> <p>18 a final order of certification or --</p> <p>19 MR. BOYER: It didn't convert to a final</p> <p>20 order of certification. I think the clear consequence of</p> <p>21 the Court's legal analysis and ultimately its order was</p> <p>22 that these ballots at issue which are the same ballots</p> <p>23 we're here talking about today were lawfully cast. That</p> <p>24 order was never -- it wasn't vacated. It wasn't</p> <p>25 contravened by a final judgment by Your Honor.</p>
<p style="text-align: right;">Page 252</p> <p>1 Number one, this is exactly the right action</p> <p>2 for these circumstances. There's no statute that</p> <p>3 contemplates what the counties are doing here which is</p> <p>4 refusing to include from their certifications lawfully cast</p> <p>5 and canvassed ballots. Under 3158 and 3159 of the Election</p> <p>6 Code by refusing to do that, they are interfering with the</p> <p>7 Secretary's statutory obligation to receive those</p> <p>8 accurately completed certifications and then perform her</p> <p>9 own certifications of those results.</p> <p>10 You heard allusions to this may not be the</p> <p>11 right time, that Mr. Marks has made clear what the</p> <p>12 Department was doing. It was communicating with the</p> <p>13 counties and was prevailing upon the counties, it was</p> <p>14 convincing the counties successfully in those back and</p> <p>15 forths; and I do not think we want the precedent to be the</p> <p>16 Department must sue a county immediately if there's a hint</p> <p>17 of disagreement.</p> <p>18 There's been a lot of talk including from us</p> <p>19 about the significance of Your Honor's decision in</p> <p>20 McCormick. I think --</p> <p>21 JUDGE COHN JUBELIRER: Listen, if you could</p> <p>22 just talk a little slower and louder, that would be</p> <p>23 helpful.</p> <p>24 MR. BOYER: Forgive me. I will. I didn't</p> <p>25 want to take up any more of your time --</p>	<p style="text-align: right;">Page 254</p> <p>1 JUDGE COHN JUBELIRER: So if the case hadn't</p> <p>2 been dismissed and there had been further arguments and</p> <p>3 orders, in that case what would have happened to this</p> <p>4 order?</p> <p>5 MR. BOYER: I think it depends on what order</p> <p>6 Your Honor ultimately entered. If Your Honor entered an</p> <p>7 order saying much like the order granting preliminary</p> <p>8 injunction these are lawful ballots, they must be</p> <p>9 canvassed, they must be canvassed -- excuse me, canvassed,</p> <p>10 counted, we'd be in the exact same position.</p> <p>11 JUDGE COHN JUBELIRER: So it really in your</p> <p>12 mind the effect of the order not vacating the opinion and</p> <p>13 order is somehow influencing your argument here?</p> <p>14 MR. BOYER: I think it's one, the existence</p> <p>15 of the order; two, Your Honor's decision not to vacate it;</p> <p>16 and three, no other order whether from a final judgment</p> <p>17 from Your Honor or on appeal. There's only been one order.</p> <p>18 It's to canvass these ballots. It said separately exclude</p> <p>19 ballots in case there's a different decision. That</p> <p>20 theoretical possibility never arrived.</p> <p>21 JUDGE COHN JUBELIRER: Okay.</p> <p>22 MR. BOYER: I'd like to move quickly to In</p> <p>23 Re: Canvass and make a couple of points about that. I</p> <p>24 think Your Honor's questions got at this, but it is</p> <p>25 absolutely not precedential. I know there is one decision,</p>

<p style="text-align: right;">Page 255</p> <p>1 an unprecedented 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?</p>	<p style="text-align: right;">Page 257</p> <p>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</p>
<p style="text-align: right;">Page 256</p> <p>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</p>	<p style="text-align: right;">Page 258</p> <p>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</p>

<p style="text-align: right;">Page 259</p> <p>1 understand. It's a little --</p> <p>2 MR. BOYER: It is correct to say the</p> <p>3 Secretary cannot certify results if she receives from the</p> <p>4 counties incomplete certifications and incomplete by virtue</p> <p>5 of them excluding lawfully cast ballots. She does not have</p> <p>6 the independent authority to decide what constitutes a</p> <p>7 lawfully cast ballot or not. That's up to the Courts. And</p> <p>8 in this context the Courts have spoken as to what qualifies</p> <p>9 as a lawfully cast ballot.</p> <p>10 JUDGE COHN JUBELIRER: So she's here trying</p> <p>11 to give effect to a Court's decision and how she</p> <p>12 understands it?</p> <p>13 MR. BOYER: Correct. If you imagine two</p> <p>14 poles, at one a Secretary who believes she has the</p> <p>15 independent authority to review and make her own judgments</p> <p>16 of the law; another a Secretary that's purely a rubber</p> <p>17 stamp even if there are patently mistakes in the</p> <p>18 certifications whether they're clerical, whether there are</p> <p>19 whole swaths of ballots. I think the Secretary's authority</p> <p>20 clearly falls somewhere in between those.</p> <p>21 And when there is a decision or decisions of</p> <p>22 the Court that say the certifications are excluding ballots</p> <p>23 that under state law, under federal law, under the</p> <p>24 consequences of this Court's order must be canvassed and</p> <p>25 counted, those ballots cannot be excluded from</p>	<p style="text-align: right;">Page 261</p> <p>1 I'll say and this is exactly the right case</p> <p>2 to do it, and there is a clear case in controversy. The</p> <p>3 issues are squarely presented, thoroughly briefed in</p> <p>4 Pennsylvania law, and voters generally need clarity on</p> <p>5 these issues; and I think we have presented reasons why</p> <p>6 clarity should counsel for counting these ballots and</p> <p>7 ultimately have them included in the final certifications</p> <p>8 of elections.</p> <p>9 Thank you, Your Honor.</p> <p>10 JUDGE COHN JUBELIRER: Thank you very much.</p> <p>11 As we conclude this very long day, I want to</p> <p>12 thank all of you for your preparation, for your thoughtful</p> <p>13 legal arguments, and a very thorough presentation of the</p> <p>14 issues. Clearly you're all extremely knowledgeable; and</p> <p>15 while you and the parties have different interpretations of</p> <p>16 the law, you are united in appreciating the importance of</p> <p>17 your common purpose to assure that ballots are accurately</p> <p>18 counted and that the voters of Pennsylvania can exercise</p> <p>19 their right to vote for the candidates of their choice in a</p> <p>20 free and fair election.</p> <p>21 I want to recognize all the county boards,</p> <p>22 the county boards that were here as well as all of the</p> <p>23 county boards and election workers who steadfastly and</p> <p>24 tirelessly work to meet the challenge; and we heard some of</p> <p>25 what is involved with that today.</p>
<p style="text-align: right;">Page 260</p> <p>1 certification. The Secretary is aware of those Court</p> <p>2 decisions and not --</p> <p>3 JUDGE COHN JUBELIRER: And now a final</p> <p>4 question by me is, if I just assume for the sake of</p> <p>5 argument that I don't agree with your interpretation of the</p> <p>6 June 2nd order, is that the end of it or are you still</p> <p>7 relying on the Migliori case or federal law or any other</p> <p>8 opinion of the Court that would support your position?</p> <p>9 MR. BOYER: If Your Honor disagrees with our</p> <p>10 read of the June 2nd order, I believe that's it for the</p> <p>11 mandamus count but not for the declaratory and injunctive</p> <p>12 relief count. I think the arguments we have presented make</p> <p>13 it clear as to why even in the absence of that order the</p> <p>14 law does require the counties to include these</p> <p>15 certifications under the reasoning announced and</p> <p>16 articulated in the opinion from Your Honor, in the opinion</p> <p>17 from the Third Circuit.</p> <p>18 So yes, the mandamus count does depend on</p> <p>19 the consequence of the order. The declaratory and</p> <p>20 injunctive relief count does not.</p> <p>21 JUDGE COHN JUBELIRER: Okay. Thank you.</p> <p>22 MR. BOYER: I would like to make one last</p> <p>23 point about uniformity and finality. The Secretary has</p> <p>24 been pushing for uniformity and finality on this issue for</p> <p>25 quite some time now, and it's desperately needed.</p>	<p style="text-align: right;">Page 262</p> <p>1 It is now the Court's responsibility to</p> <p>2 render a decision based on the law and applying the law to</p> <p>3 the facts of this case. While it's a challenging task in</p> <p>4 this very interesting and very important case, your</p> <p>5 advocacy, both oral and written, will guide the Court's</p> <p>6 decision.</p> <p>7 So I thank you all very much, and with that</p> <p>8 I believe we can conclude.</p> <p>9 (Whereupon, at 4:45 p.m., the hearing was</p> <p>10 adjourned.)</p> <p>11 ***</p>

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<p style="text-align: right;">Page 263</p> <p style="text-align: center;">C E R T I F I C A T E</p> <p>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.</p> <p style="text-align: center;">By: _____ Judith E. Shuller</p>	

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