

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 286 MD 2022

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

Petitioners,

v.

LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS SECRETARY OF
THE COMMONWEALTH OF PENNSYLVANIA *et al.*,

Respondents.

**DOCTOR OZ FOR SENATE & DR. MEHMET OZ'S
APPLICATION FOR LEAVE TO INTERVENE**

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APPLICATION FOR LEAVE TO INTERVENE

Proposed Intervenor-Respondents Doctor Oz for Senate and Dr. Mehmet Oz, (collectively, the “Proposed Intervenor-Respondents”), by and through undersigned counsel, respectfully submit the following Application for Leave to Intervene as Respondents in the original jurisdiction matter under Pennsylvania Rules of Appellate Procedure 106, 123, and 1531(b) and Pennsylvania Rules of Civil Procedure 2326 through 2329, and aver the following in support thereof:

PRELIMINARY STATEMENT

Doctor Oz for Senate and Dr. Mehmet Oz support and seek to uphold free and fair elections for all Pennsylvanians and the laws that guarantee the integrity of those elections. Doctor Oz for Senate is the principal campaign committee for Dr. Oz, who is currently leading the May 17, 2022, primary election to serve as the Republican candidate to represent Pennsylvania in the United States Senate.

In a desperate attempt to scrounge up more votes with the hope of surpassing Dr. Oz in the official vote total, Petitioners Dave McCormick for U.S. Senate and David H. McCormick have filed suit asking this Court to order county boards of elections to count ballots that are invalid under Pennsylvania law. The Election Code mandates that voters who choose to vote by mail-in or absentee ballot “*shall . . . fill out, date, and sign the declaration*” on the envelope. 25 P.S. §§ 3146.6(a), 3150.6(a) (emphasis added). A majority of the Pennsylvania Supreme Court has held that any

mail-in or absentee ballot that lacks a voter-completed date is invalid under Pennsylvania law and cannot be counted. See *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d 1058, 1079-80 (2020) (Opinion of Justice Wecht); *id.* at 1090-91 (Opinion of Justices Dougherty, Saylor, and Mundy). This Court twice has recognized that it is bound by this holding and rejected claims to count such ballots. See *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 Elecs.*, No. 1322 CD 2021, 2022 WL 16577, at *8 (Pa. Commw. Ct. Jan. 3, 2022), *appeal denied* 2022 WL 244122 (Pa. Jan. 27, 2022). County boards of election likewise are bound to follow Pennsylvania law. See, e.g., *County of Fulton v. Secretary of the Commonwealth*, No. 277 MD 2021 (Pa. Commw. Ct. May 23, 2022). Nonetheless, Petitioners ask the Court to order county boards of elections to count in the May 2022 primary election mail-in and absentee ballots that lack a voter-completed date.

Doctor Oz for Senate and Dr. Oz now seek to intervene to preserve the free and fair May 2022 primary election, to prevent a change to the rules of the election after election day, and to uphold Pennsylvania's vital election integrity laws. Doctor Oz for Senate and Dr. Oz have made significant investments in connection with this primary election and Dr. Oz is leading in the current vote count. The Proposed

Intervenor-Respondents thus have a substantial and particularized interest in defending this action. No other party to this action represents these private interests, and therefore this timely application for intervention should be granted. The Proposed Intervenor-Respondents respectfully request that the Court grant their application to intervene as Respondents, and to permit them to file of record the Preliminary Objections attached hereto.

I. BACKGROUND

A. The Proposed Intervenor-Respondents

1. Doctor Oz for Senate (the “Oz Campaign”) is the principal campaign committee for Dr. Mehmet Oz, who is currently leading in the May 17, 2022, primary election to serve as the Republican candidate to represent Pennsylvania in the United States Senate. The Oz Campaign seeks to intervene on its own behalf and on behalf of its candidate, Dr. Mehmet Oz. Dr. Oz is a “candidate” as that term is defined in Election Code Section 102(a), 25 P.S. § 2602(a). *See Rowland v. Smith*, 83 Pa. D. & C. 99, 101–02 (Pa. Ct. Com. Pl. Dauphin 1952) (“candidate” under the Election Code includes one who is a candidate for nomination for President of the United States).

2. Dr. Mehmet Oz is a candidate—and current frontrunner—in the Republican primary election, and a Pennsylvania voter. On information and belief, some of the undated ballots at issue here contain votes for Dr. Oz and some for his

opponent, Petitioner McCormick. Dr. Oz accordingly has standing in this action, *see In re Gen. Election-1985*, 531 A.2d 836, 838 (Pa. Commw. 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. 2022) (“In sum, a candidate has an interest beyond the interest of other citizens and voters in election matters.”).

B. Procedural history

3. Yesterday, on May 23, 2022, the Petitioners filed a Petition for Review addressed to the Commonwealth Court of Pennsylvania’s original jurisdiction against Leigh M. Chapman, the Secretary of the Commonwealth, and 60 County Board of Elections of the Commonwealth of Pennsylvania.

4. The Petitioners seek an order directing those county boards of elections to count in the May 2022 primary election results mail-in or absentee ballots that lack a voter-completed date.

5. This case is still in its infancy. As of the filing of this Application for Leave to Intervene, the only pleadings that have been filed in this proceeding are the Petition for Leave to Intervene and the Petitioners’ Application for Immediate Special Injunction. It is unclear if Petitioners have served original process on all Respondents in this action.

II. THE GOVERNING INTERVENTION STANDARD

6. “The right to intervention should be accorded to anyone having an interest of his own which no other party on the record is interested in protecting.” *Keener v. Zoning Hearing Bd. Of Millcreek Twp.*, 714 A.2d 1120, 1123 (Pa. Commw. 1998) (citing *Bily v. Bd. of Property Assessment, Appeals and Review of Allegheny Cty.*, 44 A.2d 250 (Pa. 1945)).

7. A nonparty may file an application for leave to intervene in an original jurisdiction petition for review. Pa.R.A.P. 1531(b).

8. The standards for intervention under Pennsylvania Rules of Civil Procedure 2326 to 2329 apply to an original jurisdiction petition for review because Pennsylvania Rule of Appellate Procedure 106 (“Original Jurisdiction Matters”) applies the “general rules” for practice in the courts of common pleas—namely, the Rules of Civil Procedure—“so far as they may be applied.”

9. Moreover, Pennsylvania law affords a party an absolute right to intervene in an action if the party can satisfy any one of the categories specified in Pa. R. Civ. P. 2327. Pa. R. Civ. P. 2329; *see also Larock v. Sugarloaf Township Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999).

10. Proposed Intervenor-Respondents seek to intervene under Pennsylvania Rule of Civil Procedure 2327(3) and (4), which provide in pertinent part:

At any time during the pendency of an action, a person not a party thereto *shall be permitted to intervene therein*, subject to these rules *if*

(3) such person could have joined as an original party in the action or could have been joined therein; or

(4) *the determination of such action may affect any legally enforceable interest of such person* whether or not such person may be bound by a judgment in the action.

Pa. R.C.P. No. 2327(3), (4) (emphasis added); *see also Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*, No. 26 M.D. 2019, 2020 Pa. Commw. LEXIS 104, 2020 WL 424866, at *5 (Pa. Commw. Ct. Jan. 28, 2020) (“Pennsylvania Rule of Civil Procedure No. 2327(4) . . . permits intervention where the determination ‘*may affect any legally enforceable interest*’ of a proposed intervenor.” (quoting Pa. R.C.P. No. 2327(4) and emphasis in original)).

11. The Court should grant the application to intervene because the Court’s determination of this action may affect the Proposed Intervenor-Respondents’ legally enforceable interests, no exception applies under Rule 2329, and the Proposed Intervenor-Respondents’ participation will aid the Court.

III. BASIS FOR THE INTERVENTION

A. Doctor Oz for Senate And Dr. Oz have a substantial interest in this action.

12. Doctor Oz for Senate and Dr. Oz have a substantial and particularized interest in preserving the state election laws challenged in this action, which were enacted to ensure the structure and integrity of Pennsylvania’s elections.

13. There can be no question that Doctor Oz for Senate and Dr. Oz have a direct and significant interest in preserving Dr. Oz's apparent victory in the May 2022 primary election. *See, e.g., Bush v. Gore*, 531 U.S. 98 (2000); *McLinko*, 270 A.3d at 1282.

14. Moreover, courts have recognized that intervention is "uniquely" appropriate where the proposed intervenor represents the "'mirror-image' interests of the plaintiffs" who brought the lawsuit. *Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 U.S. Dist. LEXIS 76765, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020) (quoting *Builders Ass'n of Greater Chicago v. Chicago*, 170 F.R.D. 435, 441 (N.D. Ill. 1996)).

15. Doctor Oz for Senate and Dr. Oz are the "mirror-image" of Petitioners insofar as they are opponents in the May 2022 primary election and Petitioners seek to overturn the result of that election.

16. Unlike the Petitioners, however, Doctor Oz for Senate and Dr. Oz seek to preserve the Pennsylvania Supreme Court's and this Court's prior holdings regarding the treatment of undated mail-in and absentee ballots.

17. Furthermore, Doctor Oz for Senate and Dr. Oz have a direct and significant interest in the continued enforcement of Pennsylvania's laws governing mail-in and absentee ballots, as those laws are designed to ensure "the integrity of [the] election process," *Eu v. San Fran. Cty. Democratic Centr. Comm.*, 489 U.S.

214, 231 (1989), and the “orderly administration of elections,” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (Op. of Stevens, J.). Were these validly enacted laws to be cast aside, the current competitive electoral environment in Pennsylvania, in which Doctor Oz for Senate, Dr. Oz, and all other candidates for elected office invested substantial resources, would be altered or impaired. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 n.5, 800 (Pa. 2018).

18. If Petitioners’ action succeeds, the orderly administration of Pennsylvania’s May 2022 primary election will be upended **after** election day.

19. Not only would this undercut democratically enacted laws that protect voters and candidates (including the Doctor Oz for Senate and Dr. Oz), *Caba v. Weaknecht*, 64 A.3d 39, 50 (Pa. Commw. 2013) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008)), it would change the “structur[e] of [the] competitive environment” in Pennsylvania’s elections and “fundamentally alter the environment in which rival [candidates] defend their concrete interests (e.g., their interest in ... winning [elections]),” *Shays v. Fed. Elec. Comm’n*, 414 F.3d 76, 86 (D.C. Cir. 2005).

20. Such extremely late changes also risk confusing voters and undermine confidence in the electoral process. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (“Court orders affecting elections ... can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer,

that risk will increase.”); *Merrill v. Milligan*, 142 S.Ct. 879 (2022); *DNC v. Wisconsin State Leg.*, 141 S. Ct. 28, 35 (Mem.) (Oct. 26, 2020) (Kavanaugh, J., concurring).

B. There is no basis to deny the application for intervention.

21. Pennsylvania Rule of Civil Procedure 2329 provides that an application for intervention may be refused if: (1) the petitioner’s claim or defense “is not in subordination to and in recognition of the propriety of the action”; (2) the petitioner’s interest is already adequately represented; or (3) “the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.”

22. None of these factors applies to the Proposed Intervenor-Respondents.

23. First, the Proposed Intervenor-Respondents’ defense in this action is in subordination to and in recognition of the action’s propriety.

24. Second, no existing party adequately represents the Proposed Intervenor-Respondents’ particularized interests. *See* Pa.R.C.P. No. 2329(2). The Respondents, the Secretary of the Commonwealth of Pennsylvania and the County Boards of Elections, are political appointees who do not represent any particular candidate’s or campaign’s interests in this case and, therefore, do represent the unique interests of the Proposed Intervenor-Respondents. The Petitioners, as the competing candidate in the Republican primary for United States Senate, have

interests directly at odds with the Proposed Intervenor-Respondents, as the Petitioners are seeking to rewrite the Election Code and well-established precedent in a Hail-Mary effort to overturn the results of the May 2022 primary election by changing the rules after the race is over.

25. Third, the Proposed Intervenor-Respondents have not unduly delayed the submission of their application to intervene in this action, which remains in its infancy. The Respondents have not yet filed a responsive pleading to the Petition or the Application for Immediate Relief. Thus, the Proposed Intervenor-Respondents' intervention will not cause any undue delay, embarrassment, or prejudice to any party, but their intervention will aid the court in resolving the important legal and factual questions before it.

IV. CONCLUSION

26. For the reasons set forth above, the Proposed Intervenor-Respondents have a clear right to intervene in this case challenging important state laws governing an election that has already taken place.

27. The Proposed Intervenor-Respondents seek to intervene as Respondents in this action and will assert various defenses to the Petition but will not raise claims against Respondents.

28. If granted leave to intervene, the Proposed Intervenor-Respondents intend to file the Preliminary Objections attached as Exhibit 1, as well as a Brief in

Opposition to the Petitioners' Application for Immediate Special Injunction attached as Exhibit 2.

WHEREFORE, the Proposed Intervenor-Respondents respectfully request that this Honorable Court enter an Order granting this Application to Intervene in this matter together with any other relief the Court deems appropriate or necessary.

Respectfully submitted,

Dated: May 24, 2022

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**Pro hac vice application pending*

EXHIBIT 1

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

<p>DAVE McCORMICK FOR U.S. SENATE and DAVID H. McCORMICK,</p> <p>Petitioners,</p> <p>v.</p> <p>LEGH M. CHAPMAN, in her official capacity as Secretary of the Commonwealth of Pennsylvania, <i>et al.</i>,</p> <p>Respondents.</p>	<p>No. 286 MD 2022</p>
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NOTICE TO PLEAD

To Petitioners:

You are hereby notified to file a written response to the enclosed preliminary objections within thirty (30) days from service hereof or a judgment may be entered against you.

Dated: May 24, 2022

/s/ Kathleen A. Gallagher
Kathleen A. Gallagher
Russell D. Giancola
Gallagher Giancola LLC

Counsel for Intervenor-Respondents

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

<p>DAVE McCORMICK FOR U.S. SENATE and DAVID H. McCORMICK,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">v.</p> <p>LEIGH M. CHAPMAN, in her official capacity as Secretary of the Commonwealth of Pennsylvania, <i>et al.</i>,</p> <p style="text-align: center;">Respondents.</p>	<p style="text-align: center;">No. 286 MD 2022</p>
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PRELIMINARY OBJECTIONS TO PETITION FOR REVIEW

Pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure, Intervenor-Respondents, Doctor Oz for Senate and Dr. Mehmet Oz, file these Preliminary Objections to the Petition for Review (“Petition”), and state as follows:

I. PRELIMINARY STATEMENT

In a desperate attempt to scrounge up more votes with the hope of surpassing Dr. Oz in the official vote total, Petitioners Dave McCormick for U.S. Senate and David H. McCormick have filed suit asking this Court to order county boards of elections to count ballots that are invalid under Pennsylvania law. The Election Code mandates that voters who choose to vote by mail-in or absentee ballot “*shall . . . fill out, date, and sign the declaration*” on the envelope. 25 P.S. §§ 3146.6(a), 3150.6(a) (emphasis added). A majority of the Pennsylvania Supreme Court has held that any

mail-in or absentee ballot that lacks a voter-completed date is invalid under Pennsylvania law and may not be counted. *See In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d 1058, 1079-80 (2020) (Opinion of Justice Wecht); *id.* at 1090-91 (Opinion of Justices Dougherty, Saylor, and Mundy). This Court twice has recognized that it is bound by this holding and rejected claims to count such ballots. *See 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 Elecs.*, No. 1322 CD 2021, 2022 WL 16577, at *8 (Pa. Commw. Ct. Jan. 3, 2022), *appeal denied* 2022 WL 244122 (Pa. Jan. 27, 2022). County boards of election likewise are bound to follow Pennsylvania law. *See, e.g., County of Fulton v. Secretary of the Commonwealth*, No. 277 MD 2021 (Pa. Commw. Ct. May 23, 2022). Nonetheless, Petitioners ask the Court to order county boards of elections to count in the May 2022 primary election mail-in and absentee ballots that lack a voter-completed date.

The Petition for Review should be denied. *First*, the issue raised in the Petition for Review is not ripe: Petitioners acknowledge that several Boards of Elections have not determined how they will address undated absentee and mail-in ballots. *Second*, Petitioners' last-ditch effort to rewrite the Election Code after the primary election is untimely because last-minute or after-the-fact changes to the rules governing an

election are improper. *Third*, Count I of the Petition for Review—for alleged violation of 52 U.S.C. § 10101(a)(2)(B)—fails to state a claim because no private right of action exists, *see Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), and Pennsylvania’s date requirement does not “deny the right of any individual to vote” in any event, 52 U.S.C. § 10101(a)(2)(B). *Finally*, Count II of the Petition for Review—for alleged violation of the Pennsylvania Constitution—also fails under binding precedent.

Accordingly, Doctor Oz for Senate and Dr. Mehmet Oz respectfully request that this Court deny the Petition for Review and dismiss it with prejudice.

II. PRELIMINARY OBJECTIONS

1. Pennsylvania Rule of Civil Procedure 1028(a) provides that “[p]reliminary objections may be filed by any party to any pleading” based upon grounds including “failure of a pleading to conform to law” and “legal insufficiency of a pleading (demurrer).” Pa. R. Civ. P. 1028(a)(2), (4).

2. Rule 1028 is applicable to this original jurisdiction matter pursuant to Pennsylvania Rule of Appellate Procedure 106. *See also* Pa. R.A.P. 1516(b) (providing for the filing of preliminary objections in response to a petition for review addressed to the Court’s original jurisdiction).

A. Petitioners’ Claims Are Not Ripe and Thus Not Justiciable, Pa. R.C.P. 1028(a)(4)

3. Doctor Oz for Senate and Dr. Oz incorporate all foregoing paragraphs as if they were fully set forth herein.

4. This action must be dismissed because Petitioners’ claims are not ripe.

5. The doctrine of ripeness “mandates the presence of an actual controversy.” *Bayada Nurses, Inc. v. Dep’t of Labor & Industry*, 8 A.3d 866, 874 (Pa. 2010).

6. “Standing and ripeness are distinct concepts insofar as ripeness also reflects the separate concern that relevant facts are not sufficiently developed to permit judicial resolution of the dispute.” *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013).

7. “Parties may raise questions regarding standing, ripeness, and the political question doctrine by filing preliminary objections to a petition for review filed in the original jurisdiction of the Commonwealth Court.” *Id.*

8. A claim is not ripe where it rests on speculation regarding future events. *See, e.g., Disability Rights Pa.*, 2020 WL 2820467, 2020 Pa. LEXIS 2751; *id.* (Wecht, J., concurring); *Delisle*, 2020 WL 3053629, 2020 Pa. LEXIS 2970; *id.* (Wecht, J., concurring).

9. Petitioners acknowledge that certain Boards of Elections have not yet determined how they will treat undated mail-in and absentee ballots. *See* Pet. ¶ 2

(“Certain Boards are keeping voters in limbo”); *see also* Petitioners’ Application for Immediate Special Injunction at 1.

10. Indeed, per the Petition for Review, some of the Boards will take no action on the undated mail-in and absentee ballots until after Memorial Day.

11. A refusal to commit to counting ballots does not result in harm; rather, harm could only occur, if at all, after each Board has made a determination regarding how it will address these ballots.

WHEREFORE, Doctor Oz for Senate and Dr. Oz respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

B. Petitioners Fail to State a Claim for Relief, Pa. R.C.P. 1028(a)(4)

1. Petitioners’ Request Should Be Denied as Untimely

12. The Petition for Review seeks to change the rules governing the primary election *after* the election.

13. The United States Supreme Court “has repeatedly emphasized that . . . courts should ordinarily not alter the election rules on the eve of an election.” *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205 (2020) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006); *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 574 U.S. 951 (2014)).

14. Such last-minute—or in this case, after-the-fact—changes to the rules of the game undermine “confidence in the integrity of our electoral processes” and “the functioning of our participatory democracy.” *Purcell*, 549 U.S. at 4.

15. These harms to the integrity of elections and public trust are only magnified by “the chaos and suspicions of impropriety” that occur when invalid ballots are counted “after election day and potentially flip the results of an election.” *DNC v. Wisconsin State Leg.*, 141 S. Ct. 28, 33 (Mem.) (Oct. 26, 2020) (Kavanaugh, J., concurring).

16. Petitioners waited far longer than the last minute to bring this issue to the Court’s attention: they waited until nearly a week *after* the primary election to file their Petition for Review, only after recognizing that the current total of valid votes was unlikely to result in their victory.

17. Especially where this Court and the Pennsylvania Supreme Court have already unequivocally addressed the issue raised in Petitioners’ Petition, this Court should apply *Purcell* and abstain from changing the rules of the game after the fact.

WHEREFORE, Dr. Oz for Senate and Dr. Oz respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

2. Count I Fails to State a Claim for Relief Under Federal Law

18. Count I purports to invoke the federal materiality provision, 52 U.S.C. § 10101(a)(2)(B), but fails to state a claim for relief.

19. *First*, the federal materiality provision does not create a private right of action and, thus, Petitioners may not enforce it.

20. “[P]rivate rights of action to enforce federal law must be created by Congress.” *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

21. Such rights are created by Congress only when the statutory text “displays an intent to create . . . a private remedy”; otherwise, “a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.” *Id.* at 286–87.

22. Moreover, “[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.” *Id.* at 304–05.

23. The materiality provision is enforced through 52 U.S.C. § 10101(c), which provides for exclusive enforcement by the Attorney General:

Whenever any person has engaged . . . in any act or practice which would deprive any other person of any right or privilege secured by the subsection (a) or (b), *the Attorney General* may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief.

52 U.S.C. § 10101(c) (emphasis added).

24. This enforcement provision thus does not “display[] an intent to create . . . a private remedy,” and “courts may not create one.” *Sandoval*, 532 U.S. at 286–87; *see also id.* at 304–05.

25. *Second*, the materiality provision does not preclude application of neutral state-law rules, like the date requirement, to decline to count noncompliant ballots.

26. “States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.” *Timmons v. Twin City Area New Party*, 520 U.S. 351, 358 (1997).

27. The materiality provision recognizes this reality, providing:

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).

28. Thus, where it applies, the materiality provision prohibits only “deny[ing] the right . . . to vote,” *id.*, not application of neutral state-law rules that facilitate, rather than deny, exercise of the right to vote.

29. Indeed, application of neutral state-law requirements to decline to count a noncompliant ballot does not “deny the right . . . to vote,” *id.*, or disenfranchise anyone. *See, e.g., Rosario v. Rockefeller*, 410 U.S. 752, 757 (1973) (application of

neutral state-law voting requirement does not “disenfranchise” voters); *DNC v. Wisconsin State Leg.*, 141 S. Ct. 28, 35 (Mem.) (Oct. 26, 2020) (Kavanaugh, J., concurring) (“In other words, reasonable election deadlines do not ‘disenfranchise’ anyone under any legitimate understanding of that term.”).

30. The date requirement does not “deny the right of any individual to vote.” 52 U.S.C. § 10101(a)(2)(B). Rather, that requirement is part and parcel of the Commonwealth’s comprehensive mail-in and absentee voting scheme that facilitates voting by qualified individuals. *See* 25 P.S. §§ 3146.6(c); 3150.6(c). It addresses *how* an eligible individual effectuates a vote, not whether an individual “is qualified under State law to vote” in the first instance. 52 U.S.C. § 10101(a)(2)(B).

31. Indeed, if the materiality provision regulated state-law rules for effectuating a vote rather than the qualifications to vote, then it would subject a wide range of state election laws to federal supervision—and, in fact, federalize the conduct of elections. After all, it might not be “material in determining whether [an] individual is qualified under State law to vote” to require them to vote no later than election day, in certain places, or only once. But, of course, the Civil Rights Act does not forbid such requirements: “States may, and inevitably must, enact reasonable regulations” for effectuating votes. *Timmons*, 520 U.S. at 358.

32. For all of these reasons, Count I fails to state a claim for relief.

WHEREFORE, Doctor Oz for Senate and Dr. Oz respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

3. Count II Fails To State A Claim For Relief Under The Pennsylvania Constitution

33. Count II purports to invoke the Pennsylvania Constitution but fails to state a claim for relief.

34. A majority of the Pennsylvania Supreme Court already has held that any mail-in or absentee ballot that lacks a voter-completed date is invalid under Pennsylvania law and cannot be counted. *See In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d at 1079-80 (Opinion of Justice Wecht); *id.* at 1090-91 (Opinion of Justices Dougherty, Saylor, and Mundy).

35. This Court twice has recognized that it is bound by this holding and rejected claims to count such ballots. *See In re Election in Region 4*, No. 1381 CD 2021, 2022 WL 96156; *Ritter*, No. 1322 CD 2021, 2022 WL 16577, at *8 (Pa. Commw. Ct. Jan. 3, 2022).

36. This statutory construction is consistent with the Free and Fair Elections Clause, which recognizes that the Legislature may—and must—enact rules regulating the orderly effectuation of votes. *See, e.g., In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d at 1079-80 (Opinion of Justice Wecht); *id.* at 1090-91 (Opinion of Justices Dougherty, Saylor,

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Respectfully submitted,

Dated: May 24, 2022

/s/ Kathleen A. Gallagher
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*Counsel for Proposed Intervenor-Respondents
Doctor Oz for Senate and Dr. Mehmet Oz*

**Pro hac vice application pending*

VERIFICATION

I, Casey Contres, hereby aver that I am the campaign manager of Doctor Oz for Senate and that the statements of fact contained in the attached Preliminary Objections are true and correct to the best of his knowledge and belief and are made subject to the penalties of 18 Pa. Cons. Ann. Section 4904 relating to unsworn falsification to authorities.

Date: May 24, 2022

By:  _____
Casey Contres

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

<p>DAVE McCORMICK FOR U.S. SENATE and DAVID H. McCORMICK,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">v.</p> <p>LEGH M. CHAPMAN, in her official capacity as Secretary of the Commonwealth of Pennsylvania, <i>et al.</i>,</p> <p style="text-align: center;">Respondents.</p>	<p style="text-align: center;">No. 286 MD 2022</p>
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ORDER OF COURT

AND NOW, this ____ day of _____, 2022, upon consideration of the Preliminary Objections to the Petition for Review filed by Doctor Oz for Senate and Dr. Mehmet Oz, and any opposition thereto, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

Said Preliminary Objections are SUSTAINED. The Petition for Review filed by Petitioners Dave McCormick for U.S. Senate and David H. McCormick is hereby dismissed.

BY THE COURT:

_____, J

EXHIBIT 2

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 286 MD 2022

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

Petitioners,

v.

LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS SECRETARY OF
THE COMMONWEALTH OF PENNSYLVANIA *et al.*,

Respondents.

**DOCTOR OZ FOR SENATE & DR. MEHMET OZ'S BRIEF
IN OPPOSITION TO PETITIONERS' MOTION FOR IMMEDIATE
SPECIAL INJUNCTION**

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**Pro hac vice application pending*

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Dr. Mehmet Oz*

PRELIMINARY STATEMENT

A majority of the Pennsylvania Supreme Court has held that any mail-in or absentee ballot that lacks a voter-completed date is invalid under Pennsylvania law and cannot be counted. *See In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d 1058, 1079-80 (2020) (Opinion of Justice Wecht); *id.* at 1090-91 (Opinion of Justices Dougherty, Saylor, and Mundy). This Court twice has recognized that it is bound by this holding and rejected claims to count such ballots. *See 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 Elecs.*, No. 1322 CD 2021, 2022 WL 16577, at *8 (Pa. Commw. Ct. Jan. 3, 2022), *appeal denied* 2022 WL 244122 (Pa. Jan. 27, 2022). County boards of election likewise are bound to follow Pennsylvania law. *See, e.g., County of Fulton v. Secretary of the Commonwealth*, No. 277 MD 2021 (Pa. Commw. Ct. May 23, 2022).

Petitioners' Motion misrepresents the Pennsylvania Supreme Court's binding holding, fails even to mention this Court's two on-point cases, and hurls false allegations of "disenfranchisement." Mot. at 5. The Court should uphold the free and fair May 2022 primary election on behalf of all Pennsylvanians, refuse to change the rules of the election after election day, and deny Petitioners' Motion.

I. THE PENNSYLVANIA SUPREME COURT AND THIS COURT ALREADY HAVE REJECTED PETITIONERS' POSITION ON THE MERITS

The Court should deny the Motion for one simple reason: Petitioners not only are not “likely to succeed on the merits,” *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount., Inc.*, 828 A.2d 995, 1001 (Pa. 2003), but, in fact, advance a merits position that the Pennsylvania Supreme Court and this Court already have rejected, *see In re Canvass of Absentee and Mail-In Ballots*, 241 A.3d at 1079-80 (Opinion of Justice Wecht); *id.* at 1090-91 (Opinion of Justices Dougherty, Saylor, and Mundy); *see also In re Election in Region 4*, No. 1381 CD 2021, 2022 WL 96156; *Ritter*, No. 1322 CD 2021, 2022 WL 16577, at *8.

And rightfully so: the “date and sign requirement” for mail-in and absentee ballots “derives from an unmistakable statutory directive.” *In re Canvass of Absentee and Mail-In Ballots*, 241 A.3d at 1085 (Opinion of Justice Wecht). The Election Code directs that the voter “shall . . . fill out, date, and sign the declaration” on the envelope. 25 P.S. §§ 3146.6(a), 3150.6(a) (emphasis added). The “unambiguous meaning” of the word “shall” in the Election Code carries “an imperative or mandatory meaning.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1231 (Pa. 2004). Accordingly, a failure to comply with the date rule is no “minor irregularity” and requires invalidation of the ballot. *See, e.g., In re Canvass of Absentee and Mail-In Ballots*, 241 A.3d at 1079-

80 (Opinion of Justice Wecht); *id.* at 1090-91 (Opinion of Justices Dougherty, Saylor, and Mundy); *see also In re Election in Region 4*, No. 1381 CD 2021, 2022 WL 96156; *Ritter*, No. 1322 CD 2021, 2022 WL 16577, at *8. Petitioners' Motion therefore fails on the merits.

Petitioners do not even mention this Court's decisions in *In re Election in Region 4* and *Ritter*. Instead, they advance two arguments in an attempt to show a likelihood of success on the merits, each of which fails. *First*, Petitioners selectively misquote the Pennsylvania Supreme Court's decision in *In re Canvass of Absentee and Mail-In Ballots*, suggesting that the decision in fact requires counting of mail-in or absentee ballots that lack a voter-completed date. *See* Mot. 5-6. But Petitioners cite only to the "plurality" opinion in that case, *see id.*, and nowhere acknowledge Justice Wecht's pivotal statement that the date requirement would be applied "prospectively" to "invalidate" noncompliant ballots in post-2020 elections, *see In re Canvass of Absentee and Mail-In Ballots*, 241 A.3d at 1079-80 (Opinion of Justice Wecht); *id.* at 1090-91; *see also In re Election in Region 4*, No. 1381 CD 2021, 2022 WL 96156; *Ritter*, No. 1322 CD 2021, 2022 WL 16577, at *8.

Second, Petitioners point to the judgment issued by a panel of the Third Circuit last Friday in *Migliori v. Lehigh Cnty. Bd. of Elecs.*, No. 22-1499 (3d Cir. May 20, 2022) (Doc. 80). But the *Migliori* judgment does not warrant, much less authorize, a departure from the binding holdings of the Pennsylvania Supreme Court or this

Court. In the first place, that judgment is not final and remains subject to further review in the Third Circuit and the U.S. Supreme Court. *See Migliori* Order at 2. The appellee has already sought a stay. *See* Mot. To Stay The Mandate, *Migliori v. Lehigh Cnty. Bd. of Elecs.*, No. 22-1499 (3d Cir. May 23, 2022) (Doc. 81).

There is good reason to believe that such further review will reverse the panel's judgment. For one thing, the panel's conclusion that the federal materiality statute, 52 U.S.C. § 10101, creates a private right of action contradicts decades of governing U.S. Supreme Court precedent: the materiality provision is exclusively enforceable by "the Attorney General," 52 U.S.C. § 10101(c), and does not evince any intent "by Congress" to create "a private remedy," *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001).

For another, "[s]tates may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin City Area New Party*, 520 U.S. 351, 358 (1997). The materiality provision recognizes this reality, prohibiting only "den[ial]" of "the right of any individual to vote" where "such individual is qualified under State law to vote." 52 U.S.C. § 10101. Application of neutral state-law requirements to decline to count a noncompliant ballot does not "deny the right . . . to vote," *id.*, or disenfranchise anyone. *See, e.g., Rosario v. Rockefeller*, 410 U.S. 752, 757 (1973) (application of neutral state-law voting requirement does not "disenfranchise" voters); *DNC v.*

Wisconsin State Leg., 141 S. Ct. 28, 35 (Mem.) (Oct. 26, 2020) (Kavanaugh, J., concurring) (“In other words, reasonable election deadlines do not ‘disenfranchise’ anyone under any legitimate understanding of that term.”).

Pennsylvania’s date requirement is one such valid state-law rule that does not “deny the right of any individual to vote.” 52 U.S.C. § 10101(a)(2)(B). Quite the contrary: that rule is part and parcel of the Commonwealth’s comprehensive mail-in and absentee voting scheme that *expands and facilitates* voting by qualified individuals. *See* 25 P.S. §§ 3146.6(c); 3150.6(c). And the date requirement addresses how a qualified individual effectuates a vote, not whether an individual “is qualified under State law to vote” in the first instance. 52 U.S.C. § 10101(a)(2)(B).

Indeed, if the federal materiality provision regulated state-law rules for effectuating a vote rather than the qualifications to vote, it would subject a wide range of state election laws to federal supervision—and, in fact, federalize the conduct of elections. After all, it might not be “material in determining whether [an] individual is qualified under State law to vote” to require them to vote no later than election day, in certain places, or only once. But, of course, the Civil Rights Act does not forbid such requirements: “States may, and inevitably must, enact reasonable regulations” for effectuating votes. *Timmons*, 520 U.S. at 358.

Finally, the Third Circuit panel’s judgment is inapplicable to the May 2022 primary election on its own terms. As the panel itself made clear, the judgment applies only to “the November 2, 2021 election for Judge of the Common Pleas of Lehigh County,” not to any other election. *Migliori* Judgment at 2. It therefore provides no occasion to throw out the date requirement for the May 2022 primary election—much less to do so after election day and while ballots are still being counted.

II. PETITIONERS’ MOTION RESTS ON FALSE AND UNRIPE ALLEGATIONS OF DISENFRANCHISEMENT

Petitioners’ Motion should be denied for another reason: Petitioners fail to demonstrate “immediate and irreparable harm.” *Summit Towne Ctr.*, 828 A.2d at 1001. Petitioners allege that application of the date requirement will result in voters being “disenfranchised,” Mot. 3, 5-6, but this overheated allegation is false. After all, as explained above, declining to count a ballot due to noncompliance with a neutral, mandatory state-law requirement is not “disenfranchisement” at all. *See, e.g., Rosario*, 410 U.S. at 757; *DNC*, 141 S. Ct. at 35 (Mem.) (Kavanaugh, J., concurring). Were the law otherwise, election officials could *never* apply neutral state-law rules to invalidate ballots—and the Pennsylvania Supreme Court and this Court would be guilty of “disenfranchisement” for upholding the date requirement in prior cases. *See In re Canvass of Absentee and Mail-In Ballots*, 241 A.3d at 1079-80 (Opinion of Justice Wecht); *id.* at 1090-91 (Opinion of Justices Dougherty,

Saylor, and Mundy); *In re Election in Region 4*, No. 1381 CD 2021, 2022 WL 96156; *Ritter*, No. 1322 CD 2021, 2022 WL 16577, at *8.

Moreover, the first sentence of Petitioners' Motion confirms that whatever harm Petitioners allege is speculative and unripe. *See, e.g., Disability Rights Pa. v. Boockvar*, 83 MM 2020, 2020 WL 2507661 (Pa. May 15, 2020) (denying injunction in voting rights case where harm was speculative); *Delisle v. Boockvar*, 95 MM 2020, 2020 WL 3053629 (Pa. May 29, 2020) (same); *see also Bayada Nurses, Inc. v. Dep't of Labor & Industry*, 8 A.3d 866, 874 (Pa. 2010) (doctrine of ripeness "mandates the presence of an actual controversy"). In particular, Petitioners complain that some county boards of elections "refuse to count (*or commit to counting*) absentee and mail-in ballots" lacking a voter-completed date. Mot. at 1 (emphasis added). But a refusal to *commit to counting* ballots at this juncture does *not* harm to anyone, let alone an "immediate and irreparable injury." PA. R. Civ. P. 1531(a); *see also Summit Towne Ctr.*, 828 A.2d at 1001.

Indeed, as at least one of the county boards sued by Petitioners already has indicated, it is not even addressing the validity of undated ballots until after Memorial Day and will segregate such ballots in the interim. *See Blair County Email* (May 23, 2022) (Ex. A). The Secretary of the Commonwealth likewise has advised county boards to segregate undated mail-in and absentee ballots. *See Guidance Concerning Examination Of Absentee And Mail-In Ballot Return Envelopes* (May

24, 2022) (Ex. B).¹ Petitioners’ contention that this Court must order counting of invalid undated mail-in and absentee ballots before “Boards reports the unofficial returns of the canvass to the Department of State on Tuesday, May 24, 2022,” Mot. 3, in order to prevent alleged “disenfranchisement,” *id.* at 5, is simply erroneous. The Court should deny Petitioners’ Motion.

III. THE PUBLIC INTEREST OVERWHELMINGLY FAVORS DENYING PETITIONERS’ MOTION

Finally, the equities require denial of Petitioners’ Motion because denial will preserve the “status quo ante,” advance “the public interest,” and prevent the “greater injury” that would result from granting an injunction. *Summit Towne Ctr.*, 828 A.2d at 1001. It is beyond dispute that courts may not order changes to election rules on the eve of an election—much less *after* election day while ballots are still being counted. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1 (2006); *Merrill v. Milligan*, 142 S.Ct. 879 (2022). Such last-minute or after-the-fact judicial changes to the rules of the game undermine “[c]onfidence in the integrity of our electoral processes” and “the functioning of our participatory democracy.” *Purcell*, 549 U.S. at 4. These harms to the integrity of elections and public trust are only magnified by “the chaos

¹ To be sure, Intervenor-Respondents maintain that the Secretary’s guidance that county boards should count mail-in and absentee ballots that lack a voter-completed date is legally erroneous and not binding in any event. *See, e.g., County of Fulton*, No. 277 MD 2021. Nonetheless, that county boards can segregate such (invalid) ballots puts the lie to Petitioners’ claim that the Court must order those ballots to be counted today.

and suspicions of impropriety” that occur when invalid ballots are counted “after election day and potentially flip the results of an election.” *DNC*, 141 S. Ct. at 33 (Mem.) (Kavanaugh, J., concurring). The Court should uphold the free and fair May 2022 primary election on behalf of all Pennsylvanians and deny Petitioners’ Motion.

CONCLUSION

The Court should deny Petitioners’ Motion For Immediate Special Injunction.

Dated: May 24, 2022

Respectfully submitted,

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

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**Pro hac vice application pending*

EXHIBIT A

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EXHIBIT A

RETRIEVED FROM DEMOCRACYDOCKET.COM

From: Nathan Karn <nkarn@blairco.org>

Sent: Monday, May 23, 2022 8:41 AM

To: Hicks, Ronald L., Jr. <RHicks@porterwright.com>; 'tgates@pa.gov' <tgates@pa.gov>; 'mmudd@adamscounty.us' <mmudd@adamscounty.us>; 'andrew.szefi@alleghenycounty.us' <andrew.szefi@alleghenycounty.us>; 'aopsitnick@opsitnickslaw.com' <aopsitnick@opsitnickslaw.com>; 'sslaw@windstream.net' <sslaw@windstream.net>; 'gfedeles@beavercountypa.gov' <gfedeles@beavercountypa.gov>; 'nmorgan@beavercountypa.gov' <nmorgan@beavercountypa.gov>; 'dcrabtree.kclaw@comcast.net' <dcrabtree.kclaw@comcast.net>; 'csadler@countyofberks.com' <csadler@countyofberks.com>; 'cschnee@countyofberks.com' <cschnee@countyofberks.com>; 'Jonathan.Jr@fosterslawfirm.com' <Jonathan.Jr@fosterslawfirm.com>; 'WWhite@co.butler.pa.us' <WWhite@co.butler.pa.us>; 'wgbarbin@atlanticbb.net' <wgbarbin@atlanticbb.net>; 'ewtompkinslaw@gmail.com' <ewtompkinslaw@gmail.com>; 'dam@gmlawoffices.com' <dam@gmlawoffices.com>; 'bdupuis@babstcalland.com' <bdupuis@babstcalland.com>; 'kmayock@chesco.org' <kmayock@chesco.org>; 'cgabriel@cfwwg.com' <cgabriel@cfwwg.com>; 'Info@VariLaw.com' <Info@VariLaw.com>; 'lec@crwlaw.net' <lec@crwlaw.net>; 'ajm@mmkllp.com' <ajm@mmkllp.com>; 'kbutton@shaferlaw.com' <kbutton@shaferlaw.com>; 'solicitor@ccpa.net' <solicitor@ccpa.net>; 'jcurcillo@dauphinc.org' <jcurcillo@dauphinc.org>; 'martinw@co.delaware.pa.us' <martinw@co.delaware.pa.us>; 'info@mwbklaw.com' <info@mwbklaw.com>; 'rperhacs@eriecountypa.gov' <rperhacs@eriecountypa.gov>; 'ttalarico@nwpalawyers.com' <ttalarico@nwpalawyers.com>; 'jackpurcell146@gmail.com' <jackpurcell146@gmail.com>; 'attorneys@sbglawoffice.com' <attorneys@sbglawoffice.com>; 'Jerrolsuldove@blackanddavisson.com'

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<fwgarrigan@gmail.com>; 'wrb@pa.net' <wrb@pa.net>; 'benjamin.field@phila.gov' <benjamin.field@phila.gov>;
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'jana.grimm@steptoe-johnson.com' <jana.grimm@steptoe-johnson.com>; 'wkay@waynecountypa.gov'
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Cc: McGee, Carolyn B. <CBMcGee@porterwright.com>; Mercer, Jeremy A. <JMercer@porterwright.com>; Jonathan Goldstein <jgoldstein@goldsteinlp.com>; Britain Henry <bhenry@goldsteinlp.com>

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

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.

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

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'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

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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 (jmerc@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

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EXHIBIT B

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**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.

VERIFICATION

I, Casey Contres, hereby aver that I am the campaign manager of Doctor Oz for Senate and that the statements of fact contained in the attached Brief in Opposition to Petitioners' Motion for Immediate Special Injunction are true and correct to the best of his knowledge and belief and are made subject to the penalties of 18 Pa. Cons. Ann. Section 4904 relating to unsworn falsification to authorities.

Date: May 24, 2022

By: _____

Casey Contres

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Brief contains 2,055 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

/s/ Kathleen A. Gallagher

*Counsel for Proposed Intervenor-
Respondents Doctor Oz for Senate and
Dr. Mehmet Oz*

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CERTIFICATE OF COMPLIANCE

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

/s/ Kathleen A. Gallagher

*Counsel for Proposed Intervenor-
Respondents Doctor Oz for Senate and
Dr. Mehmet Oz*

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May 2022, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

/s/ Kathleen A. Gallagher
*Counsel for Proposed Intervenor-
Respondents Doctor Oz for Senate and
Dr. Mehmet Oz*

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**CERTIFICATION OF COMPLIANCE
WITH CASE RECORDS PUBLIC ACCESS POLICY**

I, Kathleen A. Gallagher, 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: May 24, 2022

GALLAGHER GIANCOLA LLC

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

*Counsel for Proposed Intervenor-Respondents,
Doctor Oz for Senate and Dr. Mehmet Oz*

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GALLAGHER GIANCOLA LLC

/s/ Kathleen A. Gallagher _____

Kathleen A. Gallagher

*Counsel for Proposed Intervenor-Respondents,
Doctor Oz for Senate and Dr. Mehmet Oz*

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VERIFICATION

I, Casey Contres, hereby aver that I am the campaign manager of Doctor Oz for Senate and that the statements of fact contained in the attached Application for Leave to Intervene are true and correct to the best of his knowledge and belief and are made subject to the penalties of 18 Pa. Cons. Ann. Section 4904 relating to unsworn falsification to authorities.

Date: May 24, 2022

By: 

Casey Contres

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DAVE McCORMICK FOR U.S. SENATE and DAVID H. McCORMICK, Petitioners, v. LEGH M. CHAPMAN, in her official capacity as Secretary of the Commonwealth of Pennsylvania, <i>et al.</i> , Respondents.	No. 286 MD 2022
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ORDER OF COURT

AND NOW, this ____ day of _____, 2022, upon consideration of the Application for Leave to Intervene filed by Doctor Oz for Senate and Dr. Mehmet Oz, and any opposition thereto, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

Said Application is GRANTED. Doctor Oz for Senate and Dr. Mehmet Oz shall participate in this action as Intervenor-Respondents.

BY THE COURT:

_____, J.