

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 286 MM 2022

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

Petitioners,

v.

**LEIGH M. CHAPMAN, in her official capacity as
Secretary of State for the Commonwealth,
ADAMS COUNTY BOARD OF ELECTIONS,
ALLEGHENY COUNTY BOARD OF ELECTIONS,
BEAVER COUNTY BOARD OF ELECTIONS,
BEDFORD COUNTY BOARD OF ELECTIONS,
BERKS COUNTY BOARD OF ELECTIONS,
BLAIR COUNTY BOARD OF ELECTIONS,
BRADFORD COUNTY BOARD OF ELECTIONS,
BUCKS COUNTY BOARD OF ELECTIONS,
BUTLER COUNTY BOARD OF ELECTIONS,
CAMBRIA COUNTY BOARD OF ELECTIONS,
CAMERON COUNTY BOARD OF ELECTIONS,
CARBON COUNTY BOARD OF ELECTIONS,
CENTRE COUNTY BOARD OF ELECTIONS,
CHESTER COUNTY BOARD OF ELECTIONS,
CLARION COUNTY BOARD OF ELECTIONS,
CLEARFIELD COUNTY OF ELECTIONS,
CLINTON COUNTY BOARD OF ELECTIONS,
COLUMBIA COUNTY BOARD OF ELECTIONS,
CRAWFORD COUNTY BOARD OF ELECTIONS,
CUMBERLAND COUNTY BOARD OF ELECTIONS,
DAUPHIN COUNTY BOARD OF ELECTIONS,
DELAWARE COUNTY BOARD OF ELECTIONS,**

**ELK COUNTY BOARD OF ELECTIONS, FAYETTE
COUNTY BOARD OF ELECTIONS, FOREST
COUNTY BOARD OF ELECTIONS, FRANKLIN
COUNTY BOARD OF ELECTIONS, FULTON
COUNTY BOARD OF ELECTIONS, HUNTINGDON
COUNTY BOARD OF ELECTIONS, INDIANA
COUNTY BOARD OF ELECTIONS, JEFFERSON
COUNTY BOARD OF ELECTIONS, JUNIATA
COUNTY BOARD OF ELECTIONS, LACKAWANNA
COUNTY BOARD OF ELECTIONS, LANCASTER
COUNTY BOARD OF ELECTIONS, LAWRENCE
COUNTY BOARD OF ELECTIONS, LEBANON
COUNTY BOARD OF ELECTIONS, LEHIGH
COUNTY BOARD OF ELECTIONS, LUZERNE
COUNTY BOARD OF ELECTIONS, LYCOMING
COUNTY OF ELECTIONS,
MCKEAN COUNTY BOARD OF ELECTIONS,
MERCER COUNTY BOARD OF ELECTIONS,
MIFFLIN COUNTY BOARD OF ELECTIONS,
MONROE COUNTY BOARD OF ELECTIONS,
MONTGOMERY COUNTY BOARD OF ELECTIONS,
MONTOUR COUNTY BOARD OF ELECTIONS,
NORTHAMPTON COUNTY BOARD OF ELECTIONS,
NORTHUMBERLAND COUNTY BOARD OF ELECTIONS,
PERRY COUNTY BOARD OF ELECTIONS,
PIKE COUNTY BOARD OF ELECTIONS,
POTTER COUNTY BOARD OF ELECTIONS,
SNYDER COUNTY BOARD OF ELECTIONS,
SOMERSET COUNTY BOARD OF ELECTIONS,
SULLIVAN COUNTY BOARD OF ELECTIONS,
TIOGA COUNTY BOARD OF ELECTIONS,
UNION COUNTY BOARD OF ELECTIONS,
VENANGO COUNTY BOARD OF ELECTIONS,
WARREN COUNTY BOARD OF ELECTIONS,
WASHINGTON COUNTY BOARD OF ELECTIONS,
WAYNE COUNTY BOARD OF ELECTIONS,**

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

Respondents.

**RESPONSE TO MOTION FOR SPECIAL INJUNCTION
BY BLAIR COUNTY**

May 25, 2022

/s/ Nathan W. Karn, Sr.

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TABLE OF AUTHORITIES

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BLAIR COUNTY POSITION STATEMENT

The Pennsylvania Supreme Court determined in In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058, 1061–62 (Pa. 2020) (plurality op.) that the undated ballots should not be disregarded in the 2020 General Election, but that with respect to future elections, undated ballots should not be counted. This Honorable Court thorough analyzed the Supreme Court’s decision in holding it was bound not to count undated ballots in Ritter v. Lehigh County Board of Elections (1322 C.D. 2021). The Pennsylvania Supreme Court refused to grant *allocator* upon petition for allowance of appeal from the Commonwealth Court’s decision in Ritter. See order denying Petition for Allowance of Appeal dated January 27, 2022, Petition of Zac Cohen, Ritter v. Lehigh County Board of Elections (9 MAL 2022).

Recently, the United States District Court for the Eastern District of Pennsylvania not only determined in Migliori v. Lehigh Cnty. Bd. of Elections, No. 5:22-cv-00397 that the plaintiffs in the case before it lacked standing, but it also determined “the handwritten date requirement does not pose an undue burden on Plaintiffs’ right to vote under the First and Fourteenth Amendments.” See Document 49, filed 3/16/2022, page 28. Consequently, the Third Circuit Court of Appeals’ judgment, without opinion, Migliori v. Lehigh Cnty. Bd. of Elections, No. 22-1499, Doc. 80 (3d Cir. May 20, 2022), is the first instance since

the November 3, 2020 Municipal Election to determine that undated ballots should be counted AND that requiring a date is an undue burden on voters under federal law.

On May 24, 2022, the Commonwealth of Pennsylvania, Department of State, issued guidance on handling undated ballots from the May 17, 2022 Primary Election. See Exhibit A. Being guidance only, it represents the Department's recommendation regarding how it thinks that the counties should proceed with respect to the undated ballots; however, the Department has no legal authority to require any of the Respondent counties, including Blair County, to follow the same. Nevertheless, even the Department's guidance advises: "A determination on whether the segregated tabulations will be used in certifying elections has not yet been made, given the ongoing litigation." Consequently, even taking the Department's own guidance into account, Blair County has at all times acted appropriately with segregating 10 Republican ballots and 7 Democrat ballots and not including them in their unofficial totals required by law to be provided to the Commonwealth by May 24, 2022.¹

Blair County's only concern is finality with respect to the treatment of the 17 total (10 Republican, 7 Democrat) undated ballots that have yet to be

¹ The Department's guidance sought for the counties to canvass such segregated ballots and report those numbers to the Commonwealth by 5:00 pm May 24, 2022 even though they would not be added to the unofficial total. Blair County had already completed all canvassing and unofficial counting by Friday, May 20, 2022, with only a brief meeting on Wednesday, May 25, 2022, to canvass any additional military and/or overseas ballots (which there were none) to determine if any provisional ballot voter who needed to provide proof of identification had done so, and to sign the election results to certify them.

canvassed. Without the Third Circuit Court of Appeals' opinion, it is unknown if the Third Circuit Court of Appeals intended it to apply its decision to the May 17, 2022 Primary Election. However, even if we assume it does intend that result, presently, the Third Circuit Court of Appeals' own order indicates the potential for a re-hearing five (5) days after its opinion is filed, which, as of the date of this filing, no such opinion has been filed. Additionally, David Ritter, one of the Lehigh County judicial candidates involved in the Migliori case, has requested a stay of the Third Circuit Court of Appeals' decision while it files a Petition with the United States Supreme Court. See news report attached as Exhibit B.

With finality as Blair County's primary goal, Blair County has supported the request for the Supreme Court to take jurisdiction pursuant to its powers as the King's Bench without taking a position on the of counting undated ballots. Thus, Blair County is opposed to the Motion for Special Injunction. In the alternative, if the Commonwealth Court elects to proceed, this Honorable Court should limit its approach to this matter by simply staying certification of the Republican nomination for the United States Senate pending either clarity (whether the Migliori decision is intended to apply to the current election) and/or finality (rehearing and/or any United States Supreme Court action) of the federal court action. By taking this approach, the Respondent counties are removed from active involvement in in this matter, and the federal courts can make the final

determination under federal law whether dating the declaration envelope is an undue burden.

Respectfully submitted,

May 25, 2022

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EXHIBIT A

TLP: WHITE



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

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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.

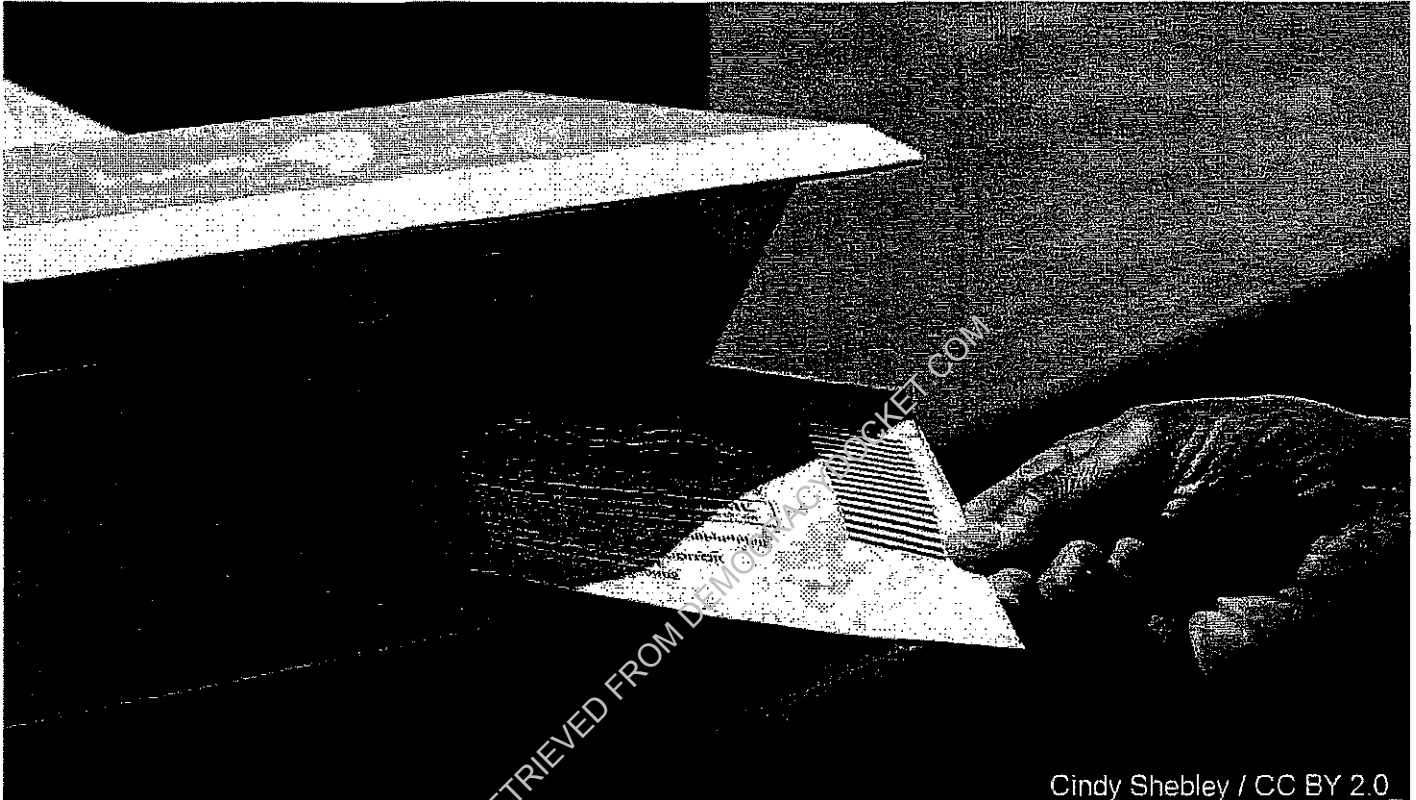
EXHIBIT B

https://www.wfmz.com/news/area/lehighvalley/candidate-for-judge-in-lehigh-county-asks-for-stay-of-court-ruling-that-allowed-undated/article_e0d43dca-d b87-1 1ec-be71-0726ac393c4f.html

Candidate for judge in Lehigh County asks for stay of court ruling that allowed undated mail-in ballots to be counted in 2021 race

69 News

May 24, 2022



A candidate for a judgeship in Lehigh County is asking for a stay of a court ruling ordering that mail-in ballots filled out without dates be counted in a 2021 race.

A federal appeals court ruling from Friday said that undated Lehigh County ballots, which arrived on time, should be counted in the 2021 general election. Fewer than 75 votes separate Republican David Ritter and Democrat Zachary Cohen for the final spot for Court of Common Pleas judge. 257 mail-in ballots without dates were in dispute in that election.

Ritter filed a motion Monday asking for a stay of Friday's ruling, arguing that Ritter needed time to file a petition with the U.S. Supreme Court. Ritter argues that if the stay is not granted, irreparable injury will occur because his opponent could wrongly assume office, and state residents "will be subject to the power of an official who was seated in error."

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A court has not issued a response to Ritter's motion.

An attorney for Ritter had argued in federal court that the 257 mail-in ballots in

November's 2021 general election should not be counted because a hand-written date was not on the ballot envelope.

The attorney said it's against Pennsylvania law and the issue was already upheld by the state Supreme Court in March.

"The issue here is different from the issue in state court. The issue here is whether under federal law a voter can be disenfranchised for a minor paperwork error," said ACLU attorney Ari Savitzky in a court hearing last week.

Savitzky represents five bipartisan voters who appealed to the federal court to have the 257 votes counted.

In court, Savitzky argued this isn't a case of fraud and the voter's eligibility or status isn't in question and as long as the ballots are received by the board of elections by 8 p.m. on election day the written date on the envelope is irrelevant.

"This case is important because every vote matters and every valid vote should be counted," Savitzky had said.

A formal written opinion still has not been issued on Friday's federal appeals court decision. It is possible that decision could be appealed to the U.S. Supreme Court.

The Court of Common Pleas seat remains vacant until the issue is determined.
