

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DAVE McCORMICK FOR U.S. SENATE, and
DAVID H. McCORMICK,

Petitioners,

v.

Case No. _____

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,
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LAWRENCE COUNTY BOARD OF ELECTIONS,
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LEHIGH COUNTY BOARD OF ELECTIONS,
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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.

NOTICE

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Petition for Review and Notice are served, or within any other timeframe as ordered by the Court, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Petitioners. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

Dauphin County Lawyer Referral Service
213 North Front Street
Harrisburg, Pennsylvania 17101
(717) 232-7536

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WAYNE COUNTY BOARD OF ELECTIONS,
WESTMORELAND COUNTY BOARD OF ELECTIONS,
and WYOMING COUNTY BOARD OF ELECTIONS,

Respondents.

PETITION FOR REVIEW
IN THE NATURE OF A COMPLAINT IN EQUITY

Introduction

The above-listed county boards of elections (“Boards”) refuse to count absentee and mail-in ballots simply because the voters failed to handwrite a date (which the Pennsylvania Attorney General acknowledges can be any date—even a wrong date) on the exterior mailing envelope (which is separated by yet another envelope from the ballot itself). These ballots were indisputably submitted on time—they were date-stamped upon receipt—and no fraud or irregularity has been alleged. The Boards’ only basis for disenfranchising these voters is a technical error that is immaterial under both state and federal law. A plurality of the Pennsylvania Supreme Court has already held that the Commonwealth’s Election Code—which “must be liberally construed so as not to deprive . . . the voters of their right to elect a candidate of their choice”—“*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 . . . [the] date, where no fraud or irregularity has been alleged.” *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1062, 1071 (Pa. 2020) (plurality op.) (quoting *In re Ross Nomination Petition*, 190 A.2d 719, 719 (Pa. 1963)) (“*In re 2020 Canvass*”). And the U.S. Court of Appeals for the Third Circuit

has recently held that federal law—specifically a provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B)—*prohibits* county boards of elections from rejecting absentee or mail-in ballots on that basis. *See* Initial and Amended Judgment, *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 22-1499, Doc. 80 (3d Cir. May 20, 2022) (“*Migliori* Judgment”), Exhibit 1. The Boards’ refusal to count lawful ballots defies these precedents and is inconsistent with the judgments of other Counties that have counted ballots notwithstanding this technical deficiency. Petitioners thus seek an order declaring that voters validly cast the ballots at issue, that the Boards must canvass these ballots, and that the Boards must report the unofficial results of this canvass to the Pennsylvania Department of State. *See* 25 P.S. § 3154(f). In support, Petitioners allege:

Nature of the Cause of Action

1. Pennsylvania law states that “the elector” must place her “absentee ballot” in an exterior mailing envelope that she must “fill out, date and sign.” 25 P.S. §§ 3146.6(a), 3150.16(a).

2. On information and belief, the Boards refuse to count ballots where the voter failed to handwrite a date on the envelope but otherwise complied with all applicable requirements, and where the Boards stamped the envelope with the date the Boards received the absentee ballot. Certain Boards are keeping voters in limbo. Counsel for the Blair County Board of Elections represented to Petitioners’ counsel

that the Blair County Board would not take action on these ballots until next week, well after the Board must report the unofficial results of its canvass to the Department of State. *See* Exhibit 2 (correspondence with Board noting its position). On information and belief, the Allegheny County Board of Elections has taken the same position.

3. The Boards' refusal to count the ballots at issue violates the protections of the right to vote under the federal Civil Rights Act and the Pennsylvania Constitution.

4. The federal Civil Rights Act provides that

[n]o 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). On May 20, 2022, a panel of the Third Circuit ruled, unanimously, that this provision prohibited the Lehigh County Board of Elections from rejecting absentee and mail-in ballots cast in a November 2021 municipal election solely because the ballots' exterior mailing envelopes lacked handwritten dates. *See Migliori* Judgment at 2. Although the court has issued only a judgment, with an opinion to follow, its reasoning is clear from the judgment: these dates "are immaterial under § 10101(a)(2)(B)," meaning that they are immaterial to determining whether the voter is qualified to vote. Federal law

overrides any contradictory state requirements, *see* U.S. CONST. art. VI, cl. 2, and Pennsylvania courts presumptively defer to the Third Circuit’s construction of federal law, *see, e.g., W. Chester Area Sch. Dist. v. A.M.*, 164 A.3d 620, 630 (Pa. Commw. Ct. 2017). The implication of the Third Circuit’s judgment for this case is clear as well: Section 10101(a)(2)(B) prohibits the Boards from denying absentee and mail-in ballots based solely on the lack of a handwritten date on the exterior mailing envelope.

5. The Pennsylvania Constitution requires that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” PA. CONST. art. I, § 5. This Free Elections provision “mandates clearly and unambiguously, and in the broadest possible terms, that *all* elections conducted in this Commonwealth must be ‘free and equal.’” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018) (emphasis in original). It is “specifically intended to equalize the power of voters in our Commonwealth’s election process.” *Id.* at 812. The Election Code exists “[t]o obtain freedom of choice, a fair election and an honest election return.” *Perles v. Hoffman*, 213 A.2d 781, 783 (Pa. 1965). The Boards’ refusal to count absentee and mail-in ballots based solely on a technical error runs afoul of these basic guarantees and deprives voters of their right under Commonwealth law to vote absentee or by mail. *See* 25 P.S. §§ 3146.6(a), 3150.16(a).

6. This action seeks declaratory and injunctive relief requiring the Boards to count absentee and mail-in ballots that were returned on time but that lack a handwritten date on the exterior mailing envelope.

Jurisdiction & Venue

7. Pursuant to 42 Pa. C.S. § 764, this Court “has original exclusive jurisdiction of matters relating to statewide office.” *In re Nader*, 905 A.2d 450, 459 (2006).

8. The Declaratory Judgments Act provides a basis for relief. The Act allows this Court to “settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.” 42 Pa. C.S. § 7541(a). Among other things, the broadly worded Act allows “[a]ny person . . . whose rights, status, or other legal relations are affected by a statute” to “have determined any question of construction or validity arising under the . . . statute” and to “obtain a declaration of rights, status, or other legal relations thereunder.” *Id.* § 7533. Injunctive relief in furtherance of any declaration is also appropriate.

Parties

9. Petitioner Dave McCormick for U.S. Senate is the principal campaign committee for David H. McCormick, who ran in the May 17, 2022, primary election to serve as the Republican candidate to represent Pennsylvania in the United States Senate.

10. Petitioner David H. McCormick is a candidate in the Republican primary election, and a Pennsylvania voter. On information and belief, some of the ballots that the Boards refuse to count contain votes for Petitioner McCormick. He accordingly has standing to challenge the Boards' decisions, *see In re Gen. Election-1985*, 531 A.2d 836, 838 (Pa. Commw. Ct. 1987), as does his campaign committee, which shares his interest in gaining election. *Id.*; *see also McLinko v. Commonwealth*, 270 A.3d 1278, 1282 (Pa. Commw. Ct. 2022) (“In sum, a candidate has an interest beyond the interest of other citizens and voters in election matters.”) (collecting citations).

11. Respondent Boards have “jurisdiction over the conduct of primaries and elections” in their respective counties. 25 P.S. § 2641(a). Accordingly, the Boards must “receive from district election officers the returns of all primaries and elections, to canvass and compute the same, and to certify, no later than the third Monday following the primary or election, the results thereof to the Secretary of the Commonwealth.” *Id.* § 2642(k).

General Allegations

12. Pennsylvania law requires absentee voters, among other things, to (1) place their marked ballots in a sealed envelope, (2) place that envelope inside a second envelope, which is marked with a “declaration of the elector” form, (3) “fill out, *date* and sign the declaration printed on such envelope,” and then (4) return the

ballot by 8 p.m. on election day. 25 P.S. § 3146.6(a) (emphasis added). The same rules apply to other voters who vote by mail. *See id.* § 3150.16(a).

13. When votes were being counted for the 2020 general election, the Pennsylvania Supreme Court was asked to decide “whether the Election Code requires a 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,” among other things, “a date.” *In re 2020 Canvass*, 241 A.3d at 1061–62 (plurality op.). The Court’s judgment was that it does not. *See id.* at 1062; *see also id.* at 1079 (Wecht, J., concurring in part and dissenting in part) (agreeing that the undated ballots should not be thrown out in that election). As the plurality opinion noted, it is “a well-settled principle of Pennsylvania election law that every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.” *Id.* at 1071 (cleaned up). Viewed through that lens, the plurality “conclude[d] that dating the declaration is a directory, rather than a mandatory, instruction.” *Id.* at 1076. Thus, “while constituting [a] technical violation[] of the Election Code,” *id.* at 1079, a failure to handwrite a date on the ballot’s outer envelope does not “implicate . . . ‘weighty interests’ in the election process, like ballot confidentiality or fraud prevention,” *id.* at 1076 (citation

omitted). Accordingly, this “minor irregularit[y]” did “not warrant the wholesale disenfranchisement of,” in that case, “thousands of Pennsylvania voters.” *Id.* at 1079.

14. More recently, on May 20 and 23, 2022, a unanimous Third Circuit panel ruled that Pennsylvania’s date requirements violate the Civil Rights Act, which prohibits the use of state law to “deny the right of any individual to vote in any election because of an error or omission” that 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). The panel therefore directed the district court “to forthwith enter an order that the undated ballots be counted” in the November 2021 election for Judge of the Court of Common Pleas of Lehigh County, from which that suit arose. *Migliori* Judgment at 2. This result accorded with the position of the Pennsylvania Attorney General, who argued in an *amicus* brief that “[d]isenfranchising 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.” Br. of the Commw. of Pa. as *Amicus Curiae* at 7, *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 22-1499, Doc. 42 (3d Cir. Apr. 1, 2022).

15. That same day, counsel for Petitioners emailed a copy of the Third Circuit judgment to counsel for all county boards of elections, including the Respondent Boards. *See* Email from Ronald L. Hicks, Jr. (May 20, 2022, 5:46 P.M. EDT), Exhibit 3. The email explained county boards’ responsibility under federal

law “to count any and all absentee or mail-in ballots that were timely received but were set aside/not counted simply because those ballots lacked a voter-provided date on the outside of the envelope,” and requested a hearing before any boards that refused to do so. *Id.*

16. On information and belief, at least seven county boards — Armstrong, Erie, Greene, Philadelphia, Schuylkill, Susquehanna, and York County Boards of Elections—have proceeded to count the absentee and mail-in ballots that they had previously not counted for lack of a handwritten date on the exterior mailing envelope.

17. The Respondent Boards, however, refuse to count absentee and mail-in ballots that lack a handwritten date in the declaration section of the exterior envelope. This missing date is the only reason these voters are being disenfranchised and rendered unable to exercise their right to vote in a statewide election on an equal footing with voters in other counties.

Count I: Violation of 52 U.S.C. § 10101(a)(2)(B)

18. Petitioners incorporate by reference paragraphs 1 through 17.

19. The federal Civil Rights Act prohibits the Boards 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” that “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). This includes errors committed during any “action necessary to make a vote effective,” “including . . . casting a ballot.” *Id.* § 10101(a)(3)(A), (e) (emphasis added).

20. By refusing to count absentee and mail-in ballots based solely on the lack of a handwritten date in the declaration section of the exterior mailing envelope, the Boards are depriving likely thousands of voters of the right to vote that Section 10101(a)(2)(B) explicitly preserves. These ballots were indisputably returned on time. Whether or not a voter remembered to write a date on the mailing envelope is entirely immaterial to whether that voter “is qualified under State law to vote.” Just as in *Migliori*, and even more so in light of the *Migliori* judgment, “there is no basis on this record [for the Boards] to refuse to count undated ballots.” *Migliori* Judgment at 2.

Count II: Violation of PA. CONST. art. I, § 5

21. Petitioners incorporate by reference paragraphs 1 through 17.

22. “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. Elections are “free and equal” only 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). And, under the Commonwealth’s Constitution, efforts must be made to “equalize the power of

voters” and avoid disenfranchisement even when it happens “by inadvertence.” *League of Women Voters*, 178 A.3d at 810, 812 (citing *In re New Britain Borough Sch. Dist.*, 145 A. 597, 599 (Pa. 1929)).

23. The Boards’ refusal to count ballots due solely to the lack of a handwritten date on the exterior mailing envelope—a technical requirement that a plurality of the Pennsylvania Supreme Court has already deemed not mandatory—disenfranchises registered voters of both political parties who chose to exercise their right under Commonwealth law to vote absentee or by mail, in violation of the Free Elections provision of the Commonwealth Constitution.

Prayer for Relief

WHEREFORE, Petitioners ask that this Court grant the following relief so that lawful absentee and mail-in ballots may count for this election:

1. Declare 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;
2. Direct the Respondent 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;
3. Direct the Respondent Boards to report to the Pennsylvania Department of State the unofficial results of the canvass, 25 P.S. § 3154(f), of any timely returned

absentee or mail-in ballot that lacks a date on its exterior envelope absent any other irregularities;

4. Enjoin the Respondent Boards to take all other steps necessary to effectuate this Court's declaration; and

5. Grant any other relief this Court deems appropriate and necessary.

Respectfully Submitted,

Dated: May 23, 2022

/s/ Ronald L. Hicks, Jr.

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*Motions for admission pro hac vice forthcoming

Counsel for Petitioners

EXHIBIT 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1499

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

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 5-22-cv-00397
District Judge: Honorable Joseph F. Leeson

Argued: May 18, 2022

Before: McKEE, GREENAWAY JR., and MATEY, *Circuit Judges*.

JUDGMENT

This judgment is issued at the direction of the Court pursuant to Fed. R. App. P. 36(a)(2).

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on May 18, 2022.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that 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. § 10101 as there exists a private right of action under 42 U.S.C. § 1983. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 284–85 (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. §§ 3146.6(a) and 3150.16(a) are immaterial under § 10101(a)(2)(B). Accordingly, there is no basis on this record to refuse to count undated ballots that have been set aside in the November 2, 2021, election for Judge of the Common Pleas of Lehigh County.

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.

ATTEST:

s/ Patricia S. Dodszeit
Clerk

Dated: May 20, 2022

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1499

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

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 5-22-cv-00397
District Judge: Honorable Joseph F. Leeson

Argued: May 18, 2022

Before: McKEE, GREENAWAY JR., and MATEY, *Circuit Judges*.

AMENDED JUDGMENT

This judgment is issued at the direction of the Court pursuant to Fed. R. App. P. 36(a)(2).

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on May 18, 2022.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that 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. § 10101 as there exists a private right of action under 42 U.S.C. § 1983. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 284–85 (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. §§ 3146.6(a) and 3150.16(a) are immaterial under § 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.

ATTEST:

s/ Patricia S. Dodszeit
Clerk

Dated: May 23, 2022

EXHIBIT 2

Hicks, Ronald L., Jr.

From: Nathan Karn <nkarn@blairco.org>
Sent: Monday, May 23, 2022 8:41 AM
To: Hicks, Ronald L., Jr.; 'tgates@pa.gov'; 'mmudd@adamscounty.us'; 'andrew.szefi@alleghenycounty.us'; 'aopsitnick@opsitnickslaw.com'; 'sslaw@windstream.net'; 'gfedeles@beavercountypa.gov'; 'nmorgan@beavercountypa.gov'; 'dcrabtree.kclaw@comcast.net'; 'csadler@countyofberks.com'; 'cschnee@countyofberks.com'; 'Jonathan.Jr@fosterslawfirm.com'; 'WWhite@co.butler.pa.us'; 'wgbarbin@atlanticbb.net'; 'ewtompkinslaw@gmail.com'; 'dam@gmlawoffices.com'; 'bdupuis@babstcalland.com'; 'kmayock@chesco.org'; 'cgabriel@cfwwg.com'; 'Info@VariLaw.com'; 'lec@crwlaw.net'; 'ajm@mmkllp.com'; 'kbutton@shaferlaw.com'; 'solicitor@ccpa.net'; 'jcurcillo@dauphinc.org'; 'martinw@co.delaware.pa.us'; 'info@mwbkllaw.com'; 'rperhacs@eriecountypa.gov'; 'ttalarico@nwpalawyers.com'; 'jackpurcell146@gmail.com'; 'attorneys@sbgllawoffice.com'; 'Jerrolsulcove@blackanddavis.com'; 'dsslw@dsslawyers.com'; 'rgrimm@co.greene.pa.us'; 'pmcmanamon@penn.com'; 'mtb@bwlaw120.com'; 'cjz@zwick-law.com'; 'dzagurskie@juniataco.org'; 'RuggieroF@lackawannacounty.org'; 'Fredericksond@lackawannacounty.org'; 'chausner@co.lancaster.pa.us'; 'tleslie@co.lawrence.pa.us'; 'warner@buzgondavis.com'; 'Romilda.Crocamo@luzernecounty.org'; 'dsmith@mcclaw.com'; 'thecclarkefirm@yahoo.com'; 'wjmpc1@gmail.com'; 'ssnook@bmzllaw.com'; 'john@matergiadunn.com'; 'jstein1@montcopa.org'; 'pnewcome@montcopa.org'; 'info@mmdplaw.com'; 'mrudas@northamptoncounty.org'; 'fwgarrigan@gmail.com'; 'wrb@pa.net'; 'benjamin.field@phila.gov'; 'marcel.pratt@phila.gov'; 'cweed@kfblawoffice.com'; 'tomshaffer@verizon.net'; 'groth@co.schuylkill.pa.us'; 'clawoff@hotmail.com'; 'mpbarbera@barberalaw.com'; 'krllaw@epix.net'; 'fxoconnor@frontiernet.net'; 'reg@gv-law.com'; 'jdewald@mpvhlaw.com'; 'rwinkler@zoominternet.net'; 'contact@theschmidtlawfirm.com'; 'jana.grimm@steptoe-johnson.com'; 'wky@waynecountypa.gov'; 'solicitor@co.westmoreland.pa.us'; 'krllaw@epix.net'; 'plitwin@epix.net'; 'mpokrifka@yorkcountypa.gov'
Cc: McGee, Carolyn B.; Mercer, Jeremy A.; 'Jonathan Goldstein'; 'Britain Henry'
Subject: #EXT# Re: May 17, 2022 Primary - Undated Absentee/Mail-In/Overseas/Military Ballots

External Email

Attorneys Hicks for McCormick and Henry for Oz:

I am in receipt of both your emails and attached letters. It appears that Attorney Hicks request to immediately count segregated ballots that were not counted due to the Declaration Envelopes not being dated, which only amounts to 10 Republican ballots and 6 Democrat ballots in Blair County, is premature in that the Order appears to indicate (1) that the Order to count ballots from the November 2, 2021 Lehigh County election for judge of the Court of Common Pleas will not be effective until the filing of the opinion ("The mandate will issue immediately upon filing the opinion") and (2) a rehearing can be requested within 5 days of the entry of the Opinion on the docket. Additionally, while I do not always agree with the guidance provided by the Department of State, Bureau of Elections, and Blair County is not legally obligated to follow such guidance, I also do not believe it would be appropriate for the County to

proceed without having reviewed such guidance. Lastly, it is entirely likely that either a request for certiorari will be sought to the US Supreme Court to review the Third Circuit Court's decision or that counsel for US Senate Candidate Oz will seek legal review as to the application of the Third Circuit Court's decision to this particular election.

Obviously, once these ballots are intermixed with the rest of the ballot population, there is no way to retrieve them. With all of the outstanding issues, Blair County will be maintaining the segregation of the undated ballots at this time and will not count them until there is clear finality. As I will be away on an annual family trip starting Thursday that takes me to a location where cell coverage is poor and I will not have access to email, Blair County will not act in any event prior to Memorial Day, although I cannot imagine a scenario where all of the issues I have raised above will result in finality prior to Memorial Day. I will return on the Tuesday following Memorial Day, and I will review any developments that occurred in my absence with my Director of Elections and Board of Elections at that time.

With respect to Attorney Hicks' request regarding ballots placed in secrecy envelopes that were not sealed, Blair County counted such ballots.

Nathan W. Karn, Sr., Esq.
Blair County Solicitor

For convenience, call me at my private law office: 814-695-7581 or fax: 814-695-1750

From: Hicks, Ronald L., Jr. <RHicks@porterwright.com>

Sent: Friday, May 20, 2022 5:45:16 PM

To: 'tgates@pa.gov'; 'mmudd@adamscounty.us'; 'andrew.szefi@alleghenycounty.us'; 'aopsitnick@opsitnickslaw.com'; 'sslaw@windstream.net'; 'gfedeles@beavercountypa.gov'; 'nmorgan@beavercountypa.gov'; 'dcrabtree.kclaw@comcast.net'; 'csadler@countyofberks.com'; 'cshnee@countyofberks.com'; Nathan Karn; 'Jonathan.Jr@fosterslawfirm.com'; 'WWhite@co.butler.pa.us'; 'wgbarbin@atlanticbb.net'; 'ewtompkinslaw@gmail.com'; 'dam@gmlawoffices.com'; 'bdupuis@babstcalland.com'; 'kmayock@chesco.org'; 'cgabriel@cfwwg.com'; 'Info@VariLaw.com'; 'lec@crwlaw.net'; 'ajm@mmkllp.com'; 'kbutton@shaferlaw.com'; 'solicitor@ccpa.net'; 'jcurcillo@dauphinc.org'; 'martinw@co.delaware.pa.us'; 'info@mwbkllaw.com'; 'rperhacs@eriecountypa.gov'; 'ttalarico@nwpalawyers.com'; 'jackpurcell146@gmail.com'; 'attorneys@sbgllawoffice.com'; 'Jerroldsulcove@blackanddavisson.com'; 'dsslav@dsslawyers.com'; 'rgrimm@co.greene.pa.us'; 'pmcmanamon@penn.com'; 'mtb@bwlaw120.com'; 'cjz@zwick-law.com'; 'dzagurskie@juniataco.org'; 'RuggieroF@lackawannacounty.org'; 'Fredericksond@lackawannacounty.org'; 'chausner@co.lancaster.pa.us'; 'tleslie@co.lawrence.pa.us'; 'warner@buzgondavis.com'; 'Romilda.Crocamo@luzernecounty.org'; 'dsmith@mcclaw.com'; 'theclarkefirm@yahoo.com'; 'wjmpc1@gmail.com'; 'ssnook@bmzlaw.com'; 'john@matergiadunn.com'; 'jstein1@montcopa.org'; 'pnewcome@montcopa.org'; 'info@mmdplaw.com'; 'mrudas@northamptoncounty.org'; 'fwgarrigan@gmail.com'; 'wrb@pa.net'; 'benjamin.field@phila.gov'; 'marcel.pratt@phila.gov'; 'cweed@kfbllawoffice.com'; 'tomshaffer@verizon.net'; 'groth@co.schuylkill.pa.us'; 'clawoff@hotmail.com'; 'mpbarbera@barberalaw.com'; 'krllaw@epix.net'; 'fxoconnor@frontiernet.net'; 'reg@gv-law.com'; 'jdewald@mpvhlaw.com'; 'rwinkler@zoominternet.net'; 'contact@theschmidtlawfirm.com'; 'jana.grimm@steptoe-johnson.com'; 'wkay@waynecountypa.gov'; 'solicitor@co.westmoreland.pa.us'; 'krllaw@epix.net'; 'plitwin@epix.net'; 'mpokrifka@yorkcountypa.gov'

Cc: McGee, Carolyn B.; Mercer, Jeremy A.; 'Jonathan Goldstein'; 'Britain Henry'

Subject: May 17, 2022 Primary - Undated Absentee/Mail-In/Overseas/Military Ballots

This is an EXTERNAL email. Exercise Caution.
DO NOT open attachments or click links from unknown senders or unexpected email.

Dear Counsel,

Our firm represents the Dave McCormick for U.S. Senate committee and its candidate David H. McCormick. We are writing to advise you of a decision issued today by the United States Court of Appeals for the Third Circuit which impacts the counting of ballots in the May 2022 Primary.

In *Migliori v. Lehigh County Board of Elections*, Case No. 22-1499, the Third Circuit determined that the lack of a voter-provided date on the outside of an absentee or mail-in ballot envelope cannot prevent that ballot's counting because the lack of that date on an indisputably-timely ballot is immaterial under federal law. As the Third Circuit summarized: "[I]t is further ORDERED and ADJUDGED that, the dating provisions contained in 25 Pa. Cons. Stat. §§ 3146.6(a) and 3150.16(a) are immaterial under [52 U.S.C.] § 10101(a)(2)(B). Accordingly, there is no basis on this record to refuse to count undated ballots that have been set aside" For your convenience, a copy of the Third Circuit's judgment is attached.

We trust that in light of the Third Circuit's judgment you will advise your respective Boards to count any and all absentee or mail-in ballots that were timely received but were set aside/not counted simply because those ballots lacked a voter-provided date on the outside of the envelope. To the extent you are not willing to provide this advice, we ask for a formal hearing before your Boards on this issue.

Please let me know by response email whether your respective Boards will be counting the aforementioned ballots so that I may advise my clients accordingly. Should you wish to discuss, please feel free to contact me or my colleagues Jeremy Mercer (j Mercer@porterwright.com or 724-816-2309) or Carolyn McGee (cbmcgee@porterwright.com or 412-867-0722)

Best regards,

RONALD L. HICKS, JR.

Pronouns: he / him / his

Porter Wright Morris & Arthur LLP
[Bio / RHicks@porterwright.com](mailto:RHicks@porterwright.com)
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EXHIBIT 3

Hicks, Ronald L., Jr.

From: Hicks, Ronald L., Jr.
Sent: Friday, May 20, 2022 5:45 PM
To: 'tgates@pa.gov'; 'mmudd@adamscounty.us'; 'andrew.szefi@alleghenycounty.us'; 'aopsitnick@opsitnickslaw.com'; 'sslaw@windstream.net'; 'gfedeles@beavercountypa.gov'; 'nmorgan@beavercountypa.gov'; 'dcrabtree.kclaw@comcast.net'; 'csadler@countyofberks.com'; 'cschnee@countyofberks.com'; 'nkarn@blairco.org'; 'Jonathan.Jr@fosterslawfirm.com'; 'WWhite@co.butler.pa.us'; 'wgbarbin@atlanticbb.net'; 'ewtompkinslaw@gmail.com'; 'dam@gmlawoffices.com'; 'bdupuis@babstcalland.com'; 'kmayock@chesco.org'; 'cgabriel@cfwwg.com'; 'Info@VariLaw.com'; 'lec@crwlaw.net'; 'ajm@mmkllp.com'; 'kbutton@shaferlaw.com'; 'solicitor@ccpa.net'; 'jcurcillo@dauphinc.org'; 'martinw@co.delaware.pa.us'; 'info@mbwklaw.com'; 'rperhacs@eriecountypa.gov'; 'ttalarico@nwpalawyers.com'; 'jackpurcell146@gmail.com'; 'attorneys@sbglawoffice.com'; 'Jerroldsulcove@blackanddavis.com'; 'dsslw@dsslwlaw.com'; 'rgrimm@co.greene.pa.us'; 'pmcmanamon@penn.com'; 'mtb@bwlaw120.com'; 'cjz@zwick-law.com'; 'dzagurskie@juniataco.org'; 'RuggieroF@lackawannacounty.org'; 'Fredericksond@lackawannacounty.org'; 'chausner@co.lancaster.pa.us'; 'tleslie@co.lawrence.pa.us'; 'warner@buzgondavis.com'; 'Romilda.Crocamo@luzernecounty.org'; 'dsmith@mcclaw.com'; 'theclarkefirm@yahoo.com'; 'wjmpc1@gmail.com'; 'ssnook@bmzlaw.com'; 'john@matergiadunn.com'; 'jstein1@montcopa.org'; 'pnewcome@montcopa.org'; 'info@mmdplaw.com'; 'mrudas@northamptoncounty.org'; 'fwgarrigan@gmail.com'; 'wrb@pa.net'; 'benjamin.field@phila.gov'; 'marcel.pratt@phila.gov'; 'cweed@kfblawoffice.com'; 'tomshaffer@verizon.net'; 'groth@co.schuylkill.pa.us'; 'clawoff@hotmail.com'; 'mpbarbera@barberlaw.com'; 'krllaw@epix.net'; 'fxoconnor@frontiernet.net'; 'reg@gv-law.com'; 'jdewald@mpvhlaw.com'; 'rwinkler@zoominternet.net'; 'contact@theschmidtlawfirm.com'; 'jana.grimm@steptoe-johnson.com'; 'wkay@waynecountypa.gov'; 'solicitor@co.westmoreland.pa.us'; 'krllaw@epix.net'; 'plitwin@epix.net'; 'mpokrifka@yorkcountypa.gov'
Cc: McGee, Carolyn B.; Mercer, Jeremy A.; 'Jonathan Goldstein'; 'Britain Henry'
Subject: May 17, 2022 Primary - Undated Absentee/Mail-In/Overseas/Military Ballots
Attachments: 22-1499 Third Circuit Judgment.pdf

Tracking:

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McGee, Carolyn B.	Delivered: 5/20/2022 5:47 PM	Read: 5/20/2022 5:51 PM
Mercer, Jeremy A.	Delivered: 5/20/2022 5:47 PM	
'Jonathan Goldstein'		
'Britain Henry'		

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Best regards,

RONALD L. HICKS, JR.

Pronouns: he / him / his

Porter Wright Morris & Arthur LLP

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VERIFICATION

I, Jonathan Ewing, hereby swear or affirm that I am Campaign Manger for McCormick for Senate; and that the facts contained in the attached Petition are true and correct based on information supplied to be by others.

This statement is made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: May 23 2022

A handwritten signature in black ink, appearing to read "Jonathan Ewing", is written over a horizontal line. The signature is stylized and cursive.

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.

/s/ Ronald L. Hicks, Jr.
Ronald L. Hicks, Jr.
PA Supreme Court No. 49520