

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

DAVID MCCORMICK

vs.

MONTGOMERY COUNTY BOARD OF ELECTIONS

NO. 2024-26283

CIVIL COVER SHEET

State Rule 205.5 requires this form be attached to any document commencing an action in the Montgomery County Court of Common Pleas. The information provided herein is used solely as an aid in tracking cases in the court system. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

Name of Plaintiff/Appellant's Attorney: WALTER S ZIMOLONG, Esq., ID: 89151

Self-Represented (Pro Se) Litigant

Class Action Suit Yes No

MDJ Appeal Yes No

Money Damages Requested

Commencement of Action:

Amount in Controversy:

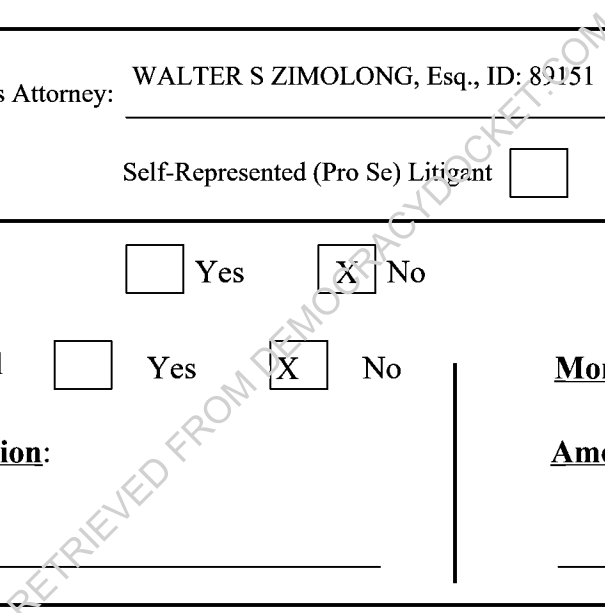
Petition

Case Type and Code

Civil Appeals: _____

Board of Elections _____

Other: _____



IN THE COMMONWEALTH OF PENNSYLVANIA
COURT OF COMMON PLEAS OF MONTGOMERY COUNTY
CIVIL DIVISION

DAVID MCCORMICK
2401 Pennsylvania Ave.
Philadelphia, PA 19130,

REPUBLICAN NATIONAL COMMITTEE
310 First Street, SE
Washington, D.C. 20003,

and

REPUBLICAN PARTY OF PENNSYLVANIA
3501 N. Front Street, Suite 200
Harrisburg, PA 17110,

Petitioners,

v.

**MONTGOMERY COUNTY BOARD OF
ELECTIONS**
425 Swede Street
Suite 602
Norristown, PA 19401

Respondent.

No. _____

ELECTION APPEAL

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PETITION FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL

Petitioners David McCormick, the Republican National Committee, and the Republican Party of Pennsylvania, by and through their undersigned counsel, appeal pursuant to 25 P.S. § 3157 from the decision of the Montgomery County Board of Elections (“Board”) on November 14, 2024, to count 501 undated or misdated mail

ballots in the November 5, 2024 General Election.¹ Petitioners aver as follows:

INTRODUCTION

1. This appeal concerns the Board's decision to count undated and misdated mail ballots in the November 5, 2024 General Election.

2. The Board's decision is legally erroneous because undated or misdated mail ballots are invalid as a matter of law and cannot be counted in the 2024 General Election—as the Pennsylvania Supreme Court has already made clear.

3. In particular, the Election Code unambiguously requires individuals voting by mail to “fill out, date and sign the declaration” on the ballot return envelope. *See* 25 P.S. §§ 3146.6(a), (b)(3), 3150.16(a), (b)(3). After years of repeatedly holding that the date requirement is mandatory, the Pennsylvania Supreme Court earlier this month reaffirmed that the requirement “shall ... be applied to the November 5, 2024 General Election.” *Baxter v. Philadelphia Bd. of Elections*, __A.3d__, 2024 WL 4650792, at *1 (Pa. Nov. 1, 2024) (staying lower court order against date requirement). The Board's baffling decision *not* to enforce the date requirement and to count noncompliant ballots thus directly contravenes binding Pennsylvania law. *See id.*; *New Pa. Project Education Fund v. Schmidt*, No. 112 MM 2024, 2024 WL 4410884, at *1 (Pa. Oct. 5, 2024) (per curiam) (“*New Pa.*”) (declining to exercise King's Bench jurisdiction over state constitutional challenge to date requirement); *Black Political Empowerment Project v. Schmidt*, 322 A.3d 221, 222 (Pa. 2024) (per curiam)

¹ The Election Code's date requirement implicated in this appeal governs county boards' processing both of absentee ballots and mail-in ballots. *See* 25 P.S. §§ 3146.6(a), (b)(3), 3150.16(a), (b)(3). For ease of reference, this Petition refers to both types of ballots as “mail ballots.”

(“*BPEP* Order”) (vacating order striking down date requirement under state constitution); *Ball v. Chapman*, 289 A.3d 1, 14-16 & n.77 (Pa. 2022) (rejecting host of challenges to date requirement); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) (rejecting state constitutional challenge to sign-and-date mandate, of which date requirement is a part); *In re: Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 General Election*, 241 A.3d 1058, 1085-89 (Pa. 2020) (Wecht, J., concurring in part) (deciding vote making clear date requirement is mandatory and enforceable for all elections after 2020).

4. Even more on point, on October 5, 2024, the Pennsylvania Supreme Court rejected a challenge to the date requirement and held it would “neither impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election.” *New Pa.*, 2024 WL 4410884, at *1. In particular, the Pennsylvania Supreme Court adopted the *Purcell* principle from federal law, which prohibits changes to electoral rules close to an election—and especially *after* Election Day. *See id.* (quoting *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016)). The Commonwealth Court subsequently disregarded that instruction and struck down the date requirement, which led to the Pennsylvania Supreme Court entering a stay and reaffirming that the date requirement is mandatory and must be enforced for the 2024 General Election. *See Baxter*, 2024 WL 4650792, at *1.

5. In what can only be understood as a confused or defiant action, the Montgomery County Board of Elections has voted to count 501 mail ballots that do not comply with the date requirement. The Pennsylvania Supreme Court has clearly

prohibited this action. And to the extent anyone suggests that the date requirement violates the Materiality Provision of the federal Civil Rights Act, that too is wrong as a matter of law. The U.S. Court of Appeals for the Third Circuit has rejected that claim. *Pa. State Conf. of NAACP Branches v. Sec’y Commonwealth. of Pa.*, 97 F.4th 120 (3d Cir. 2024), *reh’g denied*, 2024 WL 3085152 (Apr. 30, 2024).

6. Further, the Board’s decision not to enforce the date requirement triggers the absolute non-severability provision in Act 77, which established universal mail-in voting. Accordingly, if left uncorrected, the Board’s decision jeopardizes universal mail-in voting for all Commonwealth voters.

7. Finally, the Board’s decision to count undated and incorrectly dated mail ballots in contravention of the Election Code violates the U.S. Constitution’s Equal Protection Clause and the Pennsylvania Constitution. Under the Equal Protection Clause of the U.S. Constitution, a “State may not, by . . . arbitrary and disparate treatment, value one person’s vote over that of another,” *Bush v. Gore*, 531 U.S. 98, 104-05 (2000), so counties cannot use “varying standards to determine what [i]s a legal vote” in a statewide election, *id.* at 107. Likewise, the Pennsylvania Constitution decrees that “[a]ll laws regulating the holding of elections . . . shall be uniform throughout the State,” Pa. Const. art. VII, § 6, and the Free and Equal Elections Clause requires voting laws to “treat[] all voters alike” in “the same circumstances,” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914).

8. Other county boards of elections have correctly decided *not* to count mail ballots that do not comply with the date requirement. Thus, allowing the Board

to count such ballots would unconstitutionally create “varying standards to determine what [i]s a legal vote,” *Bush*, 531 U.S. 104-05, and inject *disuniformity* into the administration of the General Election across the Commonwealth, *see* Pa. Const. art. VII, § 6; *Winston*, 91 A. at 523.

9. For all of these reasons, the Court should reverse the Board’s decision to count mail ballots that fail to comply with the date requirement.

10. Petitioners are aggrieved by the Board’s decisions and hereby appeal from them pursuant to 25 P.S. § 3157(a).

JURISDICTION

11. The Court has jurisdiction over this statutory appeal pursuant to 25 P.S. § 3157(a).

PARTIES

12. Petitioner David McCormick is the Republican candidate for Senate. McCormick is currently leading his nearest opponent by approximately 29,338 votes. The United States Senate recognizes McCormick as the Senator-elect from Pennsylvania.

13. Petitioner Republican National Committee (RNC) is a national committee of the Republican Party as defined by 52 U.S.C. § 30101(14). The RNC manages the Republican Party’s business at the national level, including development and promotion of the Party’s national platform and fundraising and election strategies; supports Republican candidates for public office at all levels across the country, including those on the ballot in Pennsylvania; and assists state

parties throughout the country, including the Republican Party of Pennsylvania, to educate, mobilize, assist, and turn out voters.

14. Petitioner Republican Party of Pennsylvania (RPP) is a major political party, 25 P.S. § 2831(a), and the “State committee” for the Republican Party in Pennsylvania, 25 P.S. § 2834, as well as a federally registered “State Committee” of the Republican Party as defined by 52 U.S.C. § 30101(15). The RPP on behalf of itself and its members nominates, promotes, and assists Republican candidates seeking election or appointment to federal, state, and local office in Pennsylvania.

15. Respondent the Montgomery County Board of Elections is responsible for overseeing the conduct of all elections in Bucks County.

DECISION OF THE BOARD AT ISSUE

16. The Board met in a public meeting on November 14, 2024, to adjudicate challenges to mail and provisional ballots. In a 2-1 vote, the Board announced its decision to count 501 mail ballots that did not comply with the date requirement.

17. Petitioners now appeal that decision.

FACTUAL BACKGROUND

18. In 2019, as part of an important bipartisan compromise, the General Assembly amended the Election Code to permit all Pennsylvanians to vote by mail without any excuse. 2019 Pa. Leg. Serv. Act 2019-77 (“Act 77”). As part of the compromise, which was protected with an absolute non-severability clause, *see* Act 77, § 11, the bill also included certain mandatory rules that Pennsylvanians voting by mail must follow to have their ballots counted.

19. For example, mail voters must enclose their ballots and secrecy envelopes within mailing envelopes bearing a declaration that voters must sign and date. *See* 25 P.S. §§ 3146.6(a).

20. The Pennsylvania Supreme Court has repeatedly held that the date requirement is mandatory; an elector's failure to comply renders the ballot ineligible to be counted. *See, e.g., Ball*, 289 A.3d at 14-16; *Pa. Democratic Party*, 238 A.3d at 372-74, 380 (rejecting challenge under Free and Equal Elections Clause to mandatory rules for mailing envelopes, including date requirement). That is why the Pennsylvania Supreme Court ordered all 67 county boards of elections not to count mail ballots that do not comply with the date requirement during the 2022 General Election. *See Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022).

21. Nevertheless, various litigants have continued to file lawsuits seeking invalidation of the date requirement. All of these efforts have failed, and the Pennsylvania Supreme Court has *twice* held that the date requirement must be enforced for the 2024 General Election. *See New Pa.*, 2024 WL 4410884; *Baxter*, 2024 WL 4650792, at *1.

22. For example, litigants have previously argued that the date requirement violates the federal Materiality Provision in the Civil Rights Act of 1964. But the U.S. Court of Appeals for the Third Circuit decisively rejected those challenges and upheld the date requirement under the Materiality Provision. *See Pa. State Conf. of NAACP Branches*, 97 F.4th at 129-39. That court correctly held that the Materiality Provision only applies to voter-registration rules. *Id.* at 129-35.

And because the date requirement does not apply during voter registration, it is clearly lawful under the Materiality Provision. *See id.*

23. Litigants have also continued to assert state-law arguments against the date requirement. In June 2024, the Commonwealth Court invalidated the date requirement under the Free and Equal Elections Clause, but the Pennsylvania Supreme Court vacated that opinion and order on multiple procedural grounds. *See BPEP Order at *1, vacating Black Political Empowerment Project v. Schmidt*, No. 283 M.D. 2024, 2024 WL 4002321, at *1 (Pa. Commw. Ct. Aug. 30, 2024).

24. Subsequently, litigants filed a King's Bench petition asking the Pennsylvania Supreme Court to invalidate the date requirement. The Pennsylvania Supreme Court rejected that petition on October 5, 2024, holding that it would "neither impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election." *New Pa.*, 2024 WL 4410884, at *1.

25. Nevertheless, litigants did not give up on their efforts to invalidate the date requirement for the 2024 General Election. In a lawsuit related to the Philadelphia Board of Elections' compliance with the date requirement in a 2024 special election, the Commonwealth Court again struck down the date requirement. *See Baxter v. Philadelphia Bd. of Elections*, 2024 WL 4614689 (Pa. Commw. Ct. Oct. 30, 2024). The Pennsylvania Supreme Court promptly stayed that ruling and said it "shall not be applied to the November 5, 2024 General Election." *Baxter*, 2024 WL 4650792, at *1. In a concurrence, Justice Donohue explained that the stay was

necessary so that “county boards” would not rely on the opinion during “canvassing . . . in the upcoming election,” which would “disturb[] the status quo.” *Id.* at *1 (Donohue, J., concurring). Justice Dougherty also concurred and sharply criticized the continuing efforts of courts and litigants to invalidate the date requirement for the 2024 General Election, accusing them of defying the Pennsylvania Supreme Court’s clear orders. *Id.* at *2-8 (Dougherty, J., concurring) (recounting full history of such efforts).

26. The Board met on November 14, 2024 to adjudicate disputes over mail and ballots cast in the 2024 General Election.

27. In contravention of the Pennsylvania Supreme Court’s clear order that the date requirement is in force for the 2024 General Election, the Board voted 2-1 to count 501 mail ballots that were undated or that were incorrectly dated.

28. Petitioners objected to this decision before the Board.

GROUND FOR APPEAL

29. The Board violated the Election Code’s mandatory date requirement and the Pennsylvania Supreme Court’s repeated orders holding that the date requirement must be enforced in the 2024 General Election.

30. As noted, the Pennsylvania Supreme Court has now issued two orders making clear that the date requirement is in force and cannot be changed for the 2024 General Election. *See New Pa.*, 2024 WL 4410884, at *1; *Baxter*, 2024 WL 4650792, at *1. As Justice Dougherty explained, failing to enforce the date requirement in the 2024 General Election can only be understood as defiance of the Pennsylvania

Supreme Court. *See id.* at *2-8 (Dougherty, J., concurring). The Board’s legal advisors recognized that the law prohibits counting undated or misdated ballots, Video at 1:13:00-1:14:00, but the Board decided to flout the law. This Court should reverse for that reason alone.

31. Moreover, the Board’s decision not to enforce the date requirement jeopardizes universal mail voting across Pennsylvania. As “a general matter, nonseverability provisions are constitutionally proper.” *Stilp v. Commonwealth*, 905 A.2d 918, 978 (Pa. 2006). Act 77’s non-severability provision states: “Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void.” Act 77 § 11. The date requirement is part of the universal mail voting established in section 8, so invalidating “its application to any person or circumstance” voids the entire Act. *Id.*; *see McLinko v. Dep’t of State*, 279 A.3d 539, 609-610 (Pa. 2022) (Brobson, J., dissenting); *McLinko v. Dep’t of State*, 270 A.3d 1243, 1277-78 (Pa. Commw. Ct. 2022) (Wojcik, J., concurring in part and dissenting in part); *BPEP*, 2024 WL 4002321, at *62-64 (McCullough, J., dissenting).

32. Finally, the Board’s decision to count mail ballots that do not comply with the date requirement violates the U.S. Constitution’s Equal Protection Clause and the Pennsylvania Constitution.

33. Under the Equal Protection Clause of the U.S. Constitution, a “State may not, by . . . arbitrary and disparate treatment, value one person’s vote over that

of another.” *Bush*, 531 U.S. at 104-05. Accordingly, at least where a “statewide” rule governs, such as in a statewide election, there must be “adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them.” *Id.* at 110. And counties cannot “use[] varying standards to determine what [i]s a legal vote.” *Id.* at 107.

34. Yet that is precisely what will happen if this Court permits the Board not to enforce the date requirement. Other county boards have correctly decided to follow the law, which means that the Board’s decision would result in “varying standards to determine what [i]s a legal vote” from “county to county” and be unconstitutional. *See id.* at 106-07.

35. The Board’s refusal to follow the Election Code also violates the Pennsylvania Constitution, which decrees that “[a]ll laws regulating the holding of elections . . . shall be uniform throughout the State,” Pa. Const. art. VII, § 6, the Free and Equal Elections Clause, *see Winston*, 91 A. at 523, and the Election Code, which requires that elections be “uniformly conducted” throughout the Commonwealth. 25 Pa. Stat. § 2642(g). Because other counties have correctly decided to follow the law, the Board’s decision will result in unlawful unequal treatment of Pennsylvania voters.

36. For all of these reasons, the Court should reverse the Board’s decision to count in the 2024 General Election mail ballots that do not comply with the date requirement.

WHEREFORE, Petitioners respectfully request that this Honorable Court enter an order reversing the decision of the Montgomery County Board of Elections, ordering the Montgomery County Board of Elections not to count ballots that do not comply with the date requirement, and providing such other and further relief as provided by the Pennsylvania Election Code or as this Court deems just and appropriate.

Respectfully submitted,

/s/ Walter S. Zimolong

WALTER S. ZIMOLONG, ESQUIRE

Attorney I.D. No. 89151

wally@zimolonglaw.com

JAMES J. FITZPATRICK, ESQUIRE

Attorney I.D. No. 320497

james@zimolonglaw.com

ZIMOLONG LLC

353 W. Lancaster Avenue, Suite 300

Wayne, PA 19087

(215) 665-0842

/s/ Britain Henry, Esq.

Britain R. Henry, Esquire

Attorney I.D. No. 314279

Goldstein Law Partners

11 Church Road, Suite 1A

Hatfield, PA 19440

Attorneys for Petitioners

David McCormick,

Republican National Committee,

and Republican Party of Pennsylvania

**CERTIFICATE OF COMPLIANCE
WITH PUBLIC ACCESS POLICY**

I certify that this filing complies with the provisions of the *Public Access Policy of the United 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.

Respectfully submitted,

/s/ Walter S. Zimolong

WALTER S. ZIMOLONG, ESQUIRE

Attorney I.D. No. 89151

wally@zimolonglaw.com

JAMES J. FITZPATRICK, ESQUIRE

Attorney I.D. No. 320497

james@zimolonglaw.com

ZIMOLONG LLC

353 W. Lancaster Avenue, Suite 300

Wayne, PA 19087

(215) 665-0842

November 15, 2024

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CERTIFICATE OF SERVICE

I, Walter S. Zimolong, hereby certify that on the date set forth below, in accordance with Pa.R.Civ.P. 205.4(g)(1)(ii), the foregoing was electronically filed with the Montgomery County Court of Common Pleas electronic filing system website and is available for review on the Montgomery County Court of Common Pleas electronic filing system's website, which filing constitutes proper service upon counsel of record.

Service was also completed by email to counsel as follows:

John Marlatt, Esquire
P.O. Box 311
Norristown, PA 19404-0311

Matthew E. Hoover
Grim Biehn & Thatcher
104 S. 6th Street
P.O. Box 215
Perkasie, PA 18944
mhoover@grimlaw.com

Mindy Johnson
Elias Law Group
250 Massachusetts Avenue, NW
Suite 400
Washington, DC 20001

Ronni E. Fuchs
Troutman Pepper
Ronni.fuchs@troutman.com

Dated: November 15, 2024

/s/ Walter S. Zimolong

VERIFICATION OF REPUBLICAN NATIONAL COMMITTEE

I, Ashley Walukevich, Pennsylvania State Director at the Republican National Committee, am authorized to make this verification on behalf of the Republican National Committee. I hereby verify that the factual statements set forth in the foregoing Petition For Review In The Nature Of A Statutory Appeal are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.



Ashley Walukevich
Pennsylvania State Director
Republican National Committee

Date: 11/13/2024

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VERIFICATION OF REPUBLICAN PARTY OF PENNSYLVANIA

I, Angela Alleman, Executive Director at the Republican Party of Pennsylvania, am authorized to make this verification on behalf of the Republican Party of Pennsylvania. I hereby verify that the factual statements set forth in the foregoing Petition For Review In The Nature Of A Statutory Appeal are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.



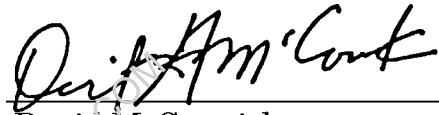
Angela Alleman
Executive Director
Republican Party of Pennsylvania

Date: 11/13/24

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VERIFICATION

I, David McCormick, verify that that the facts contained in the foregoing are true and correct based upon my knowledge, information, and belief. However, while the facts are true and correct based upon my knowledge, information, and belief, the words contained in the foregoing are those of counsel and not mine. I understand that statements herein are made subject to the penalties set forth in 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.



David McCormick

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From: ST, Elections <RA-Elections@pa.gov>
Sent: Thursday, November 7, 2024 6:38:07 PM
Subject: (EXTERNAL) [External] DOS Email: Provisional Ballot Questions

Caution: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe. When in doubt, contact your IT Department

Sent on behalf of Deputy Secretary Jonathan Marks


Dear County Election Officials,

The Department has received inquiries from counties as to whether a provisional ballot should be counted if the voter affidavit is not signed by the Judge of Elections and/or the Minority Inspector. It is the Department's position that a missing signature of the Judge of Elections and/or the Minority Inspector should not invalidate a provisional ballot if there are no other disqualifying errors. The lack of a signature from the Judge of Elections or the Minority Inspector is not specified in the Election Code as a basis for refusing to count a provisional ballot. See 25 P.S. § 3050(a.4)(5)(ii). While the affidavit to be signed by the voter contains a space for both officials to sign, and the Department's guidance accordingly includes both officials' signing the affidavit as part of the provisional ballot process, nothing in the Election Code authorizes counties to reject provisional ballots because either or both failed to sign the affidavit. By contrast, the Election Code does provide that if the voter's signature is missing from either the affidavit or the provisional ballot envelope the ballot cannot be counted.

Additionally, we write to remind you about an important post-election deadline, and an issue the Department has observed that requires your attention. We believe some counties' sorting machines may not have properly tagged returned ballots as "PEND-NO ID", and counties should apply that status to ensure that voters can have their voices heard. If you properly approved a mail ballot application where the ID didn't verify, and the application was marked as Approved-ID Not verified, the voter should have received the ballot with notification that ID was needed. If the voter returned that ballot before the deadline, but did not include the required ID, their ballot status reason *must* be manually updated to have a ballot status reason of "PEND-NO ID". If these ballots went through a mail scanner, the scanner would not have updated the ballot status reason. We have observed several counties who have marked applications as Approved with ID Not Verified, but who have no mail ballots as PEND NO ID. As a reminder, voters may expect their ballot to be counted if they provide qualifying ID on or before Tuesday, November 12. This is a right granted to them by statute, and discussed on Page 6 of our [Guidance on Civilian Absentee and Mail-in Ballot Procedures](#).

It is critical that you mark all timely returned ballots, where the voter's ID did not verify on the application, as "PEND-NO ID", so that voters are aware of the steps they must take to ensure their ballot is counted.

As always, we urge you to consult with your Solicitor if you have further questions. Thank you for all your efforts ensuring a free and fair election.

 Division of Election Administration | Bureau of Elections
PA Department of State
210 North Office Building, Harrisburg, PA 17120
Office: 717-787-5280
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Reply



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