

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 102 MM 2022

David Ball, James D. Bee, Jesse D. Daniel, Gwendolyn Mae DeLuca, Ross M. Faber, Lynn Marie Kalcevic, Vallerie Siciliano-Biancaniello, S. Michael Streib, Republican National Committee, National Republican Congressional Committee, and 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,

Respondents.

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF ON BEHALF OF THE BUTLER COUNTY REPUBLICAN COMMITTEE, LAWRENCE COUNTY REPUBLICAN PARTY, CAMBRIA COUNTY REPUBLICAN COMMITTEE, COREY CHECK, RYAN A. COVERT, DONNA M. HENSEL, FREDERICK W. HENSEL, ERIC V. HULICK, CHESTER L. JACK, RYAN B. MARTIN, MARCI MUSTELLO, MICHAEL J. OEHLING, JR., JAMES PASQUALINI, GARY T. VANASDALE, LYNNE RYAN, AND JACQUELINE KULBACK IN SUPPORT OF PETITIONERS

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APPLICATION FOR LEAVE TO FILE AMICUS BRIEF

1. On October 16, 2022, Petitioners filed a Petition for Application for the Exercise of King’s Bench Power or Extraordinary Jurisdiction seeking to determine the intent of the Election Code’s instruction and whether that instruction would violate the Civil Rights Act of 1964.
2. On October 19, 2022, Respondents filed an Answer opposing the Petition for Extraordinary Relief.
3. On October 21, 2022, Petitioners’ Application for the Exercise of King’s

Bench Power or Extraordinary Jurisdiction was GRANTED, wherein Petitioners were to file briefs on October 24, 2022, at noon, and Respondents on October 25, 2022, at noon.

4. The Butler County Republican Committee, Lawrence County Republican Party, Cambria County Republican Committee, Corey Check, Ryan A. Covert, Donna M. Hensel, Frederick W. Hensel, Eric V. Hulick, Chester L. Jack, Ryan B. Martin, Marci Mustello, Michael J. Oehling, Jr., Gary T. Vanasdale, Lynne Ryan, and Jacqueline Kulback (hereinafter “Butler County Republican Committee, et al.”), attempted to electronically file an Amicus Brief relating to maintaining and strengthening the integrity of political elections in the Commonwealth of Pennsylvania on October 24, 2022, prior to the noon deadline.

5. The Unified Judicial System of Pennsylvania, which was utilized to electronically file the Amicus Brief, was apparently running slow, and the office of counsel for the Butler County Republican Committee, et al. attempted to submit prior to the noon deadline. Paralegal for the undersigned also experienced difficulties such as issues with entering the appearance of the undersigned and selecting parties for service.

6. Counsel for the Butler County Republican Committee, et al., called the Prothonotary of the Supreme Court around noon indicating that there was an issue, who instructed to call and coordinate with the help desk.

7. As a result, the undersigned's staff called and consulted with the help desk to properly file the Amicus Brief, which was ultimately filed at 12:24 p.m. It was originally served at about 12:26 per the date and timestamp.

8. Thereafter, at about 1:29 p.m. the subsequent notice was received that said the Amicus Brief was rejected as untimely.

9. The Butler County Republican Committee et al., was attempting to file an Amicus Brief in Support of Petitioners, who already filed a substantiated brief.

10. The Butler County Republican Committee, et al.'s submission was seeking to participate as *amicus curiae* in support of Petitioner's original Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction. Thus, the Butler County Republican Committee, et al., was not filing a Petition for Review of that action, but instead a brief supporting the position of Petitioners.

11. The Butler County Republican Committee, et al., complied with Pa. R.A.P. 531(b)(4), which requires that an *amicus curiae* brief "must be filed on or before the date of filing of the party whose position as to affirmance or reversal of the *amicus curiae* will support."

12. As the argument contained within the Butler County Republican Committee, et al.'s, Amicus Brief is only supportive in nature and not dispositive of the underlying issues, there would be no prejudice to Respondents in permitting the Amicus Brief to be filed.

13. Given the importance of this issue, the Butler County Republican Committee, et al., respectfully asks this Honorable Court for permission to accept its Amicus Brief in this matter.

14. There is no prejudice for this relief. In fact, Amici Curiae who support Respondents' positions are not due until tomorrow at noon. No reply briefs are permitted. As such, there is no prejudice to any party.

15. Given the emergent nature of this matter, Butler County Republican Committee, et al., has attached the Amicus Brief filed earlier today as **Exhibit "A."**

Respectfully Submitted,

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*Counsel for Butler County
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Date: October 24, 2022

CERTIFICATE OF COMPLIANCE

I, Deanna Lyn Istik, hereby 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.

Respectfully Submitted,

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Date: October 24, 2022

EXHIBIT “A”

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I. INTEREST OF AMICUS CURIAE

The Butler County Republican Committee is the County Committee for the Republican Party for Butler County that assists political campaigns and candidates. The Lawrence County Republican Committee is the County Committee for Lawrence County that also assists political campaigns and candidates. The Cambria County Republican Committee is the County Committee for Cambria County that also assists political campaigns and candidates. Corey Check is a member and contact for Southeast District of the Butler County Republican Committee. Ryan A. Covert is a member and contact for the Northeast District of the Butler County Republican Committee. Donna M. Hensel is a member and State Committee Member for Butler County. Frederick W. Hensel is a member and District Chair of the Western District of the Butler County Republican Committee. Erik V. Hulick is a member and contact for the Central District of the Butler County Republican Committee. Chester L. Jack is a member, District Chair of the Southwestern District of the Butler County Republican Committee, and State Committee Member for Butler County. Ryan B. Martin is a member and State Committee Member for Butler County. Marci Mustello is a State Committee Member for Butler County and State Representative District 11 for Butler County. Michael J. Oehling, Jr., is a member and Co-Chair of the Butler County Republican Committee. James Pasqualini is a member and the Northwest District Chair of the Butler County Republican

Committee. Gary T. Vanasdale is a member and Co-Chair of the Butler County Republican Committee and Butler County Chairman of the State Committee. Lynne Ryan is a member and Chairwoman of the Lawrence County Republican Committee and Chairwoman of the Northwest Caucus of the Republican Party of Pennsylvania. Jacqueline Kulback is a member and Chairwoman of the Cambria County Republican Committee and Chairwoman of the Southwest Caucus of the Republican Party of Pennsylvania.

Amicus Curiae have a strong interest in maintaining and strengthening the integrity of political elections in the County of Butler and throughout the Commonwealth of Pennsylvania.

II. SUMMARY OF ARGUMENT

Petitioners' requested relief should be granted. As stated in the Amicus Curiae Brief of Steven Adams, et al., "the Secretary of the Commonwealth's guidance to the sixty-seven County Boards of Election of this Commonwealth contradicts the Election Code, contradicts what already appears to be the opinion of a majority of this Honorable Court, and is instead reliant on a now vacated Third Circuit holding.

The statute requiring the outer envelope of each mail-in ballot is mandatory. This requirement does not violate the Civil Rights Act of 1964. If the Secretary of the Commonwealth's guidance is permitted to continue, it would erode the public interest in this Commonwealth's next election and violate the plain language of the Election Code."

III. STATEMENT OF JURISDICTION

Amicus Curiae adopt the Statement of Jurisdiction, if any, in the brief(s) of the Petitioners and the Amicus Curiae Brief of Steven Adams, et al.

IV. ORDER OR OTHER DETERMINATION IN QUESTION

Amicus Curiae adopt the Order or Other Determination in Question, if any, in the brief(s) of the Petitioners and the Amicus Curiae Brief of Steven Adams, et al.

V. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Amicus Curiae adopt the Statement of the Scope and Standard of Review, if any, in the brief(s) of Petitioners and the Amicus Curiae Brief of Steven Adams, et al.

VI. STATEMENT OF THE CASE

Amicus Curiae adopt the Statement of the Case, if any, in the brief(s) of Petitioners, and the Amicus Curiae Brief of Steven Adams, et al., as well as the Statement of the Case in their Application for the Exercise of King's Bench Power of Extraordinary Jurisdiction.

VII. ARGUMENT

As stated in the Amicus Curiae Brief of Steven Adams, et al., and joined as adopted herein, “This Honorable Court should immediately declare that absentee and mail-in ballots that are undated or incorrectly dated cannot be included in the pre-canvass or canvass under 25 P.S. Sections 3146.6(a) and 3150.6(a) of the Election Code or, at the very least, order county boards of elections to segregate all absentee or mail-in ballots received for the 2022 general election that do not comply with the date requirement. These statutes passed by the Pennsylvania General Assembly requiring electors to date the declaration printed on the outer envelope of their ballots are clear and unambiguous. A majority of this Honorable Court already appears to agree the date requirements should be mandatory. Regarding the requirement as mandatory does not violate the materiality provision of the Civil Rights Act of 1964. The Secretary of the Commonwealth’s guidance to county boards of elections to include undated or incorrectly dated ballot-return envelopes in the canvass and pre-canvass contravenes the plain meaning of the statutes as well as the learned opinions of a majority of this court. Presumably, the Secretary bases her guidance on a federal decision that the United States Supreme Court has since vacated. Thus, this Honorable Court should grant the relief requested of the Petitioners. To not do so would cause confusion among the individual boards of elections and erode public trust in this Commonwealth’s elections.

The Election Code is clear and unambiguous. The plain meaning of the statute calls for an elector to date and sign the declaration printed on the outer envelope of the ballot.

Except as provided in paragraphs (2) and (3), at any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election, the elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. **The elector shall then fill out, date and sign the declaration printed on such envelope.** Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. Section 3146(a) (emphasis added). This language is repeated in 25 P.S. Section 3150.16(a). Allowing the Secretary of the Commonwealth to encourage

county boards of elections to include undated and incorrectly dated ballots in their canvas and pre-canvas clearly contradicts what the General Assembly expressly requires of each elector who chooses to submit their vote via a mail-in ballot, and therefore, Petitioners' relief requested should be granted.

A majority of this Honorable Court appears to agree that the date requirements is important and should be construed as mandatory. In a concurring and dissenting opinion in which then Chief Justice Saylor and Justice Mundy joined, Justice Dougherty opined, "I cannot agree that the obligation of electors to set forth the date they signed the declaration on that envelope does not carry 'weighty interests.'" In re Canvass of Absentee & Mail-In Ballots of November 3, 2020 Gen. Election., 241 A.3d 1058, 1079 (Pa. 2020). Justice Dougherty further elaborated, "I do not view the absence of a date as a mere technical insufficiency we may overlook." *Id.* In a concurring and dissenting opinion, Justice Wecht submitted, "I part ways with the conclusion that reflected in the Opinion Announcing the Judgment of the Court that a voter's failure to comply with the statutory requirement that voters date the voter declaration should be overlooked as a 'minor irregularity.'" *Id.* Justice Brobson, while still on the Commonwealth Court, opined, "...there is an obvious and salutary purpose behind the requirement that a voter date the declaration[,]. . . . [it] . . . provides a measure of security, establishing the date on which the elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a

polling place...[and]... establishes a point in time against which to measure the electors' eligibility to cast the ballot, as reflected in the body of the declaration itself.” In re 2,349 Ballots in the 2020 Gen.Election., 2020 Pa. Commw. Unpub. Lexis 560 at 16. Most importantly, Justice Brobson wisely observed, “...[t]he danger to our democracy is not that electors who failed to follow the law in casting their ballots will have their ballots set aside due to their own error; rather, the real danger is leaving it to each county board of election to decide what laws must be followed (mandatory) and what laws are optional (directory), providing a patchwork of unwritten and arbitrary rules[,]...[and][s]uch a patchwork system does not guarantee voters an ‘equal’ election, particularly where the election involves inter-county and statewide offices.” *Id.* Allowing each county board of election, or in the case of *sub judice* each Secretary of the Commonwealth from one election cycle to the next, to decide what election laws must be followed and what elections law are optional would erode public trust in this Commonwealth’s elections. A majority of this Honorable Court already appears to agree. Thus, the Petitioners’ relief requested should be granted.

Regarding the date requirement as mandatory does not violate the materiality provision of the Civil Rights Act of 1964. Presumably, the Secretary of the Commonwealth’s guidance is based primarily on a Third Circuit holding that the federal materiality statute preempts the date requirement. Migliori v. Cohen, 36 F.4th

153 (3d Cir. 2022). This holding was vacated on October 11, 2022. Ritter v. Miglori, No. 22-30, 2022 U.S. LEXIS 4530 (October 11, 2022)(granting petition for Writ of Certiorari). Three United States Supreme Court Justices have already voiced their opinion that the Third Circuit’s now vacated holding was “very likely wrong.” Ritter v. Miglori, 142 S. Ct. 1824 (2022). IN the opinion of Justice Alito in dissent of the majority’s denial of application for stay, with whom Justice Thomas and Justice Gorsuch jointed, Justice Alito submitted “... it appears to me, based on the review that I have been able to conduct in the time allowed, that the Third Circuit’s interpretation is very likely wrong...[i]t seems plainly contrary to the statutory language.” Id. Justice Alito went on to observe, “[w]hen a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied ‘the right to vote.’ Rather, that individual’s vote is not counted because he or she did not follow the rules for casting a ballot.” Id. Justice Alito also questioned, “... the Third Circuit held that this state-law rule is preempted by 52 U.S.C. Section 10101(a)(2)(B) because the inclusion of a date is not material to the question of whether a person is qualified to vote. Can that possibly be correct?” Id. Since the Secretary of the Commonwealth’s legal basis for her guidance is presumably based primarily on a Third Circuit holding that is now vacated and which multiple United States Court Justices have already declared “very likely wrong,” allowing the Secretary of the Commonwealth to continue to publish such guidelines would erode the public trust

in this Commonwealth's election process. Since regarding the date requirement as mandatory does not violate the Civil Rights Act, Petitioners' requested relief should be granted."

The Commonwealth cannot let elections be determined by inconsistent actions within the 67 counties. The law is clear and must be followed – undated mail-ins shall not be counted.

VIII. CONCLUSION

For the reasons stated above and for the reasons stated in Petitioners' brief(s), and Amicus Curiae Brief of Steven Adams, et al., the Amicus Curiae respectfully requests that this Honorable Court GRANT Petitioners' requested relief.

Respectfully Submitted,

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