

IN THE SUPREME COURT OF PENNSYLVANIA

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| David Ball, <i>et al.</i> , | : | |
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| Petitioners, | : | |
| | : | |
| v. | : | 102 MM 2022 |
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| Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth, <i>et al.</i> , | : | |
| | : | |
| Respondents. | : | |

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

Introduction:

The Luzerne County Board of Elections (Board) offers the present response to Petitioners' King's Bench / extraordinary jurisdiction request. In so doing, the Board stresses that, in the past (notably, the Primary in Spring of 2022), it has already taken the kind of action which satisfies one of the prayers for relief Petitioners seek, namely the segregation of "undated"¹ mail-in and/or absentee ballots. Of concern at present is the imposition this late litigation imposes on

¹ The question of what, exactly, is a "proper" date with regard to mail-in ballots is another question, as different cultures offer different dating designations, i.e., whether numerical references place the month first or the day first, etc. *See, e.g.*, International Organization for Standardization date format, <https://www.techtarget.com/whatis/definition/ISO-date-format> (last visited Oct. 19, 2022).

election boards, not only in expenditure of time and costs, but also in creating clouds of uncertainty in the implementation of the election. As such, the Board prays this Court's swift address of the Application and any direction forthcoming from same.

I. Late submission of the Application:

Three weeks before Election Day 2022, Petitioners seek relief through exercise of this Court's unique powers of Kings Bench or extraordinary jurisdiction, asking the Court to impose duties on county election boards which are not otherwise required. This request comes at a time when these boards, such as the instant Respondent, are not only preparing to fulfill their constitutional and statutory duties to conduct a free and fair election, they are currently administering that election which is actually underway now. With the expansion of the right to vote through the no-excuse mail-in process, along with traditional "absentee" voting (hereinafter collectively referred to as "mail-in voting"), the electoral process is no longer a distinctly "one day matter," but commences much earlier, i.e., during the weeks preceding Election Day. The present Application comes in the heart of that timeframe, with actual votes being submitted through the mail-in process at this very moment. Attempting to litigate an electoral issue at this point, and seeking to impose yet more responsibilities on election boards, can only result

in disruption of these already strapped governmental bodies. In seeking the relief they seek, Petitioners' action injects uncertainty at this late stage of the delicate electoral process, and results (even if unintentionally) in one distinct end: disruption of a vital public service. As elections abhor uncertainty, the Court should decline to exercise its exceptional powers as requested.

This is especially so given Petitioners' own delay in seeking this relief. The question presented in their Application - whether undated mail-in ballots are valid - is not something which has newly arisen, nor something of which Petitioners have been unaware. Petitioners cite with frequency (and critique) the decision of Commonwealth Court in *McCormick for U.S. Senate v. Chapman*, 2022 WL 2900112, and its address of undated mail-in ballots.² The institutional Petitioners herein also participated in *McCormick* as Intervenors and were thus aware of the question raised regarding these ballots. The delay from June of 2022 until October 16 2022 when the present Application was filed raises at least a question of diligence on their part, and urges consideration of laches principles in addressing that Application.

"Equity has established the doctrine of laches to preclude actions that are brought without due diligence and which result in prejudice to the non-moving

² The decision in *McCormick* was a single-judge, unpublished opinion and thus is not precedential and may be cited only for its persuasive value. See Commonwealth Court Internal Operating Procedures, § 414.

party." *In re Wissahickon Playground*, No. 2492 CD 2015, 2017 WL 1152563, at 2, n.5 (Pa. Cmwlth. Mar. 28, 2017)(cited pursuant to Commonwealth Court I.O.P. § 69.414; quoting *Koter v. Cosgrove*, 844 A.2d 29, 34 (Pa. Cmwlth. 2004)).

In *Koter*, Commonwealth Court addressed a challenge to the results of a referendum dealing with the Home Rule Charter of the City of Wilkes-Barre. Although the challenging petitioners had waited "nearly thirteen months following the election" to mount their challenge, the trial court accepted their position and overturned the referendum results. *Id.* at 31, 34. In reversing, Commonwealth Court held that the trial court "erred in failing to apply the equitable doctrine of laches to preclude the suit." *Id.* at 35.

The *Koter* court explained further that the petitioners' argument that its reason for delay, i.e., that the election board had not implemented the results of the referendum for nearly a year after the election, was incorrect since "the triggering event for the challenge was not the government's implementation of the referendum," but was when the election results were clear: "A determination as to ***whether the complaining party acted with due diligence will depend on what the party might have known based on the information within its reach.***" *Id.* at 34 (emphasis added).

Koter is important for another reason within the electoral context, namely its recognition of prejudice which the unnecessary delay caused not only to the

governmental body (the election board) but also to the electorate itself, finding that the late challenge "prejudice[d] th[e Election] Board since it ha[d] already begun to act upon the referendum's terms, and **prejudice[d] the electorate** that ha[d] enacted the provision and await[ed] its implementation." *Id.* (emphasis added). In *Kelly v. Commonwealth*, 240 A.3d 1255, 1257 (Pa. 2020), *cert. denied sub nom. Kelly v. Pennsylvania*, – U.S. –, 141 S. Ct. 1449, 209 L. Ed. 2d 171 (2021), this Court also found prejudice in a late election challenge, noting that the disenfranchisement of voters established “substantial prejudice” for laches purposes.³

Given the breadth of this Court's supreme powers of King's Bench and extraordinary jurisdiction, and the purposes for which they are exercised, the restrictions which laches principles impose may not be easily applied to a case such as this. Nonetheless, those principles do offer guidance, with prudence suggesting that judicial intervention in elections (especially elections which have already begun and are in process, and especially where the question presented is one which could easily have been raised at a much earlier date) is unwise. On this background, as judicial recognition is clear that delayed electoral challenges have a deleterious impact on both governmental function and voters themselves, laches principles should persuade this Court to decline the review requested.

³ *Kelly* was a *per curiam* decision and as such, its "legal significance ... is limited ... and ... not precedential, even [if] cit[ing] to binding authority." *Cagey v. Commonwealth*, 645 Pa. 268, 179 A.3d 458, 467 (2018) (internal citations omitted).

II. Recent Supreme Court action in *Ritter v. Migliori*, No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022)

It is likewise important to address two main avenues proffered by Petitioners in seeking review. These avenues address the recent decision of the Supreme Court of the United States in *Ritter v. Migliori*, No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022) (Mem.) *cert. granted and judgment vacated*. In *Ritter*, the Court granted certiorari and vacated the decision of the U.S. Court of Appeals for the Third Circuit, *sub nom. Migliori v. Cohen*, No. 22-1499 (3d Cir. May 27, 2022). Petitioners mistakenly suggest that the *McCormick* court "relied" on the Third Circuit's *Migliori* decision, and that the Supreme Court's action now negates that reliance. That, unfortunately, is not accurate.

First, the *McCormick* court made clear that it was "not bound by the decisions of the federal district and intermediate appellate courts" but that it found the "analysis [of the Third Circuit] persuasive ..." *McCormick*, 2022 WL 2900112, at *10. To suggest that Commonwealth Court's decision is thus bound to "reliance" on the Third Circuit's decision and is not a stand-alone product of the Court's own legal interpretation is erroneous.

Second, Petitioners' misconstrue the actions of the U.S. Supreme Court in *Ritter*. While that action now eliminates any precedential value of the Third

Circuit's opinion in that matter,⁴ it cannot be considered a merits decision on the questions presented. In its October 11, 2022 Order, the Supreme Court stated that the petition for writ of certiorari challenging the Third Circuit decision was "GRANTED. Judgment VACATED and case REMANDED with instructions to dismiss the case as moot. See *United States v. Munsingwear, Inc.*, 340 U. S. 36 (1950)." (emphasis in original). So-called "*Munsingwear* vacature," is a process by which the Supreme Court disposes of matters which, while perhaps raising worthy questions, no longer offer justiciable issues due to their mootness:

When "a civil case from a court in the federal system ... has become moot while on its way here," this Court's "established practice" is "to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 95 L.Ed. 36 (1950).

Azar v. Garza, --U.S.--, 201 L. Ed. 2d 118, 138 S. Ct. 1790, 1792 (2018).

In this light, to suggest that the Supreme Court's decision in *Ritter* imports any value on the question of whether undated mail-in ballots may or should be counted is simply error.

⁴ As the *McCormick* court noted, the Third Circuit's decision was never precedential per state court analysis in any event.

Conclusion:

For the reasons stated, the Board seeks certainty in the conduct of ongoing election, either through summary dismissal of the Application or swift guidance from the Court on the Board's forthcoming duties.

Dated: October 19, 2022

Respectfully submitted,

/s/ Joseph M. Cosgrove

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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.

/s/Joseph M. Cosgrove

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