

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

BETTY EAKIN, *et al.*, :
 :
v. : Civil Action No. 1:22-cv-00340-SPB
 :
ADAMS COUNTY, *et al.* :

**BRIEF OF LUZERNE COUNTY BOARD OF ELECTIONS
PURSUANT TO THE COURT'S ORDER OF JANUARY 9, 2023**

Defendant Luzerne County Board of Elections ("Board") submits this modest brief in response to the Court's Order of January 9, 2023 directing same to address the question of whether resolution of this matter should be expedited.

This matter, and the related action, *NAACP, et al., v. Chapman, et al.*, No. 1:22-cv-00339,¹ are rooted in the decision of the Supreme Court of Pennsylvania issued on November 1, 2023 which stated that "[t]he Pennsylvania county boards of elections are hereby **ORDERED** to refrain from counting any absentee and mail-in ballots received for the November 8, 2022 general election that are contained in undated or incorrectly dated outer envelopes. *See* 25 P.S. § 3146.6(a) and § 3150.16(a)." *Ball v. Chapman*, 284 A.3d 1189, 1192 (Pa. 2022), *reconsideration and reargument denied* (Nov. 7, 2022)(emphasis in original).

¹ While the Board is likewise a defendant in *NAACP*, this Court has Ordered implementation of the stipulation entered into by the Board (and a number of other such defendants) and Plaintiffs by which the Board agrees to not actively participate in that matter. *NAACP*, Doc. 192. As such, the Board will not be filing a brief per this Court's similar Order in that case also issued on January 9, 2023.

Essential to the present litigation, the Court further stated that it was "evenly divided on the issue of whether failing to count such ballots violates 52 U.S.C. § 10101(a)(2)(B)."

This decision leaves the Board and its siblings in a precarious position. On the one hand the Board is ordered not to count the mail-in votes of electors which, although timely received, were contaminated by "undated or incorrectly dated" envelopes. Presumably, failure of the Board to obey this order could result in significant consequence at the state level. Yet in the same breath, the Supreme Court notes that obeying its order may violate federal law. (Indeed, one half of the currently sitting members of the court believe that it does.) It is this untenable situation which Plaintiffs seek to resolve. So does the Board. Where the Board and Plaintiffs differ is in their view of this legal question: Plaintiffs' view is definitive; the Board's is neutral. Yet both want the question answered.

On the issue presented by this Court in the January 9 Order, the uncertainty posed by the Supreme Court's lack of decision is one which most certainly begs for expedited resolution. It is respectfully requested that the Court undertake that task with all deliberate speed.

In so doing, the Court is also urged to stay any further proceedings and instead direct that the parties brief their legal positions forthwith. It is especially critical that all discovery be deferred until decision on the question regarding the

counting of the "undated/wrongly dated" ballots is reached. "A district court has broad discretion to stay discovery until preliminary and potentially case-dispositive questions are determined." *Soldevilla v. On the Barrelhead, Inc.*, No. 19-CV-14462, 2020 WL 597317, at *1 (S.D. Fla. Feb. 5, 2020). The Board and several others in Pennsylvania are currently engaged in preparation for special elections. These preparations, along with the usual tasks relative to the upcoming primary season, are the mainstay of the Board's *raison d'etre*, i.e., to assure and carry out free and fair elections. The Board is not a litigious creature, but the overbearing discovery expected presently, along with the other work required in litigation such as this only interferes with the Board's responsibilities, consumes the time of public servants which is best spent in other tasks, and is exceedingly costly to taxpayers. None of that is necessary to bring this case to resolution given the purely legal question it poses. In this light, there is no need at this moment for time frames regarding discovery or dispositive motions.

Although decided in a different context, there is wisdom in a decision from the U.S. District Court for Minnesota, which noted that "[a] case may involve a matter of public importance if it transcends the litigants and involves a legal question the resolution of which will advance the cause of jurisprudence to a degree that is usually not the case." *WestLB AG v. Kelley*, 514 B.R. 287, 293 (D. Minn. 2014)(cleaned up). The legal question pending in this matter is of the

greatest "public importance" and its resolution certainly "will advance the cause of jurisprudence." *Id.* It is a discrete question which should not be impeded by any other consideration. It should be decided now.

Dated: January 20, 2023

Respectfully submitted,

s/Joseph M. Cosgrove
Pa ID # 37130
Selingo Guagliardo LLC
345 Market Street
Kingston, PA 18704
570-287-2400
jcosgrove@getyourselfagoodlawyer.com

RETRIEVED FROM DEMOCRACYDOCKET.COM

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

BETTY EAKIN, <i>et al.</i> ,	:	
	:	
v.	:	Civil Action No. 1:22-cv-00340-SPB
	:	
ADAMS COUNTY, <i>et al.</i>	:	

CERTIFICATE OF SERVICE

I, Joseph M. Cosgrove, certify that on this date I caused a true and correct copy of the foregoing brief to be served by ECF upon all counsel of record.

DATED: January 20, 2023

s/ Joseph M. Cosgrove

RETRIEVED FROM DEMOCRACYDOCKET.COM