

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. 102 MM 2022

DAVID BALL, *et al.*,

Petitioners,

v.

LEIGH M. CHAPMAN, ACTING SECRETARY
OF THE COMMONWEALTH, *et al.*,

Respondents.

**BRIEF OF RESPONDENT LUZERNE COUNTY
BOARD OF ELECTIONS**

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October 25, 2022

Argument

Introduction:

In light of this Court's Order of October 21, 2022, the Luzerne County Board of Elections (Board) submits the present brief in opposition to Petitioners' request for relief. Regarding the three questions presented in the Court's Order, the Board takes no position on the first, namely the question of Petitioners' standing. Instead, the Board will address the remaining two questions, and do so from its perspective as the governmental body duty bound to ensure free and fair elections within its jurisdiction.

In Pennsylvania, state actors have little to say over the conduct of elections at a local level. The enormous burdens of conducting this essential element of our democracy falls to boards such as the present Respondent which must conduct elections under numerous and ordinary constraints, i.e., multiple electoral boundaries, Election Day staffing, infrastructure questions, candidate and political party concerns, etc. This host of issues represents the robust quality of this essential mechanism and the enormous responsibility in assuring the fundamental fairness of the electoral process.

Against this backdrop, perhaps the most essential element of ensuring that elections will be freely and fairly conducted comes from two elements: consistency and stability. This often requires boards such as this Respondent to

conduct their own legal analysis regarding controversial issues, and through their own due diligence, reach a conclusion as to what the law requires as they carry out their duties.

The present question before the Court, relating to the question of “dating“ mail-in and absentee ballots, is not a new question but has once again arisen, now unfortunately on the eve (and actually in the midst of) the November 2020 election. Litigation such as this at this late date injects uncertainty and causes enormous disruption in the electoral process, placing undue burdens on boards such as this. Nonetheless, this Board, and presumably the 66 others in this Commonwealth, must carry out their duties, and make their own legal judgments on such issues, and preferably do so well in advance of an ongoing election. This Board has done exactly that, having for example, addressed the "undated/wrongly dated" mail-in/absentee ballot question in the Primary 2022 election by segregating those ballots. While those ballots were part of a larger tally, this process preserved any issue for later review if same came to pass. This Board will continue to make its decisions on issues such as this until otherwise directed by the courts, and submits the present brief outlining its perspective.

A. Mail-in and absentee ballots do not require "dates" to be counted

B. The Third Circuit reasoning in *Migliori* remains persuasive, i.e., that the "date" requirement cannot interfere with the franchise without violating federal civil rights law

The statutory requirements at issue in the present matter direct the mail-in and absentee voter "shall ... date" the ballot. 25 P.S. §§ 3146.6(a); 3150.16(a). What constitutes the "date" requirement, however, is left to the imagination. No legislative definition has been offered, nor is there any suggestion as to what that "date" means, what its purpose is, how it is to be affixed, in what format, etc. Such a vague reference poses a tricky prospect: "date" means different things in different cultures. A mail-in or absentee ballot arriving on time, i.e. before the designated deadline of Election Day, but bearing a "date" of, for example "10/11/22" can mean different things to different people. In some cultures, this date indicates "October 11, 2022;" in others it means "November 10, 2022." Nowhere, however, is there any indication in statutory framework at issue here to suggest one format is more than the other.

To address these differences, the Geneva non-governmental organization International Organization on Standards (ISO) has developed a standard, one that is not common in the United States but is designed to rectify the uncertainties which various customs can create. According to the ISO, its standardized form would call for a form of "four digit year, months, date," something which is not at all customary in the United States. See ISO 8601, <https://www.iso.org/iso-8601->

date-and-time-format.html (last visited 10-25-2022). Perhaps the Legislature could direct the format it wishes to employ, designating how the “date“ is to be affixed to the ballot and in what format.

But not only has the Legislature failed to direct a uniform date format, it has also failed to indicate what “date“ is to be a fixed. Is it the date the elector filled out the ballot? Or the date it was deposited or submitted to the election bureau or mailed? Is it a birthdate? Is it the date of the Election Day? Vagueness alone renders this portion of the statute irrelevant, immaterial, and unenforceable.

In assessing what the law is, the Board must look for guidance to the courts, even when decisions of the courts are not precedential but importantly persuasive. Two particular cases provide important guidance to this board. Having participated in the litigation in *McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112 (Pa. Cmwith. June 2, 2022) Board is persuaded by the well reasoned decision in that matter. In *McCormick*, the court recognized the uncertainties surrounding the “date“ requirement vis-à-vis the "Free and Equal Elections Clause under article I, section 5 of the Pennsylvania Constitution, Pa. Const. art. I, § 5." *Id.* at 1. The Court reflected on what was then a decision from the United States Court of Appeals for the Third Circuit in *Migliori v. Cohen*, No. 22-1499 (3d Cir. May 27, 2022). Recognizing that it was not bound by a decision of the Third Circuit, the *McCormick* court found it persuasive and its recognition

that the "date" requirement was not substantive and could only lead to interference with exercise of the franchise. Since *McCormick*, the Third Circuit's decision has been vacated by the Supreme Court of the United States. See *Ritter v. Migliori*, No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022) (Mem.) *cert. granted and judgment (sub nom Migliori) vacated*. It is important to know however that this vacature did not address the merits but was issued enacted pursuant to *United States v. Munsingwear, Inc.*, 340 U. S. 36 (1950)" a process by which the Supreme Court disposes of matters which, while perhaps raising worthy questions, no longer In such a case, the Third Circuit reasoning remains persuasive no less so than it was prior to the Supreme Court's action. As such, the present Board is also persuaded.

The Third Circuit's reasoning regarding federal civil rights law precludes rejection of a ballot based solely on some suggestion of a violation of the "dating" requirement. The principles suggested in *Migliori* and *McCormick* are guiding the instant Board as it carries out its present duties, and will continue to do so unless, of course, a contrary directive is issued by this or any other Court.

Conclusion

For the foregoing reasons, the Luzerne County Board of Elections opposes the relief sought presently.

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/s/ Joseph M. Cosgrove

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