

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEIGH M. CHAPMAN, Acting Secretary of the
Commonwealth and the PENNSYLVANIA
DEPARTMENT OF STATE,

Petitioners,

v.

No. ____ MD 2022

BERKS COUNTY BOARD OF ELECTIONS,
FAYETTE COUNTY BOARD OF ELECTIONS, and
LANCASTER COUNTY BOARD OF ELECTIONS,

Respondents.

NOTICE TO PLEAD

To: Berks County Board of Elections, Fayette County Board of Elections,
and Lancaster County Board of Elections.

You are hereby notified to file a written response to the enclosed petition
within thirty days from service hereof, in accordance with Pennsylvania Rule of
Appellate Procedure 1516(b), or a judgment may be entered against you.

Dated: July 11, 2022

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Attorney General

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application forthcoming)
Marina Eisner (*pro hac vice* application
forthcoming)
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NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within thirty (30) days after this complaint and notice are served, in accordance with Pennsylvania Rule of Appellate Procedure 1516(b), by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

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

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

MidPenn Legal Services
213-A North Front Street
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEIGH M. CHAPMAN, Acting Secretary of the
Commonwealth and the PENNSYLVANIA
DEPARTMENT OF STATE,

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No. ____ MD 2022

BERKS COUNTY BOARD OF ELECTIONS,
FAYETTE COUNTY BOARD OF ELECTIONS, and
LANCASTER COUNTY BOARD OF ELECTIONS,

Respondents.

**PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT IN
MANDAMUS OR IN THE NATURE OF AN ACTION FOR INJUNCTIVE
AND DECLARATORY RELIEF**

Introduction

1. Three boards of elections refuse to execute their mandatory duty to certify the results of the 2022 primary election based on a full and accurate count of every lawfully cast vote, which, as this Court has ordered, includes timely received absentee and mail-in ballots cast by qualified voters even if the voter failed to write a date on the declaration printed on the ballot's return envelope. The Acting Secretary of the Commonwealth and the Department of State seek an order requiring that the three outlier counties certify returns for the 2022 primary election that include every lawfully cast vote.

Jurisdiction

2. This Court has original jurisdiction under 42 Pa.C.S. § 761(a)(1), (2) because this is an action brought by an officer of the Commonwealth government and an agency of the Commonwealth government.

Parties

3. Petitioners are Acting Secretary of the Commonwealth Leigh M. Chapman and the Pennsylvania Department of State. Among other duties, the Acting Secretary must “receive from county boards of elections the returns of primaries and elections,” “canvass and compute the votes cast for candidates and upon questions as required by the provisions of this act,” “proclaim the results of such primaries and elections,” and “issue certificates of election to the successful candidates at such elections.” 25 P.S. § 2621(f).

4. Respondents are the boards of elections from Berks, Fayette, and Lancaster Counties. These boards have “jurisdiction over the conduct of primaries and elections” in their respective counties. 25 P.S. § 2641(a). As part of each board’s responsibilities, it must “receive from district election officers the returns of all primaries and elections,” “canvass and compute the same,” and “certify, no later than the third Monday following the primary or election, the results thereof to the Secretary of the Commonwealth.” 25 P.S. § 2642(k).

Statement of Facts

5. For every general or primary election, each county board of elections has a mandatory obligation to canvass and compute the election returns. 25 P.S. §§ 2642(k), 3154(f). Boards do so based on a “computation and canvassing of the [election] returns from various districts of the county.” 25 P.S. § 3154(a); *see also* 25 P.S. 2642(k) (describing boards’ duty “to receive from district election officers the returns of all primaries and elections, [and] to canvass and compute the same”).

6. As it relates to absentee or mail-in ballots, the Election Code defines the ballots that shall be canvassed and counted as those that were returned to the voter’s board of elections by 8 p.m. on Election Day, if the voter’s identity has been verified and the declaration on the ballot’s return envelope is “sufficient” (assuming the voter has not died before Election Day and the ballot is not being challenged). 25 P.S. § 3146.8(g).

7. Once a county board’s computation of its returns is finalized, it “shall certify the returns so computed in said county.” 25 P.S. § 3154(f); *see also* 25 P.S. § 2642(k).

8. County boards keep one copy of the certified returns. 25 P.S. § 3158.

9. In a general or primary election that includes a contest for statewide office, for a seat in the General Assembly, or for federal office (among some other positions), “a separate certificate, showing totals of the returns cast for each of

such offices respectively, shall also be forwarded by the county board to the Secretary of the Commonwealth on forms furnished by the Secretary of the Commonwealth.” 25 P.S. § 3158; *see also* 25 P.S. § 2642(k).

10. After receiving certified results from the county boards, the Secretary must then “proceed to tabulate, compute and canvass the votes cast for all candidates” and “shall thereupon certify and file in his office the tabulation thereof.” 25 P.S. § 3159; *see also* 25 P.S. § 2621(f).

11. Final certification of the results of the 2022 primary election has been delayed because of litigation.

12. Most significantly, that litigation concerned whether county boards of elections must canvass—and thus include in their certified results—timely received absentee and mail-in ballots cast by a qualified voter if the voter failed to write a date on the declaration printed on the ballot’s return envelope.

13. In one case, concerning a judicial race in the 2021 general election, the U.S. Court for Appeals for the Third Circuit ruled that 52 U.S.C. § 10101(a)(2)(B) forbids a Pennsylvania board of elections from refusing to count a timely received absentee or mail-in ballot on the basis that a qualified voter did not write a date on the return envelope’s declaration. *Migliori v. Lehigh County Bd. of Elections*, 36 F.4th 153, 162-64 (3d Cir. 2022).

14. The U.S. Supreme Court denied a motion to stay the Third Circuit's ruling. *Ritter v. Migliori*, 142 S. Ct. 1824 (2022).

15. In a second case, this Court ruled that § 10101(a)(2)(B) and Pennsylvania law require county boards of elections to canvass timely received absentee and mail-in ballots cast by qualified voters even if the voter did not write a date on the declaration printed on the return envelope. *See generally* Memorandum Opinion, *McCormick v. Chapman*, No. 286 MD 2022 (Pa. Commw. Ct. June 2, 2022).

16. This Court issued a preliminary injunction, ordering that county boards of elections (including the boards for Berks, Fayette, and Lancaster counties, all of which were parties) canvass those ballots for the 2022 primary election. *See* Order, *McCormick v. Chapman*, No. 286 MD 2022 (Pa. Commw. Ct. June 2, 2022).

17. So that accurate results could be certified if a different conclusion was reached at final judgment, this Court ordered county boards to report to the Acting Secretary two tallies: one including and the other excluding absentee and mail-in ballots cast without the voter's handwritten date on the return envelope. Memorandum Opinion at 37, *McCormick v. Chapman*, No. 286 MD 2022 (Pa. Commw. Ct. June 2, 2022)

18. After an appeal of the order in *McCormick* was withdrawn, the original action was voluntarily discontinued. This Court later denied a request to vacate its order. *See Order, McCormick v. Chapman*, No. 286 MD 2022 (Pa. Commw. Ct. June 10, 2022)

19. Following the conclusion of *Migliori* and *McCormick*, the Department emailed all county boards on June 17, 2022, instructing them to transmit by June 23 a final certification of the results of the 2022 primary election that included timely received absentee and mail-in ballots cast by qualified voters even if the voter neglected to write a date on the ballot's return envelope. In other words, the Department instructed the boards to certify results that include the very ballots that this Court ordered in *McCormick* must be canvassed, which also are the type of ballots that the Third Circuit ruled in *Migliori* must be counted.

20. On June 27, 2022, the Department emailed county boards that had not yet sent to the Department certified results reflecting totals that included the ballots that were at issue in *McCormick*, and that were described in *Migliori*. The Department instructed the boards to do so by June 29.

21. On June 29, 2022, the Department wrote county boards that still had not sent accurately certified returns, notifying them of the Department's intent to pursue all available legal remedies if the board did not notify the Department it planned to send certified results reflecting totals that included the ballots at issue in

McCormick, and that were described in *Migliori*. The Department instructed the boards send this information by July 1.

22. On July 5, 2022, and again on July 8, 2022, the Department wrote the sole county board that still had not responded to any of the Department's prior communications, asking for its position.

23. Sixty-four of the 67 boards of elections have provided certified returns for the 2022 primary that include timely received absentee and mail-in ballots cast by qualified voters who failed to write a date on the declaration printed on the ballot's return envelope. Three boards of elections, however, still refuse to include those ballots in their certification.

24. The Berks County Board of Elections informed the Department on June 23, 2022, that it would not transmit to the Department certified election results that included any timely received absentee or mail-in ballot for which the voter failed to handwrite a date on the return envelope's declaration. The Berks County board confirmed that position in response to the Department's June 29 letter.

25. The Fayette County Board of Elections informed the Department on June 26, 2022, that it would not transmit to the Department certified election results that included any timely received absentee or mail-in ballot for which the voter failed to handwrite a date on the return envelope's declaration. The Fayette

County board did not respond to any of the Department's subsequent communication.

26. The Lancaster County Board of Elections informed the Department on June 27, 2022, that it would not transmit to the Department certified election results that included any timely received absentee or mail-in ballot for which the voter failed to handwrite a date on the return envelope's declaration. On July 5, 2022, the Lancaster County board confirmed its position.

27. These three boards have a non-discretionary obligation to include those ballots in their computations and in their final certifications under 25 P.S. § 2642(k), 25 P.S. § 3154, and 25 P.S. § 3158.

CLAIM I - WRIT OF MANDAMUS

28. Petitioners reallege and incorporate by reference the preceding allegations in this Petition as if fully set forth herein.

29. A writ of mandamus is used to "compel official performance of a ministerial act or mandatory duty where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other appropriate and adequate remedy." *Jackson v. Vaughn*, 777 A.2d 436, 438 (Pa. 2001); *see also MFW Wine Co., LLC v. Pennsylvania Liquor Control Bd.*, 231 A.3d 50, 56 (Pa. Commw. Ct. 2020).

30. “A ministerial act is one which a public officer is required to perform upon a given state of facts and in a prescribed manner in obedience to the mandate of legal authority.” *Philadelphia Firefighters’ Union, Loc. 22, Int’l Ass’n of Firefighters, AFL-CIO ex rel. Gault v. City of Philadelphia*, 119 A.3d 296, 303 (Pa. 2015) (internal citations omitted).

31. “A clear legal right to relief is shown where the right to require performance of the act is clear, and a corresponding duty is shown where the governing law contains directory language, requiring that an act shall be done.” *Philadelphia Firefighters’ Union*, 119 A.3d at 304 (internal citations omitted).

32. “A want of any other adequate remedy is established where there is no alternative form of relief.” *Id.*

33. County boards of elections have a mandatory duty to compute the returns for any general or primary election. 25 P.S. §§ 2642(k), 3154(f). They do so based on the election returns provided to them by the county’s various election districts. 25 P.S. § 3154(f)

34. With respect to absentee and mail-in ballots, election districts must canvass and count as part of their election returns every ballot returned to the board of elections by 8 p.m. on Election Day if the voter’s identity was verified and the declaration on the ballot’s return envelope was sufficient (assuming the voter did

not die before Election Day and the ballot is not being challenged). 25 P.S. § 3146.8(d), (g).

35. Once election districts have canvassed and counted all lawfully cast ballots, and sent those returns to the board of elections, the boards “shall certify the returns so computed in said county.” 25 P.S. § 3154(f); *see also* 25 P.S. § 2642(k). For certain elections, including the 2022 primary election, boards of elections must send certified results to the Secretary, 25 P.S. §§ 2642(k), 3158, who then performs her own computation and certification, 25 P.S. §§ 2621(f), 3159.

36. Consistent with this statutory framework, this Court’s order in *McCormick* requires the three Respondent boards to certify election returns that include ballots submitted without a handwritten date on the ballot’s return envelope. Because boards must certify results based on the returns provided to them by their election districts, and because this Court ordered that ballots without a handwritten date be canvassed—and thus counted in those returns—the Respondent boards must include those ballots as part of their certified results.

37. Until the Respondent boards certify results that include the ballots that this Court already ordered must be canvassed for the 2022 primary election, the boards are failing to perform their mandatory statutory duty.

38. The Department’s and Acting Secretary’s right to relief is clear because they must receive from every county board of elections certified results for

the 2022 primary election that reflect an accurate computation of all lawfully cast ballots.

39. The Acting Secretary has no alternative recourse because she may not direct the counties to compute, certify, and transmit any particular results.

40. A writ of mandamus should therefore issue, directing the Respondent boards to complete their statutorily prescribed obligation to certify the results of the 2022 primary election based on a count of all lawfully cast and canvassed ballots.

**CLAIM II – DECLARATORY AND INJUNCTIVE RELIEF BASED ON
EXCLUSION OF VALID BALLOTS FROM RESPONDENT BOARDS’
CERTIFIED ELECTION RETURNS**

41. Petitioners reallege and incorporate by reference the preceding allegations in this Petition as if fully set forth herein.

42. Pennsylvania law requires county boards of elections to compute the returns for any general or primary election. 25 P.S. §§ 2642(k), 3154(f). Once the computation of returns is finalized, counties “shall certify the returns so computed in said county.” 25 P.S. § 3154(f); *see also* 25 P.S. § 2642(k). Certified returns are then sent to the Secretary, who performs her own computation and certification. 25 P.S. §§ 2621(f), 3159.

43. A board's computation of election returns must include every lawfully cast and canvassed ballot, and may not exclude any ballot for any reason not permitted under Pennsylvania or federal law.

44. Pennsylvania law requires each board to include in its election returns—and ultimately in its final certification—timely and otherwise valid absentee and mail-in ballots submitted without a handwritten date on the declaration on the return envelope because such a signed declaration is “sufficient” under 25 P.S. § 3146.8(g), and the Election Code does not otherwise state that those ballots should be set aside or voided during canvassing.

45. Interpreting Pennsylvania law to allow a county board of election to exclude a ballot from its final certified results because of a minor and meaningless irregularity, such as a voter omitting a date from the declaration on a timely received ballot, would fail to fulfill the purpose of the Pennsylvania Election Code and would risk a conflict with both the Pennsylvania Constitution and federal law. *See* Memorandum Opinion at 31-34, *McCormick v. Chapman*, No. 286 MD 2022 (Pa. Commw. Ct. June 2, 2022).

46. Further, declaratory and injunctive relief is appropriate for the independent ground that federal law affirmatively prohibits any board of elections from using the omission of a handwritten date on the declaration of a timely

received absentee or mail-in ballot's return envelope as the basis for excluding the ballot from the board's certified election returns.

47. Under federal law, no county can “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).

48. A voter's failure to write a date on the declaration of a timely received ballot's return envelope is an immaterial omission under this federal statute.

49. Indeed, both the Third Circuit and this Court have recently ruled as much. *Migliori v. Lehigh County Bd. of Elections*, 36 F.4th 153, 162-64 (3d Cir. 2022); Memorandum Opinion at 22-31, *McCormick v. Chapman*, No. 286 MD 2022 (Pa. Commw. Ct. June 2, 2022).

50. For these reasons, this Court should declare that the Respondent boards' certified results for the 2022 primary election may not exclude any absentee or mail-in ballot on the grounds that the voter neglected to date the return envelope's declaration, and also order the Respondent boards to send to the Acting Secretary certified election returns that include all lawfully cast ballots.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request that the Court order the following relief:

1. Issue a writ of mandamus compelling the Respondent boards of elections to include in the certified election returns that are transmitted to the Acting Secretary for the 2022 primary election all timely received absentee and mail-in ballots cast by a qualified voter even if the voter failed to write a date on the declaration printed on the ballot's return envelope. And,

2. Issue a declaratory judgment that boards of elections may not exclude from certified election returns transmitted to the Acting Secretary timely received absentee and mail-in ballots cast by a qualified voter even if the voter failed to write a date on the declaration printed on the ballot's return envelope. And,

3. Issue an injunction prohibiting Respondent counties from excluding from their certified election returns timely received absentee and mail-in ballots cast by a qualified voter even if the voter failed to write a date on the declaration printed on the ballot's return envelope. And,

4. Grant such further relief as may be necessary.

Dated: July 11, 2022

Respectfully submitted,

Josh Shapiro
Attorney General

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(*pro hac vice* application forthcoming)
Marina Eisner
(*pro hac vice* application forthcoming)
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CERTIFICATE OF COMPLIANCE

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

Dated: July 11, 2022

/s/ Jacob B. Boyer

Jacob B. Boyer

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VERIFICATION

I hereby verify that the statements made in the foregoing Petition for Review are true and corrected based upon my personal knowledge or information and belief.

I understand that false statements therein are subject to penalties of 18 Pa. Con. Stat. § 4904, relating to unsworn falsification to authorities.

July 11, 2022



Jonathan Marks
Deputy Secretary for Elections and Commissions

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the following persons by commercial carrier, which service satisfies the requirements of Pa.R.A.P. 121:

Berks County Board of Elections
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2 W Main St., Ste. 111
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Lancaster County Board of Elections
150 N. Queen St., Ste 117
Lancaster, PA 17603

Dated: July 11, 2022

/s/ Jacob B. Boyer

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