

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dave McCormick for U.S. Senate, and :
David H. McCormick, :
Petitioners :

v. :

No. 286 M.D. 2022
Heard: May 31, 2022

Leigh M. Chapman, in her official :
capacity as Secretary of State for the :
Commonwealth, Adams County Board :
of Elections, Allegheny County Board :
of Elections, Beaver County Board of :
Elections, Bedford County Board of :
Elections, Berks County Board of :
Elections, Blair County Board of :
Elections, Bradford County Board of :
Elections, Bucks County Board of :
Elections, Butler County Board of :
Elections, Cambria County Board of :
Elections, Cameron County Board of :
Elections, Carbon County Board of :
Elections, Centre County Board of :
Elections, Chester County Board of :
Elections, Clarion County Board of :
Elections, Clearfield County Board of :
Elections, Clinton County Board of :
Elections, Columbia County Board of :
Elections, Crawford County Board of :
Elections, Cumberland County Board :
of Elections, Dauphin County Board of :
Elections, Delaware County Board of :
Elections, Elk County Board of :
Elections, Fayette County Board of :
Elections, Forest County Board of :
Elections, Franklin County Board of :
Elections, Fulton County Board of :
Elections, Huntingdon County Board :
of Elections, Indiana County Board of :
Elections, Jefferson County Board of :
Elections, Juniata County Board of :
Elections, Lackawanna County Board :

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of Elections, Lancaster County Board :
of Elections, Lawrence County Board :
of Elections, Lebanon County Board :
of Elections, Lehigh County Board of :
Elections, Luzerne County Board of :
Elections, Lycoming County Board of :
Elections, McKean County Board of :
Elections, Mercer County Board of :
Elections, Mifflin County Board of :
Elections, Monroe County Board of :
Elections, Montgomery County Board :
of Elections, Montour County Board of :
Elections, Northampton County Board :
of Elections, Northumberland County :
Board of Elections, Perry County :
Board of Elections, Pike County Board :
of Elections, Potter County Board of :
Elections, Snyder County Board of :
Elections, Somerset County Board of :
Elections, Sullivan County Board of :
Elections, Tioga County Board of :
Elections, Union County Board of :
Elections, Venango County Board of :
Elections, Warren County Board of :
Elections, Washington County Board :
of Elections, Wayne County Board of :
Elections, Westmoreland County Board :
of Elections, and Wyoming County :
Board of Elections, :
Respondents :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE COHN JUBELIRER**

FILED: June 2, 2022

On May 23, 2022, Dave McCormick for U.S. Senate and David H. McCormick (together, Petitioners) filed a Petition for Review in the Nature of a Complaint in Equity (Petition) in this Court's original jurisdiction against named Respondents Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth (Acting Secretary), and 60 county boards of elections¹ (County Boards). In their Petition, Petitioners allege that the above-listed County Boards refuse to count absentee and mail-in ballots for the Republican Nomination for the Office of United States Senator in the May 17, 2022 General Primary Election,² where the voters failed to handwrite a date on the exterior mailing envelope but the ballots were otherwise timely received based upon the date stamped by the County Boards upon receipt and complied with all applicable requirements. On May 24, 2022, Petitioners filed a Motion for Immediate Special Injunction and Supporting Memorandum of Law, which this Court treats as a motion for a preliminary

¹ Petitioners did not name the remaining seven county boards of elections based on their belief that those boards are already providing the relief sought by Petitioners in this matter. To the extent that it is asserted that these seven counties are indispensable parties and that their absence precludes this Court from acting, the Court is unconvinced at this time that the failure to name parties who are not engaging in the alleged unlawful behavior is a barrier to the Court considering this action.

² Because the unofficial returns submitted to the Department of State by the 67 county boards of elections pursuant to Section 1404(f) of the Pennsylvania Election Code (Election Code), Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. § 3154(f), for the May 17, 2022 General Primary Election indicated that a candidate in the Republican Primary for the Office of United States Senator was defeated by one-half of a percent or less of the votes cast for that office, and the defeated candidate did not request in writing that a recount not be made under Section 1404(h) of the Election Code, 25 P.S. § 3154(h), on May 26, 2022, the Acting Secretary ordered a statewide recount of the entire vote cast in the Republican Primary for the Office of United States Senator pursuant to Section 1404(g)(1) of the Election Code, 25 P.S. § 3154(g)(1). *See* Order of Recount for the Republican Primary for United States Senator, dated May 26, 2022. The recount was ordered to be completed by the county boards no later than noon on Tuesday, June 7, 2022, and the results of the recount submitted no later than noon on Wednesday, June 8, 2022. *Id.*

injunction (Motion for Special Injunction). For the following reasons, the Court grants the Motion for Special Injunction.

Background & Procedural History

Sections 1306(a) and 1306-D(a) of the Pennsylvania Election Code³ provide, respectively, that, after an elector marks their ballot and secures it in the secrecy envelope, the elector is to place that envelope into a second envelope (outer or exterior envelope) on which, among other things, is printed a “declaration of the elector” which “[t]he elector shall then fill out, date and sign” (dating provisions). 25 P.S. §§ 3146.6(a) (absentee), 3150.16(a) (mail-in). Whether ballots can be counted that do not contain a handwritten date on the outer envelope as described in these sections is the issue. In Count I of the Petition, Petitioners allege that the County Boards’ refusal to count timely received ballots lacking a handwritten date on the exterior envelope violates Section 10101(a)(2)(B) of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B),⁴ (commonly referred to as the “materiality provision”),

³ See Section 1306(a) of the Election Code, added by the Act of March 6, 1951, P.L. 3, 25 P.S. § 3146.6(a) (relating to voting by absentee electors); *see also* Section 1306-D(a) of the Election Code, added by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77), 25 P.S. § 3150.16(a) (relating to voting by mail-in electors). To complete an absentee or mail-in ballot, an elector is required to “fill out, date and sign the declaration printed on [the second, outer] envelope” and either send the envelope by mail, postage prepaid, or deliver it in person to the elector’s respective county board of elections no later than 8:00 p.m. on the day of the primary election. Sections 1306(a), (c), and 1306-D(a), (c) of the Election Code, 25 P.S. §§ 3146.6(a), (c), 3150.16(a), (c).

⁴ Section 10101(a)(2)(B) of the Voting Rights Act provides, as follows:

(a) Race, color, or previous condition not to affect right to vote; uniform standards for voting qualifications; errors or omissions from papers; literacy tests; agreements between Attorney General and State or local authorities; definitions

...

(Footnote continued on next page...)

because the dating provisions under the Election Code are immaterial to whether a voter is qualified to vote under state law. (Petition for Review (Pet. for Rev.) ¶¶ 18-20.) In Count II, Petitioners further allege that the County Boards’ refusal to count ballots lacking a handwritten date on the exterior envelope, which is a mere technical requirement, disenfranchises both absentee and mail-in voters and thus violates the Free and Equal Elections Clause under article I, section 5 of the Pennsylvania Constitution, PA. CONST. art. I, § 5.⁵ (Pet. for Rev. ¶¶ 21-23.)

As relief, Petitioners seek a judicial declaration that “timely returned absentee and mail-in ballots may not be rejected due solely to the lack of a date in the declaration on the exterior envelope”; and an order directing the County Boards “to canvass any timely returned absentee or mail-in ballot that lacks a date on its exterior envelope and no other deficiencies or irregularities[.]” “to report to the [] Department of State [(Department)] the unofficial results of the canvass . . . of any timely returned absentee or mail-in ballot that lacks a date on its exterior envelope absent any other irregularities”; and an order enjoining County Boards “to take all other steps necessary to effectuate this Court’s declaration[.]” (Pet. for Rev., Prayer for Relief ¶¶ 1-4.)

(2) No person acting under color of law shall--

...

(B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election[.]

52 U.S.C. § 10101(a)(2)(B).

⁵ The Free and Equal Elections Clause provides: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” PA. CONST. art. I, § 5.

On May 24, 2022,⁶ immediately prior to the deadline by which the unofficial returns were due to be submitted to the Acting Secretary,⁷ Petitioners filed the Motion for Special Injunction seeking an order from this Court directing the County Boards to count the ballots in question. In so requesting, Petitioners assert that Pennsylvania’s dating provisions for absentee and mail-in ballots are unenforceable under both state and federal law. Petitioners rely on our Supreme Court’s plurality decision in *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020) (*In re 2020 Canvass*), and the United States Court of Appeals for the Third Circuit’s (Third Circuit) recent decision in *Migliori v. Lehigh County Board of Elections* (3d Cir., No. 22-1499, filed May 20, 2022; Amended Judgment May 23, 2022) (opinion issued May 27, 2022).⁸ In *Migliori*, the Third Circuit held that “inasmuch as there is no dispute that ballots that have the wrong date [on the exterior envelopes] were counted in the” November 2021 General Election for the Office of Judge of the Court of Common Pleas of Lehigh County, the dating provisions under Sections 1306(a) and 1306-D(a) of the Election Code are immaterial under Section 10101(a)(2)(B) of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B). See *Migliori v. Lehigh County Board of Elections*, No.

⁶ Also on May 24, 2022, Petitioners filed an Application for the Supreme Court to Exercise Jurisdiction Pursuant to its King’s Bench Powers and/or Powers to Grant Extraordinary Relief. By per curiam order dated May 31, 2022, the Supreme Court, *inter alia*, denied the Application and declined to exercise its King’s Bench powers and/or extraordinary jurisdiction over this matter. See *Dave McCormick for U.S. Senate v. Chapman* (Pa., No. 46 MM 2022, filed May 31, 2022).

⁷ Under Section 1404(f) of the Election Code, 25 P.S. § 3154(f), county boards were required to submit the unofficial returns to the Acting Secretary by 5:00 p.m. on the Tuesday following the election, i.e., May 24, 2022.

⁸ An emergency application for a stay of the Third Circuit’s *Migliori*’s mandate, which was to go into effect on June 3, 2022, pending certiorari was granted on May 31, 2022, by the United States Supreme Court, through Associate Justice Samuel Alito. *Ritter v. Migliori* (U.S., No. 21A772, filed May 31, 2022). (“[T]he mandate of the . . . Third Circuit, case No. 22-1499, is hereby stayed pending further order of the undersigned or of the Court.”).

22-1499 (3d Cir. Amended Judgment May 23, 2022). Moreover, the Third Circuit held that, because it was undisputed that all of the ballots that had been set aside due to the lack of a date on the exterior envelope in the November 2021 election for the Office of Judge of the Court of Common Pleas of Lehigh County were received by the deadline, there was no basis on the record to refuse to count those ballots. *Id.*

In response to the Third Circuit's judgment in *Migliori*, the Department issued Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes (Guidance) on May 24, 2022,⁹ advising the County Boards to count ballots cast with undated exterior envelopes in the May 17, 2022 General Primary Election and segregate them from all other voted ballots pending ongoing litigation of the issue. The Guidance advised the same with respect to ballots containing incorrect dates.

Two applications to intervene were filed in this matter by: (1) Doctor Oz for Senate & Dr. Mehmet Oz (Oz Intervenors); and (2) the Republican National Committee and Republican Party of Pennsylvania (Republican Intervenors) (together, Intervenors). As no objections to these applications were made, the applications to intervene were granted at the hearing and confirmed by subsequent order.

By order dated May 25, 2022, this Court scheduled a hearing on the Motion for Special Injunction and directed the parties to file, *inter alia*, responses in opposition to the Motion for Special Injunction, if any, and a joint stipulation of facts indicating which County Boards are not following the Department's Guidance.

⁹ See <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-05-24-Guidance-Segregated-Undated-Ballots.pdf> (last visited June 2, 2022).

Petitioners have also filed on May 26, 2022, an Amended Application for Voluntary Discontinuance¹⁰ seeking to dismiss 12 County Boards from this action - - Adams, Bedford, Cameron, Clinton, Crawford, Elk, Potter, Sullivan, Union, Warren, Washington, and Wyoming -- on the basis that they either (1) did not receive any non-overseas/non-military absentee or mail-in ballots without a voter-supplied date on the exterior envelope; (2) already counted those ballots; or (3) are complying with the Department's Guidance to County Boards directing them to count, but segregate, the challenged ballots.¹¹

Pursuant to the Court's May 25, 2022 directive, responses in opposition to the Motion for Special Injunction were received from the following County Boards: Blair County; Westmoreland County; and Berks County. The general tenor of the first two responses is that this litigation is premature and should be resolved after *Migliori* is final and/or it is determined that *Migliori* applies to this election, and the last response contends that it is unclear that *Migliori* changed the status of Pennsylvania law. In addition, Blair County indicates that it is "act[ing] appropriately" by segregating its 17 ballots that lack a date on the exterior envelope and not including them in its unofficial totals, (Blair Cnty. Response at 3), and Berks County indicates that it is following the Department's Guidance. The Union County Board seeks to be removed as a respondent in this matter because the outcome of these proceedings will not implicate its official or unofficial results for the May 17,

¹⁰ Initially, Petitioners filed an Application for Voluntary Nonsuit, seeking to have five County Boards (Cameron, Clinton, Potter, Sullivan, and Wyoming) dismissed from this action on the basis that Petitioners' requested relief is not applicable to those County Boards, as they either did not receive any non-overseas/non-military absentee or mail-in ballots without a voter-supplied date on the exterior envelope or already counted those ballots.

¹¹ At this time and given that County Boards are alleged to be handling the ballots that lack a date on the exterior envelope differently, the Amended Application for Voluntary Discontinuance is denied without prejudice to reassert.

2022 Primary Election. Finally, the following County Boards filed responses indicating they take no position on the Motion for Special Injunction: Butler County; Chester County; Clearfield County; Franklin County; Lehigh County; Luzerne County; McKean County; and Northampton County. Clearfield and Luzerne County also indicated in their responses that they were following the Guidance.

Also in accordance with the Court's May 25, 2022 directive, the parties have filed a Joint Stipulation of Facts (filed on May 27, 2022 (Jt. Stip.)), and two Supplemental Joint Stipulations of Facts (filed on May 27, 2022 (First Suppl. Jt. Stip.), and May 31, 2022 (Second Suppl. Jt. Stip.), respectively), which are signed by some, but not all, of the parties regarding the status of the count. In the Joint Stipulation and as supplemented by the Second Supplemental Joint Stipulation, the parties stipulated that a number of county boards of elections:

- (1) were not named because they have already counted the absentee/mail-in ballots lacking dates on their exterior envelopes (Armstrong, Erie, Greene, Philadelphia, Schuylkill, Sullivan, Susquehanna, York (Jt. Stip. ¶¶ 12-13));
- (2) should be dismissed from the litigation, as they either did not receive any ballots lacking dates on the exterior envelopes or are doing as Petitioners ask (Adams, Bedford, Cameron, Clinton, Crawford, Elk, Potter, Union, Warren, Washington, Wyoming (Jt. Stip. ¶ 14));
- (3) should be dismissed from the litigation, as they did not receive any Republican absentee/mail-in ballots lacking dates on their exterior envelopes (Clarion, Columbia, Jefferson, Lackawanna, Perry, Venango, Juniata, Northumberland (Jt. Stip. ¶¶ 15; Second Suppl. Jt. Stip. ¶ 3));
- (4) should be dismissed from the litigation because they are complying with the Guidance by segregating and providing separate vote tallies to the Department (Buck, Centre, Chester, Delaware, Franklin, Indiana,

Luzerne, Montgomery, Tioga, Northampton (Jt. Stip. ¶¶ 17-18; Second Suppl. Jt. Stip. ¶ 4));

(5) it is not clear whether the board is complying with the Guidance (Somerset (Jt. Stip. ¶ 19));

(6) are complying with the Guidance but not reporting the results to the Department (Allegheny, Cambria, McKean (Jt. Stip. ¶ 20; Second Suppl. Jt. Stip. ¶ 5));

(7) should be removed because the board has already counted absentee/mail-in ballots lacking dates on their exterior envelopes in a single count with the rest of absentee/mail-in ballots that lack any other deficiency (Lehigh (Jt. Stip. ¶¶ 21-22));

(8) should be removed as parties because they have complied with the Guidance (Huntingdon, Mifflin (Jt. Stip. ¶¶ 23-24));

(9) are not following the Guidance (Bradford, Blair, Butler, Dauphin, Fayette, Lancaster, Lycoming, Westmoreland (Jt. Stip. ¶ 25));

(10) are following the Guidance but do not intend to count the absentee/mail-in ballots lacking dates on their exterior envelopes absent further clarity or finality from the Courts (Berks (Jt. Stip. ¶ 26));

(11) did not receive any absentee/mail-in ballots without dates on their exterior envelopes (Columbia, Union (Jt. Stip. ¶ 27)); or

(12) did not respond to Petitioners' questionnaire (Beaver, Carbon, Clearfield, Cumberland, Forest, Fulton, Lawrence, Lebanon, Mercer, Monroe, Montour, Pike, Snyder, Wayne (Jt. Stip. ¶ 28; Second Suppl. Jt. Stip. ¶ 6)).

The first Supplemental Joint Stipulation, filed on May 27, 2022, by Oz Intervenors and signed by several county boards of elections, purports to set forth then-current counts of the numbers of undated absentee/mail-in ballots lacking dates on the exterior envelopes timely received by various counties (Adams, Allegheny, Bucks, Cameron, Chester, Clinton, Crawford, Delaware, Franklin, Perry, Somerset, Union, Venango) for the Republican Primary Election for United States Senator,

totaling 143 absentee/mail-in ballots (38 for Oz and 52 for McCormick). (*See generally* First Suppl. Jt. Stip.)

The Acting Secretary filed an Answer to the Motion for Special Injunction, asserting that Petitioners are likely to succeed on the merits of their case based on *Migliori*, and, alternatively, under Pennsylvania law, which “does not allow rejecting timely received absentee or mail-in ballots just because the voter did not date the return envelope.” (*See* Secretary’s Answer to the Motion for Special Injunction at 10.)

Republican Intervenors filed an Answer and New Matter to the Motion for Special Injunction and a Motion to Strike the Joint Stipulation, asserting that it opposes the Motion for Special Injunction, does not agree to the Joint Stipulation, and further does not agree that **any** County Boards should be dismissed from this action. Republican Intervenors also claim that the seven county boards not named as Respondents in the Motion for Special Injunction should be joined, as all county boards are indispensable parties to this action. Oz Intervenors filed a Brief in Opposition to Petitioners’ Motion for Special injunction, which Republican Intervenors adopt.¹²

Hearing and Arguments

This Court held a hearing on the Motion for Special Injunction on May 31, 2022. At the start of the hearing, Petitioners; the Acting Secretary; various County Boards including Montgomery, Bucks, Franklin, Luzerne, Berks, Delaware, Westmoreland, and Chester; and Intervenors indicated they would not be presenting any witnesses or other evidence, and further agreed that the issue in this case is

¹² Oz Intervenors also filed Preliminary Objections to the Petition, which Republican Intervenors also adopt.

purely a legal one that may be resolved on the stipulated facts submitted by the parties. While some of the County Boards stated their position with respect to the Motion for Special Injunction, only Luzerne County subsequently offered argument in which it requested that the Court provide clear direction and guidance as to what to do with these ballots. The parties also agreed that it is undisputed that all absentee and mail-in ballots that lack dates on the exterior envelopes at issue in this case were timely received and contained no other irregularities as to the qualifications of the voters. Further, the parties generally acknowledged that County Boards were, in fact, counting ballots with incorrect dates on the exterior envelopes, such as a birth date.

Petitioners argue in support of the Motion for Special Injunction,¹³ relying first on the Third Circuit's decision in *Migliori* and Section 10101(a)(2)(B) of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), and, second, that the dating provisions under Sections 1306(a) and 1306-D(a) of the Election Code do not advance a "weighty interest" under state law given these facts, and violates the Free and Equal Elections Clause of the Pennsylvania Constitution, PA. CONST. art. I, § 5. Petitioners stress that the timeliness of receipt of the ballots in question that lack handwritten dates on the exterior envelopes is established both by "receipt stamps" placed on them by the County Boards, and separately through the unique barcode on the return envelope associated with the voter and the specific ballot, which allows for ballots to be tracked through the Statewide Uniform Registry of Electors (SURE) System.

Petitioners further argue that currently the County Boards are taking different positions with some counting the ballots that lack a date on the exterior envelopes,

¹³ Given the exigency of this matter and the fact that an automatic recount is currently ongoing, the Court dispenses with a lengthy summary of the parties' arguments contained in their filings and focus on the main points of their positions as argued at the hearing.

and others not counting them; thus, the Election Code's dating provisions, which are ambiguous and should be read liberally so as to avoid the unreasonable result of disenfranchising voters, are not being uniformly applied to all Pennsylvania voters raising a question of whether the Pennsylvania Constitution is being violated. Petitioners further contend that the date that matters for eligibility purposes is Election Day. Because these ballots were all timely received by 8:00 p.m. on Primary Election Day, and could not have been cast prior to the ballot having been received by them, there is no question that the ballots have been timely completed regardless of whether there is a date on the exterior envelope. That there are no "weighty interests" which the dates on these exterior envelopes address is evident, according to Petitioners, because ballots on which their exterior envelopes contain obviously incorrect dates, such as birth dates or past or future years, are accepted and counted. Petitioners question how it would be possible to know whether a date was written on an exterior envelope contemporaneously with signing the envelope. Thus, Petitioners argue, under the facts of this case, there is no compelling reason to disenfranchise eligible voters because they inadvertently did not handwrite a date on the exterior envelope.

With regard to Section 10101(a)(2)(B) of the Civil Rights Act, Petitioners contend that this Court should find the Third Circuit's interpretation of federal law persuasive authority and that its holding in *Migliori* is "clearly correct." Petitioners note that at least four Pennsylvania Supreme Court justices recognized the potential violation of the materiality provision by the dating provisions in *In re 2020 Canvass*, a decision that did not resolve the question presently before the Court. Regarding Section 10101(a)(2)(B) of the Civil Rights Act, Petitioners contend that there are two questions before the Court: (1) whether the exterior mailing envelope is a record

or paper requisite to voting; and (2) whether voters' omission of a handwritten date on that envelope is material in determining whether voters are qualified to vote in this election. Petitioners assert that the exterior envelope is in fact a record or paper requisite to voting, under the definitions of "vote" and "voting" in Section 10101(e) of the Civil Rights Act, and that a voter's omission of a handwritten date is not material to determining anything about the qualifications to vote under Pennsylvania law. This is particularly true, Petitioners argue, where, as is undisputed here, ballots that had exterior envelopes with patently wrong dates were counted.

Petitioners request that the Court rule in their favor and grant their requested relief because they have a likelihood of success on the merits and meet the other requirements for obtaining a preliminary injunction. Petitioners clarify that the relief they seek is an order directing the County Boards to (1) segregate and count the absentee and mail-in ballots that lacked a date on the exterior envelope and include those ballots in the County Boards' final tally submitted to the Department; or, alternatively, (2) segregate, count and separately report the votes cast by the absentee and mail-in ballots that lacked a date on the exterior envelope.

The Acting Secretary agrees with Petitioners' position that ballots without a handwritten date on the outer envelope received by 8:00 p.m. on Election Day with no other irregularities should be counted in accordance with both federal and state law on the subject. The Acting Secretary notes that incorrect dates, including birth dates and those dates using the wrong year, have been counted. The Acting Secretary explains that counties are directed to track when an absentee or mail-in ballot is received by stamping its return envelope with the "received" date, in addition to scanning the unique barcode on the return envelope, which is associated with both the voter and the specific ballot allowing the ballot to be tracked through

the SURE system. The Acting Secretary further points out that no good reasons were provided to the Third Circuit as to why the dating provisions are important and submits that the date on the outer envelope does not prevent fraud, the backdating of votes, or determining voter eligibility. The Acting Secretary also states that it is fair to read the Election Code's dating provisions as a suggestion to voters, which some do not follow. The Acting Secretary distinguishes our Supreme Court's decision in *In re 2020 Canvass* from this case, noting that the Supreme Court did not consider the issue under federal law, as there was no thorough advocacy of the issue in that case, and did not have the benefit of *Migliori*. Additionally, according to the Acting Secretary, federal and state law on this issue may be harmonized because the Election Code does not expressly impose a consequence when there is no date on the exterior envelope. The statutory ambiguity should be resolved to avoid conflicting with both federal and state law. The Acting Secretary admits that, should an envelope not be signed, the ballot would not be counted despite that there is also no consequence provided for omission of a signature in the Election Code because a signature goes to establishing the identity of the voter.

Oz Intervenors assert that the record is insufficient to show that Petitioners have met the requirements for preliminary injunctive relief. Specifically, Oz Intervenors note that there is no irreparable harm here, as no one knows how many ballots that lack a date on the envelopes there actually are and, further, there are discrepancies with the number of those ballots that have been reported to the Department and the current vote margin. Oz Intervenors state they had no objection to the segregation of ballots, as they believe all counties are currently complying with the Guidance to segregate. With these ballots already being segregated, Oz Intervenors assert that if, after the automatic recount, the number of ballots with an

undated exterior envelope is not sufficient to change the outcome of the race, then those ballots should not be counted, and the Court would not need to address the issue. Oz Intervenors also argue that this Court's unreported decision in *Ritter v. Lehigh County Board of Elections* (Pa. Cmwlth., No. 1322 C.D. 2021, filed January 3, 2022), *appeal denied*, (Pa., No. 9 MAL 2022, January 27, 2022), remains good law despite the Third Circuit's decision in *Migliori*, which involved the same election and candidates. Oz Intervenors point out that *Migliori* is not final and contradicts *Ritter*. Further, Oz Intervenors assert that, under *Ritter*, the Civil Rights Act's materiality provision does not apply here because it has nothing to do with a voter's qualifications. Oz Intervenors clarify that the consequence for not including a date on the exterior envelope would be the ballot not being counted, as opposed to, for example, removing a voter from the voter rolls. According to Oz Intervenors, merely invalidating a ballot under the Election Code for failure to include a date on the exterior envelope does not result in the voter being denied the right to vote under federal law. Oz Intervenors further contend that the materiality provision was originally enacted under the Fifteenth Amendment to the United States Constitution¹⁴ to prohibit race discrimination with respect to qualifications to vote. As there is no evidence of discrimination here and no indication that the dating provisions relate to the registration or qualifications to vote, but rather are state law provisions regarding the manner of voting, Oz Intervenors argue that the materiality provision does not apply. Finally, Oz Intervenors observe that the question of whether to count ballots with undated exterior envelopes may not even need to be

¹⁴ The Fifteenth Amendment provides, in relevant part, that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV.

decided here because there may be insufficient ballots that lack a dated exterior envelope to make a difference.

Republican Intervenors contend that Pennsylvania law is clear that ballots that lack a dated exterior envelope should not be counted. They claim that this is merely an attempt by Petitioners to change the rules after the game. Further, according to Republican Intervenors, this is a policy issue decided by the Legislature, which stated that the exterior envelopes in which the absentee and mail-in ballots are submitted shall be dated. Republican Intervenors point to Justice Dougherty's concurring and dissenting opinion in *In re 2020 Canvass* and argue that the date on the exterior envelope provides proof of both when the voter cast his or her ballot and whether the voter completed the ballot within the proper timeframe. Including a date also prevents fraudulent backdating. Republican Intervenors also point to Justice Donohue's statements in *In re 2020 Canvass* about barcodes on ballots to reflect that there is nothing factually different in this case because even in 2020 county boards were scanning the ballots when received. Republican Intervenors consistently take the position that **any** ballots that lack a date on the exterior envelope, regardless of party, should not be counted, and further, that the Department's Guidance is not binding on either the county boards or this Court. Republican Intervenors additionally assert that all 67 county boards of elections should have been named as Respondents in this action, as they are all indispensable parties and cannot be bound unless named. Further, Republican Intervenors argue that *Migliori* is clearly wrong, as the Pennsylvania Legislature has decided this policy issue and has the power to ensure integrity in elections. Republican Intervenors assert that the Court should not intervene so close to the election under *Purcell v. Gonzalez*, 549 U.S. 1 (2006), as it erodes the public's confidence in the election process.

Discussion

The Court now addresses Petitioners' Motion for Special Injunction, in which they seek an order from this Court directing the County Boards, to the extent that they are not doing so, to segregate the ballots that lack a dated exterior envelope, canvass (count) those ballots, and include those votes in the County Boards' vote totals reported to the Acting Secretary. In summary, the Acting Secretary, and some of the County Board Respondents, do not object to this relief and ask the Court to provide clarity to an issue that is being resolved differently in different counties. Intervenors, and some other of the County Board Respondents, object to the counting of the ballots that lack a dated exterior envelope and reporting of those totals to the Secretary. No one objects to the ballots that lack a dated exterior envelope being identified and segregated. As to counting the ballots that lack a dated exterior envelope, Oz Intervenors object to counting the ballots at this time, asserting that the Court should wait to see if doing so could change the outcome of the primary election. Republican Intervenors object to these ballots ever being counted, reasoning that they are invalid due to their being in violation of the Election Code based on the lack of a dated exterior envelope.

As the parties argue, the Motion for Special Injunction essentially seeks a preliminary injunction. "A preliminary injunction is an extraordinary remedy[.]" *Hart v. O'Malley*, 676 A.2d 222, 223 n.1 (Pa. 1996). There are six "essential prerequisites" that a party seeking a preliminary injunction must establish for a court to issue the injunction. *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003) (internal quotation marks omitted). As described by the Supreme Court, the party seeking the preliminary injunction bears a heavy burden of proof and is required to show that: (1) "an injunction is necessary

to prevent immediate and irreparable harm that cannot be adequately compensated by damages”; (2) “greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings”; (3) “a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct”; (4) “the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, [the petitioner] must show that it is likely to prevail on the merits”; (5) “the injunction it seeks is reasonably suited to abate the offending activity”; and (6) “a preliminary injunction will not adversely affect the public interest.” *Id.* “Because the grant of a preliminary injunction is a harsh and extraordinary remedy, it is to be granted only when and if **each** [factor] has been fully and completely established.” *Pa. AFL-CIO by George v. Commonwealth*, 683 A.2d 691, 694 (Pa. Cmwlth. 1996) (emphasis in original).

If the preliminary injunction is a mandatory one, meaning it directs “the performance of some positive act to preserve the status quo,” rather than a prohibitory one, which seeks to “enjoin the doing of an action that will change the status quo[,]” the plaintiff must establish “a clear right to relief[.]” *Mazzie v. Commonwealth*, 432 A.2d 985, 988 (Pa. 1981). This is because mandatory preliminary injunctions are more extraordinary and should be granted more sparingly than prohibitory preliminary injunctions. *Id.* “To establish a clear right to relief, the party seeking an injunction need not prove the merits of the underlying claim, but need only demonstrate that substantial legal questions must be resolved to determine the rights of the parties.” *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 506 (Pa. 2014). “For a right to be clear, it must be more than merely

viable or plausible” *Wolk v. Sch. Dist. of Lower Merion*, 228 A.3d 595, 611 (Pa. Cmwlth. 2020) (internal quotation marks and citation omitted). “If the party has met the other requirements for a preliminary injunction and the underlying cause of action raises important legal questions, the right to relief is clear.” *Lieberman Org. v. Philadelphia*, 595 A.2d 638, 640 (Pa. Cmwlth. 1990).

Notably, “[a] preliminary injunction [does not] serve as a judgment on the merits since by definition it is a **temporary remedy** granted until that time when the party’s dispute can be completely resolved.” *Appeal of Little Britain Township from Decision of Zoning Hearing Bd.*, 651 A.2d 606, 611 (Pa. Cmwlth. 1994) (emphasis added). Thus, this “proceeding is distinct from the final hearing on the merits.” *Lindeman v. Borough of Meyersdale*, 131 A.3d 145, 151 (Pa. Cmwlth. 2015).

With the above principles in mind, the Court turns to the Motion before it and the parties’ arguments beginning with the fourth prong of the *Summit Towne Centre* standard on which the parties focused their arguments -- whether Petitioners have shown that they are likely to prevail on the merits of their Petition, i.e., that their right to relief is clear.

Petitioners contend that they have established that they are likely to succeed on the merits in this matter such that they have a clear right to relief because, under Pennsylvania law, the Election Code is to be liberally construed so as not to deprive voters of their right to elect a candidate of their choice. They further argue that the dating provisions set forth in Sections 1306(a) and 1306-D(a) of the Election Code are not material to determining the qualifications of that voter under federal and Pennsylvania law and, therefore, an omission of the date may not be used to deny that voter the right to vote in this election.

Upon this Court’s review of the undisputed facts presented in this case, the parties’ arguments, and the relevant case law, the Court concludes that Petitioners have established that they are likely to succeed on the merits because they have “demonstrate[d] that substantial legal questions must be resolved to determine the rights of the parties,” *SEIU Healthcare Pa.*, 104 A.3d at 506, and their claim is “more than merely viable or plausible.” *Wolk*, 228 A.3d at 611. This conclusion weighs heavily in favor of issuing the requested injunctive relief.

The Court notes that no party has asserted, or even hinted, that the issue before the Court involves allegations of fraud. The parties have agreed that this election was free and fair. Nor is it disputed that the ballots in question were timely received, were cast by qualified Pennsylvania voters, and that ballots which had exterior envelopes that contained inaccurate dates, such as birth dates or dates that were clearly erroneous, were nonetheless opened, counted, and their votes included in the vote count. Finally, it is not disputed that County Boards throughout the Commonwealth are not uniform in how they are treating ballots that lack a date on the exterior envelope – some will not consider them at all, some are segregating them but not counting them, some are segregating and counting them but not reporting the vote in their totals, and some are segregating them, counting them, and including the recorded votes in their totals. Thus, without Court action, there exists the very real possibility that voters within this Commonwealth will not be treated equally depending on the county in which they vote.

The Court begins with the overarching principle that the Election Code should be liberally construed so as not to deprive electors of their right to elect a candidate of their choice. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020). For almost 70 years, the Pennsylvania Supreme Court has recognized that

[t]he power to throw out a ballot for minor irregularities, like the power to throw out the entire poll of an election district for irregularities, must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election **except for compelling reasons**. . . . The purpose in holding elections is to register **the actual expression of the electorate's will** and that computing judges should endeavor to see **what was the true result**. There should be the same reluctance to throw out a single ballot as there is to throw out an entire district poll, for sometimes an election hinges on one vote.

Appeal of James, 105 A.3d 64, 67 (Pa. 1954) (emphasis added). These principles are reflected in Section 10101(a)(2)(B) of the Civil Rights Act, which is the basis of Petitioners' first claim for relief.

Federal Civil Rights Act

Section 10101(a)(2)(B) of the Civil Rights Act states:

No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is **not material in determining whether such individual is qualified under State law to vote** in such election.

52 U.S.C. § 10101(a)(2)(B) (emphasis added). The requirement that an error or omission must be “material in determining whether such individual is qualified under State law to vote,” *id.*, is consistent with the state law requirement that only compelling reasons justify the disenfranchisement of a qualified voter, *Appeal of James*, 105 A.3d at 67. Under Section 10101(e) of the Civil Rights Act, “the word ‘vote’ includes **all action necessary to make a vote effective**, including, but not limited to, registration or other action required by State law prerequisite to voting, **casting a ballot, and having such ballot counted and included in the appropriate**

totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election.” 52 U.S.C. § 10101(e) (emphasis added). Section 10101(e) further provides that the words “qualified under State law” means “qualified according to the laws, customs, or usages of the State.” *Id.*

The law and customs of Pennsylvania provide that individuals are qualified to vote in Pennsylvania if they are 18 years old as of the election, a United States citizen for at least 1 month, a resident of the Commonwealth for at least 30 days, a resident of the relevant election district for at least 30 days immediately preceding the election, and are not an incarcerated felon. PA. CONST. art. VII, § 1; Section 701 of the Election Code, 25 P.S. § 2811; Section 1301(a) of the Voter Registration Act, 25 Pa.C.S. § 1301(a); *Mixon v. Commonwealth*, 759 A.2d 442, 451 (Pa. Cmwlth. 2000) (persons with felony convictions, but not currently incarcerated, may register to vote); 1972 Op. Att’y Gen. No. 121¹⁵ (concluding a durational requirement of longer than 30 days is unenforceable).

Petitioners contend that not counting timely received ballots due to the omission of the date on the exterior envelope is a denial of the right to vote in violation of Section 10101(a)(2)(B) of the Civil Rights Act because the dating provisions are not material to the four voters’ qualification requirements under state law. They argue that the dating provisions do not speak to or add any insight into a voter’s age, citizenship, residency, or incarceration status, and, therefore, cannot be used as a reason not to count an otherwise validly cast ballot. Petitioners cite the Third Circuit’s opinion in *Migliori*, which found the dating provisions are immaterial to a voter’s qualifications and eligibility under Section 10101(a)(2)(B), and ordered that such ballots were to be counted. Petitioners argue that *Migliori* answered the

¹⁵ See https://www.duq.edu/assets/Documents/law/pa-constitution/_pdf/attorney-general/1972-121.pdf (last visited June 2, 2022).

question directly posed here on almost the same factual predicate and, therefore, the Court should find the Third Circuit's reasoning persuasive and supportive of their likelihood of success on the merits.

Intervenors argue that Petitioners have not established a likelihood of success on their federal claim because Section 10101(a)(2)(B) only applies to determinations that affect a voter's actual qualification, and not to the signature requirement on an envelope in which the ballot is returned. They assert the Fifteenth Amendment to the United States Constitution, the authority under which the materiality provision was enacted, relates to racial discrimination in laws associated with the registration and qualification of voters and the materiality provision must be read in that context. As there is no allegation that the dating requirement constitutes discriminatory action in the registration or qualification of voters in Pennsylvania, this provision does not apply here. Thus, Intervenors contend, Petitioners do not have a clear right to relief as they are unlikely to be successful on the merits of the Petition. Intervenors further argue that there is no private right of action under Section 10101(a)(2)(B) that would allow Petitioners to bring this action, as the United States Attorney General has the right to enforce this provision.

Additionally, Intervenors argue that Petitioners cannot establish a likelihood of success on the merits of the federal claim based on *In re 2020 Canvass* and their belief that the majority of the Supreme Court justices determined that the dating provisions are justified by "weighty interests" precludes a finding that the dating provisions are not "material" under Section 10101(a)(2)(B). They further argue that this Court, in *Ritter*, applied those "weighty interests" in determining that Section 10101(a)(2)(B) was inapplicable in that case.

Upon our review of Section 10101(a)(2)(B), the facts here, and the Third Circuit's analysis in *Migliori*, the Court finds the analysis in *Migliori* persuasive in determining whether Petitioners have a likelihood of success on the question of federal law asserted. In doing so, the Court notes that neither the Pennsylvania Supreme Court in *In re 2020 Canvass* nor the Court in *Ritter* had the benefit of the thorough advocacy that has been presented to this Court in the case at bar, and to the Third Circuit in *Migliori*. They further did not have the benefit of the Third Circuit's interpretation of Section 10101(a)(2)(B) as it relates to the Election Code's dating provisions. While this Court is not bound by the decisions of the federal district and intermediate appellate courts on issues of federal law, "it is appropriate for a Pennsylvania appellate court to follow the Third Circuit's ruling on federal questions to which the U[nited] S[tates] Supreme Court has not yet provided a definitive answer."¹⁶ *W. Chester Sch. Dist. v. A.M.*, 164 A.3d 620, 630 (Pa. Cmwlth. 2017).

Migliori involved very similar factual circumstances as those alleged here – the refusal to count ballots of qualified Pennsylvania voters that were timely received but did not have a dated exterior envelope, notwithstanding that ballots with exterior envelopes that had incorrect or inaccurate dates were counted. In finding that Section 10101(a)(2)(B) was violated under those circumstances, the Third Circuit reasoned:

¹⁶ The Court recognizes that the United States Supreme Court, through Justice Alito, has issued a stay of the Third Circuit's mandate in *Migliori* requiring the counting and reporting of those ballots. Justice Alito's order did not include any discussion of the merits of the Third Circuit's decision. Issuance of the stay will maintain the status quo in which the office of Judge of the Court of Common Pleas is not yet filled by a candidate until there is a final determination as to who won the election. The issuance of the stay does not at this time affect the persuasive value of the *Migliori* Court's reasoning and analysis.

Th[is] requirement[, dating the exterior envelope,] is material if it goes to determining age, citizenship, residency, or current imprisonment for a felony.

Appellees cannot offer a persuasive reason for how this requirement helped determine any of these qualifications. And we can think of none. Appellees try to make several reaching arguments. None of which we find persuasive. For example, Appellees argue that the date confirms a person is qualified to vote from their residence since a person may only vote in an election district s/he has resided in for at least thirty days before the election and one's residency could change in a matter of days. It is unclear how this date would help . . . but even supposing it could, this argument assumes the date on the envelope is correct. . . .

Intervenor-Appellee Ritter also claims that the date requirement “serves a significant fraud-deterrent function” and “prevents the tabulation of potentially fraudulent back-dated votes.” Even if this were true, [Section 10101(a)(2)(B)] is clear that an “error or omission is not material” unless it serves to “determin[e] whether such individual is qualified under State law to vote in such election.” Fraud deterrence and prevention are at best tangentially related to determining whether someone is qualified to vote. But whatever sort of fraud deterrence or prevention this requirement may serve, it in no way helps the Commonwealth determine whether a voter's age, residence, citizenship, or felony status qualifies them to vote. It must be remembered that all agree that the disputed ballots were received before [the] 8:00 p.m. deadline on Election Day. It must also be remembered that ballots that were received with an erroneous date were counted. We are at a loss to understand how the date on the outside envelope could be material when incorrect dates – **including future dates** – are allowable but envelopes where the voter simply did not fill in a date are not. Surely, the right to vote is “made of sterner stuff” than that.

. . . . The nail in the coffin, as mentioned above, is that ballots were only to be set aside if the date was **missing** – not incorrect. If the substance of the string of numbers does not matter, then it is hard to understand how one could claim that this requirement has any use in determining a voter's qualifications.

[The date written on the exterior envelope] was not entered as the official date received in the SURE system, nor used for any other purpose. Appellees have offered no compelling reasons for how these

dates – even if correct, which we know they did not need to be – help determine one’s age, citizenship, residence, or felony status. And we can think of none. Thus, we find the dating provisions under 25 [P.S.] § 3146.6(a) and 3150.16(a) are immaterial under [Section 10101(a)(2)(B)].

Migliori, slip op. at 14-16 (footnotes omitted) (emphasis in original). At this stage of these proceedings, and in the absence of a definitive answer on this question by either the Pennsylvania Supreme Court or the United States Supreme Court, the Court finds *Migliori*’s analysis on this federal question sufficiently persuasive to conclude that Petitioners have established a likelihood of success on the merits on the Petition.

As to the argument that Petitioners cannot establish a likelihood of success on the merits because Section 10101(a)(2)(B) does not authorize a private cause of action, this Court is persuaded by the Third Circuit’s thorough and well-reasoned analysis of this issue in *Migliori*. Therein, the Third Circuit rejected this argument, finding that the standard set forth in *Gonzaga University v. Doe*, 536 U.S. 273, 384 (2002), was satisfied and that a private cause of action could be filed to enforce Section 10101(a)(2)(B)’s provisions. *Migliori*, slip op. at 9-13. Accordingly, this is not a basis to find that Petitioners will be unlikely to succeed on the merits of their claims.

The Court is also not persuaded that *In re 2020 Canvass* requires a different result. It is apparent from the opinions in that matter that the federal materiality question was not resolved in that case. The Opinion Announcing the Judgment of the Court (OAJC) found “persuasive” an argument that not counting ballots that lacked a dated exterior envelope could lead to a violation of Section 10101(a)(2)(B), 241 A.3d at 1074 n.5, but did not otherwise address the argument. Justice Wecht offered his own insight into that question, stating

The OAJC does not pursue this argument, except to acknowledge a handful of cases that might be read to suggest that the name and address, and perhaps even the dat[ing provisions] could qualify as “not material in determining whether such individual is qualified under State law to vote.” Given the complexity of the question, I **would not reach it without benefit of thorough advocacy**. But I certainly would expect the General Assembly to bear that binding provision in mind when it reviews our Election Code. **It is inconsistent with protecting the right to vote to insert more impediments to its exercise than considerations of fraud, election security, and voter qualifications require.**

Id. at 1080 n.54 (Wecht, J., concurring) (emphasis added). Finally, although Justice Dougherty’s concurring and dissenting opinion did discuss the “weighty interests” behind the dating provisions, there was no explicit or implicit reference to Section 10101(a)(2)(B). Thus, a careful reading of *In re 2020 Canvass* reflects that at least four justices of the Supreme Court recognized that the materiality provision of Section 10101(a)(2)(B) might be applicable, although not resolving the issue “without the benefit of thorough advocacy.” 241 A.3d at 1080 n.54 (Wecht, J., concurring). Because in this case, the Court has the “benefit of thorough advocacy,” *id.*, not present in *In re 2020 Canvass*, *In re 2020 Canvass* is not, on its face, incompatible with Petitioners’ likelihood of success on the merits of their Section 10101(a)(2)(B) claim.

Further, the specific material facts described in this case were not described by the Supreme Court in *In re 2020 Canvass*, particularly the fact that ballots with exterior envelopes that contained incorrect dates are counted and included in the election totals and that some counties are also including the ballots that lack the date on the exterior envelope in their election totals. Examining the “weighty interests” identified in Justice Dougherty’s concurring and dissenting opinion, and cited in Justice Wecht’s concurring opinion, as supporting their respective positions that the

legislative intent in using the word “shall” in relation to the dating provisions was that they be mandatory, not directory provisions, reveals that those interests identified were, at least implicitly, based on the belief that the date written on the exterior envelope **was the actual date the ballot was completed.**

For example, Justice Dougherty opined that “the date on the ballot envelope provides proof of when the elector **actually executed** the ballot in full,” “[t]he presence of the date establishes a **point in time** against which to measure the elector’s eligibility to cast the ballot,” or that the date could be used to “ensure[] the elector completed the ballot **within the proper time frame.**” *Id.* at 1090-91 (Dougherty, J., concurring and dissenting) (emphasis added) (internal quotation marks omitted). Each of these interests presume that the voter wrote the date on which the voter completed the ballot, and not their birthday or some date other than the day they executed the exterior envelope. However, it is not disputed in this matter that exterior envelopes that **clearly** used dates other than the day of execution have not been invalidated. And it would be difficult to determine whether the date accurately reflects the day the ballot was signed. Moreover, here there is no dispute that **all of the ballots were received by 8:00 p.m. on Primary Election Day**, which was not necessarily true in *In re 2020 Canvass*, which involved a unique situation where absentee and mail-in ballots were to be counted, by order of the Supreme Court, if they arrived within three days of Election Day, making it more relevant to know when, theoretically, a voter filled out, dated, and signed the exterior envelope. These “weighty interests,” and the interpretation of the legislative intent behind the use of “shall” in those provisions, are thus undermined by the facts in this case because a ballot with an exterior envelope containing an incorrect date, which can be counted, does not ensure or establish anything in relation to fraud prevention,

electoral security, ballot confidentiality, or voter eligibility. When there is no factual basis for concluding that the dating provisions serve to address the “weighty interests,” interpreting the word “shall” as mandatory, upon pain of disenfranchising qualified voters whose ballots were timely received, raises questions as to whether that interpretation fulfills the legislative intent behind those provisions. Moreover, the date that matters for eligibility purposes is the date of Election Day, which is the day of “the election.” See PA. CONST. art. VII, § 1 (speaking of voter eligibility in terms of being qualified as of “the election”); 25 Pa.C.S. § 1301 (speaking of voter eligibility in terms of “the day of the election” or “the election”). Thus, if the voter died, moved or otherwise became ineligible to vote prior to Election Day, even if the voter was eligible when signing and dating the exterior envelope, that ballot would not count, **no matter what date was on the outer envelope**. Because these ballots were all timely received by 8:00 p.m. on Primary Election Day, and could not have been cast prior to the ballot having been received, there is no question that the ballots have been timely completed whether or not there is a date on the outer envelope. Thus, the “weighty interests” identified in *In re 2020 Canvass* are not as heavy when viewed through the lens of the facts in this case, and particularly when weighed against disenfranchising a qualified voter. Accordingly, this part of *In re 2020 Canvass* is not, on its face, incompatible with Petitioners’ likelihood of success on the merits of their Section 10101(a)(2)(B).

As to *Ritter*, the Court notes that, as an unreported opinion, *Ritter* is not binding authority under Pennsylvania Rule of Appellate Procedure 126(b), Pa.R.A.P. 126(b), and Section 414(a) of this Court’s Internal Operating Procedures, 210 Pa. Code § 69.414(a). More importantly, there are several distinguishing factors between *Ritter* and this case. First, there is no mention in the *Ritter* opinion of the

material facts that are presently before the Court in this case, on which this Court relies, such as the fact that ballots that had exterior envelopes with incorrect or inaccurate dates on them are counted. This is important because *Ritter* relied on the “weighty interests” as described in Justice Dougherty’s concurring and dissenting opinion in *In re 2020 Canvass* and, as discussed, the material facts in this case do not support such a finding. Second, unlike here, *Ritter* involved a challenge to the actions of a **single** county board of elections, not a challenge to boards of election throughout the Commonwealth in a statewide election. This is important because *Ritter* did not have to consider the fact that different counties were treating the ballots without a dated exterior envelope differently, leading to a question of unequal treatment of Pennsylvania voters casting ballots for the same candidates for the same office. Finally, it is unclear that *Ritter* had the benefit of the level of advocacy on the Section 10101(a)(2)(B) issue that was presented in this matter. In this regard, *Ritter* noted that the trial court had raised Section 10101(a)(2)(B) *sua sponte*, and that it was addressing this issue “[t]o the extent the parties refer[red]” to Section 10101(a)(2)(B) in their presentations. *Ritter*, slip op. at 18. Thus, it is not clear that *Ritter* fully addressed the arguments that are now raised to the Court and under the same factual predicate. Accordingly, the Court declines to find that *Ritter* precludes Petitioners from establishing that they will be successful on the merits of their Petition.

State Law

In addition to the above federal law claim, Petitioners also assert a state law claim as a basis for relief. The Pennsylvania Constitution declares that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” PA. CONST. art. I, § 5. For over

100 years the Pennsylvania Supreme Court has held that elections are “free and equal” when “the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). Moreover, efforts must be made to avoid disenfranchisement even when it happens “by inadvertence.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 812 (Pa. 2018) (citing *In re New Britain Borough Sch. Dist.*, 145 A. 597, 599 (Pa. 1929)).

To summarize, the Election Code should be liberally construed so as not to deprive electors of their right to elect the candidate of their choice. The power to throw out a ballot for minor irregularities should be used very sparingly, and voters should not be disenfranchised except for compelling reasons. The purpose in holding an election is to register the actual expression of the electorate’s will and to see the true result.

Intervenors argue that this Court should conclude that Petitioners cannot establish a likelihood of success on the merits based on *In re 2020 Canvass* in which, they argue, a majority of the Supreme Court justices determined that the dating provisions are justified by “weighty interests.” These interests as expressed in *In re 2020 Canvass*, are the date on the exterior envelope “provides proof of when the elector actually executed the ballot in full,” “[t]he presence of the date establishes a point in time against which to measure the elector’s eligibility to cast the ballot,” or the date could be used to “ensure[] the elector completed the ballot within the proper time frame.” 241 A.3d at 1090-91 (Dougherty, J., concurring and dissenting) (internal quotations omitted).

As discussed in the Court’s consideration of Petitioners’ federal law claim, the material facts set forth in this case were **not** set forth in *In re 2020 Canvass*,

particularly the fact that ballots that had exterior envelopes with incorrect dates were counted and included in the election totals and that some counties did count and include those ballots in the election totals. The “weighty interests” identified in that case as supporting a mandatory reading of the term “shall” in the dating provisions, and relied upon by Intervenors, reveal that those interests, at least implicitly, are based on the belief that the date written on the exterior envelope **was an accurate date**. However, because it is not disputed in this matter that exterior envelopes that **clearly** used dates other than the day of execution have not been invalidated. Moreover, because there is no dispute that **all of the ballots were received by 8:00 p.m. on Election Day**, which was not necessarily true in *In re 2020 Canvass*, these “weighty interests,” and the associated interpretation of the dating provisions as mandatory, are thus undermined by the facts in this case. Under **the facts in this case**, as thoroughly described earlier in this opinion, the absence of a handwritten date on the exterior envelope could be considered a “minor irregularity” without a compelling reason that justifies the disenfranchisement of otherwise eligible voters by not counting their timely received ballot. Accordingly, these statements in *In re 2020 Canvass* are not, on their face, inconsistent with Petitioners’ likelihood of success on the merits under their state law claim. Further, as *Ritter* lacked the same factual predicate as the matter currently before the Court and relied upon the “weighty interests” analysis in *In re 2020 Canvass* to support its decision, it too is not inconsistent with Petitioners’ likelihood of success on the merits.

For these reasons, the Court concludes that Petitioners have established that they are likely to prevail on the merits of their Petition and have a clear right to relief. There is no question that Petitioners have raised substantial legal questions that must be resolved and that their right to this relief is “more than merely viable or plausible.”

Wolk, 228 A.3d at 611 (Pa. Cmwlth. 2020). Therefore, this prong weighs heavily in favor of granting the preliminary injunction.

The Remaining Prongs

The Court now considers the remaining prongs of the *Summit Towne Centre* standard. In examining prongs 1, 2 and 6, which relate to the equities of granting relief as opposed to denying the relief, the Court agrees that Petitioners have met their burden of proving their entitlement to relief. Respectively, those prongs require Petitioners to show that “an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages”; “greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings”; and “a preliminary injunction will not adversely affect the public interest.” *Summit Towne Centre, Inc.*, 828 A.2d at 1001. Here, numerous qualified Pennsylvania voters whose timely filed ballots are being rejected and not counted on a basis that appears to be inconsistent with state law and that the Third Circuit has held violates the Civil Rights Act, effectively disenfranchising them and depriving Petitioners of votes that were cast for Mr. McCormick, is irreparable harm that cannot be compensated by damages, is a great injury, and, in this Court’s view, contrary to the public’s interest. While Oz Intervenors argue that there will be no irreparable harm unless and until it is determined that counting the ballots that lack a dated exterior envelope will make a difference in the outcome of the primary election and both Intervenors argue that the public’s interest in ensuring the confidence in the election process will be harmed, the Court is not persuaded. Granting temporary relief that precludes the potential disenfranchisement of qualified Pennsylvania voters who timely cast ballots while a

determination is made as to whether that alleged disenfranchisement violates state or federal law is not inconsistent with the public's interest in ensuring confidence that the election process will count votes cast by qualified voters absent compelling circumstances, which may not be present here. As this primary election moves through the recount stage, the ability to determine which votes will make a difference is an ever-changing number and the Court concludes that to wait and direct relief, beyond segregation, will only delay the election process further. In addition, to the extent Intervenors rely on *Purcell*, the Court is unconvinced, at this stage of the proceeding, that a prohibition against federal courts weighing in on state election rules and laws on the eve of an election, precludes an after-the-fact state court challenge to the actual implementation of those state laws. Accordingly, these prongs weigh in favor of granting the requested injunctive relief.

As to prongs 3 and 5, which respectively require Petitioners to establish that “a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct”; and “the injunction it seeks is reasonably suited to abate the offending activity,” the Court concludes Petitioners have done so. Because the offending activity is the alleged violation of state law and the Civil Rights Act by not counting timely received ballots of qualified Pennsylvania voters due to an omission of a date on the exterior envelope that may not involve a “weighty interest” under state law under these facts and that is immaterial under Section 10101(a)(2)(B), directing that those ballots be counted is reasonably suited to abate that activity. However, cognizant that this is only a preliminary determination and a full decision on the merits of this issue is yet to be made, the Court agrees that segregating those ballots, such that the number of ballots lacking an undated envelope being counted is readily discernable in the event a

different conclusion is reached upon a merits-based review, is likewise suitable. As to the status quo, this case presents an interesting situation where the status quo is that every County Board is making its own determination on what to do with these ballots. This raises the specter of the unequal treatment of qualified voters in Pennsylvania in that some qualified voters who happened to not date their exterior envelopes are having their vote counted and others are not. Under these circumstances, and, given the undeniable importance of the right of citizens to engage in the elective process and have their votes counted in the absence of “compelling reasons” to disenfranchise them, *Appeal of James*, 105 A.3d at 67, the Court concludes that providing clarity and guidance, so that voters’ ballots are treated the same, satisfies this requirement. Thus, these prongs support granting Petitioners requested injunctive relief.

Conclusion

The right to vote in a free and fair election is essential in a representative democracy. The Court recognizes the tireless and dedicated efforts of the County Boards in the critical work of counting valid ballots. The Court also commends the candidates for their dedication and efforts to ensure that the election process is undertaken in a manner consistent with state and federal law. Under the facts in this case, and where there has been no answer to how requiring a handwritten date on the outside envelope supports a weighty interest when ballots with incorrect dates on their exterior envelopes are counted, a substantial question is raised as to whether voters are being disenfranchised based on a requirement that is immaterial to a voter’s qualification in violation of Section 10101(a)(2)(B) of the Civil Rights Act and/or without a compelling reason in violation of state law.

Having concluded that Petitioners have met the six essential prerequisites for obtaining a preliminary injunction, the Court will grant the Motion for Special Injunction as follows: the County Boards are directed, if they are not already doing so, to segregate the ballots that lack a dated exterior envelope, to canvass those ballots assuming there are no other deficiencies or irregularities that would require otherwise, and to provide two vote tallies to the Acting Secretary, one that includes the votes from those ballots without a dated exterior envelope and one that does not. Thus, when a final decision on the merits of whether the ballots that lack a dated exterior envelope must be counted or not, the Acting Secretary will have the necessary reports from the County Boards.



RENÉE COHN JUBELIRER, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dave McCormick for U.S. Senate, and :
David H. McCormick, :
Petitioners :

v. :

No. 286 M.D. 2022

Leigh M. Chapman, in her official :
capacity as Secretary of State for the :
Commonwealth, Adams County Board :
of Elections, Allegheny County Board :
of Elections, Beaver County Board of :
Elections, Bedford County Board of :
Elections, Berks County Board of :
Elections, Blair County Board of :
Elections, Bradford County Board of :
Elections, Bucks County Board of :
Elections, Butler County Board of :
Elections, Cambria County Board of :
Elections, Cameron County Board of :
Elections, Carbon County Board of :
Elections, Centre County Board of :
Elections, Chester County Board of :
Elections, Clarion County Board of :
Elections, Clearfield County Board of :
Elections, Clinton County Board of :
Elections, Columbia County Board of :
Elections, Crawford County Board of :
Elections, Cumberland County Board :
of Elections, Dauphin County Board of :
Elections, Delaware County Board of :
Elections, Elk County Board of :
Elections, Fayette County Board of :
Elections, Forest County Board of :
Elections, Franklin County Board of :
Elections, Fulton County Board of :
Elections, Huntingdon County Board :
of Elections, Indiana County Board of :
Elections, Jefferson County Board of :
Elections, Juniata County Board of :
Elections, Lackawanna County Board :

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Elections, McKean County Board of :
Elections, Mercer County Board of :
Elections, Mifflin County Board of :
Elections, Monroe County Board of :
Elections, Montgomery County Board :
of Elections, Montour County Board of :
Elections, Northampton County Board :
of Elections, Northumberland County :
Board of Elections, Perry County :
Board of Elections, Pike County Board :
of Elections, Potter County Board of :
Elections, Snyder County Board of :
Elections, Somerset County Board of :
Elections, Sullivan County Board of :
Elections, Tioga County Board of :
Elections, Union County Board of :
Elections, Venango County Board of :
Elections, Warren County Board of :
Elections, Washington County Board :
of Elections, Wayne County Board of :
Elections, Westmoreland County Board :
of Elections, and Wyoming County :
Board of Elections, :
Respondents :

ORDER

NOW, June 2, 2022, Petitioners’ Motion for Immediate Special Injunction is **GRANTED**, and the County Boards are directed, if they are not already doing so, to segregate the ballots that lack a dated exterior envelope, to canvass those ballots assuming there are no other deficiencies or irregularities that would require

otherwise, report two vote tallies to Leigh M. Chapman, Acting Secretary of the Commonwealth (Acting Secretary), one that includes the votes from ballots that lack dated exterior envelopes and one that does not; and to report a total vote tally which includes the votes from ballots that had both dated and undated exterior envelopes as the total votes cast. Additionally, the Amended Application for Voluntary Discontinuance filed by Dave McCormick for U.S. Senate, and David H. McCormick is **DENIED** without prejudice.



RENÉE COHN JUBELIRER, President Judge

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