

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

No. 102 MM 2022

**DAVID BALL, JAMES D. BEE, JESSE D. DANIEL, GWENDOLYN MAE
DELUCA, ROSS M. FARBER, LYNN MARIE KALCEVIC, VALLERIE
SICILIANO- BIANCANELLO, S. MICHAEL STREIB, REPUBLICAN
NATIONAL COMMITTEE, NATIONAL REPUBLICAN
CONGRESSIONAL COMMITTEE, REPUBLICAN PARTY OF
PENNSYLVANIA,**

Petitioners,

v.

**LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the
Commonwealth, and All 67 County Boards of Elections,
*et al.***

Respondents.

**RESPONSE OF RESPONDENT THE BERKS COUNTY BOARD OF
ELECTIONS TO PETITIONERS' APPLICATION FOR THE EXERCISE
OF KING'S BENCH POWER OR EXTRAORDINARY JURISDICTION**

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For The Berks County Board of Elections

TABLE OF AUTHORITIES

Cases

Chapman v. Berks County Bd. of Elecs. et al., 2022 WL 4100998
(Pa. Commw. Aug 19, 2022) 1, 2

McCormick v. Chapman, et al., 2022 WL 2900112 (Pa. Commw. June 2, 2022) 1, 2

Migliori v. Cohen, No. 22-1499 (3d Cir. May 27, 2022) 2

Ritter v. Migliori, No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022) 2

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RESPONSE OF THE BERKS COUNTY BOARD OF ELECTIONS

On October 16th, 2022, Petitioners filed the instant Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction. Petitioners are requesting that this Honorable Court exercise its King's Bench power or extraordinary jurisdiction to immediately order county board of elections to segregate undated and incorrectly dated absentee/mail-in ballots and, further, to declare that undated and incorrectly dated absentee/mail-in ballots cannot be included in the pre-canvass or canvass under the Election Code. See Petitioners' Application, at Relief Requested. Pursuant to this Honorable Court's October 17, 2022, correspondence, the Berks County Board of Elections files this Response to Petitioners' Application in support of further clarity and finality from this Honorable Court regarding the counting of undated and misdated ballots in Pennsylvania.

The instant matter is the third lawsuit since May 2022 involving undated mail-in/absentee ballots in which Berks County has been named as a Respondent.¹ Pursuant to the August 19, 2022, Commonwealth Court decision of President Judge Jubelirer in Chapman v. Berks County Bd. of Elecs., et al., 2022 WL 4100998 (Pa. Commw. Aug

¹ The previous two lawsuits, McCormick v. Chapman, et al., 2022 WL 2900112 (Pa. Commw. June 2, 2022) (unpublished) and Chapman v. Berks County Bd. of Elecs. et al., 2022 WL 4100998 (Pa. Commw. Aug 19, 2022) (unpublished), did not involve the question of misdated/incorrectly dated ballots. Petitioners have included incorrectly dated ballots within their pending Application. Due to the likelihood of future litigation regarding misdated/incorrectly dated ballots, Berks County believes it would be prudent to address the question of misdated/incorrectly dated ballots along with the undated ballot question to provide the County Boards with clarity, and avoid future litigation, on the misdated/incorrectly dated ballot question.

19, 2022) (unpublished), it was Berks County's intent to count undated ballots for the November 8th, 2022, general election. Being one of three respondent Counties in that action, Berks County believes Judge Jubelirer's decision provides a specific and sufficient basis, and clarity, for Berks County to count undated ballots, assuming there is no further change in the law.

Nonetheless, the current state of Pennsylvania law regarding the counting of undated ballots, and misdated ballots, continues to lack overall clarity. The varying state and federal law decisions since the May 17, 2022, General Primary Election have either been vacated (see Migliori v. Cohen, No. 22-1499 (3d Cir. May 27, 2022), cert. granted and judgment vacated, Ritter v. Migliori, No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022), were not final decisions on the merits of the case (see McCormick v. Chapman, et al., 2022 WL 2900112 (Pa. Commw. June 2, 2022)), and/or were unreported opinions (see id.; Chapman v. Berks County Bd. of Elecs., et al., 2022 WL 4100998 (Pa. Commw. Aug 19, 2022)). As such, Berks County would not have an objection to this Honorable Court exercising its King's Bench Power or extraordinary jurisdiction to provide the County Boards with much needed clarity and finality on the issues of undated and misdated absentee/mail-in ballots. Berks County plans to abide by any segregation orders issued by the Honorable Court in the interim.

Respectfully Submitted,

Dated: October 19, 2022

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CERTIFICATE OF COMPLIANCE

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

Dated: October 19, 2022

/s/ Cody L. Kauffman, Esq.

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