

No. 21A772

In the Supreme Court of the United States

DAVID RITTER,
Applicant,

v.

LINDA MIGLIORI, FRANCIS J. FOX, RICHARD E. RICHARDS,
KENNETH RINGER, SERGIO RIVAS, ZAC COHEN, and
LEHIGH COUNTY BOARD OF ELECTIONS,
Respondents.

**INTERVENOR-PLAINTIFF ZAC COHEN'S RESPONSE IN
OPPOSITION TO EMERGENCY APPLICATION FOR STAY**

To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme
Court of the United States and Circuit Justice for the Third Circuit

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Respondent Zac Cohen, candidate for the Court of Common Pleas of Lehigh County and intervenor-plaintiff below, opposes the application for stay and joins in the argument of the Migliori Respondent-Voters in its entirety. This response seeks only to elaborate on two small points:

1. This case is a poor vehicle for this Court’s review.

While it is easy to conceive of legislative rationales under which the voter might be required to handwrite a date on an outer ballot envelope—especially when, unlike here, there is a window between the final date a ballot can be lawfully voted and the date on which it must be delivered to the board of elections—none apply here. The date on which an ordinary mail-in voter casts a ballot is irrelevant to Pennsylvania’s statutory scheme, and nowhere in the ballot canvassing process is that date ever consulted by election board workers; rather a ballot is timely if it is received by 8 p.m. on Election Day, and the boards of elections stamp the envelopes upon receipt to confirm timeliness. *See* 25 P.S. § 3150.16(c).¹

¹ “A completed mail-in ballot must be received in the office of the county board of elections no later than eight o'clock p.m. on the day of the primary or election.”

The Department of State guidance states that the counties “should stamp the date of receipt on the ballot return. County boards of elections should record the receipt of absentee and mail ballots daily in” the statewide database for voter records. Pa. Dep’t of State, Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes (Sept. 11, 2020), available online at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Document>

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The dispositive and undisputed fact is that in this election, dates that were completely wrong were considered acceptable. Suppose the Lehigh County Board of Elections receives three final mail-in ballots on Election Day, before the deadline, and physically and electronically time-stamps them. When it's time to canvass them, the Board of Elections staff confirms on each outer envelope that the declaration was signed by the voter, having already verified the voter's qualifications and the like in approving the voter registration application and application for mail-in ballot. The staffer then looks to the right, where there is a line which says "Date (MM/DD/YYYY) / Fecha (MM/DD/AAAA)."

On that line, the first voter wrote in her birthdate, November 12, 1955. The second voter printed "July 4, 2026," perhaps in honor of our nation's forthcoming semiquincentennial. The third wrote nothing.

[s/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf](#).

By contrast, Pennsylvania law allows military and overseas civilian absentee voters to have their completed ballots delivered to the county board of elections as late as 5 p.m. on the Tuesday following Election Day, so long as they submit them for mailing by 11:59 p.m. on the night before Election Day. In assessing timely submission, the General Assembly has expressly stated that the ballot envelope will not be rejected for having a late, unreadable, or missing postmark so long as the voter has declared under penalty of perjury that the ballot was timely submitted. In that limited situation, pertaining to that specific category of voters, the date of the declaration is relevant in determining timeliness. *See* 25 Pa.C.S.A. §§ 3509, and 3511.

There is no dispute on this record that the first two envelopes would be opened, and their ballots counted, even though the dates listed are obviously “wrong.” (14a, 19a). Yet the third ballot will not be.

Under these circumstances, the date that a voter places on the ballot return envelope cannot be material, and this case accordingly presents no opportunity for this Court to resolve any important question of federal law. As the Third Circuit properly noted, “We are at a loss to understand how the date on the outside envelope could be material when incorrect date—including *future dates*—are allowable but envelopes where the voter simply did not fill in a date are not.” 15a (emphasis in original). Judge Matey, concurring, agreed that this essentially ended the materiality inquiry:

Appellees offered no evidence, and little argument, that the date requirement for voter declarations under the Pennsylvania Election Code is material as defined in § 10101(a)(2)(B). Instead, they agree that no party contests that voter declarations with inaccurate dates were counted in this election. Add up both concessions, and the Appellees have little room to defend the District Court’s decision.

(19a.) Ritter claims three anti-fraud purposes for the provision in his stay application (Application at 3-4), despite having already stipulated below that there is no known or suspected fraud as to these ballots, and that all were received on time. 3d Cir JA 169. As the Third Circuit correctly found, none are availing. Ritter has never pointed to any

passage in the Pennsylvania Election Code or its related administrative guidance in which the handwritten envelope date is employed for identity verification, fraud prevention, or any other purpose.

Indeed, each of Ritter’s proffered justifications for the requirement is rebutted by the Election Code itself:²

- a. Ritter claims it serves some anti-fraud purpose to know “when the elector actually executed the ballot.” He does not explain *why* that might matter, and in any case, if *inaccurate* dates are allowed, as they were here, then the envelope date requirement does not accomplish that function. Moreover, a voter can lawfully execute a ballot at any time between receipt and Election Day, 8 p.m. *See* 25 P.S. § 3150.16.
- b. Ritter then claims the date helps establish a point in time against which to measure the elector’s eligibility. But eligibility is based on Election Day. A 17-year-old who will turn 18 by Election Day can register to vote under Pennsylvania law, *see* 25 Pa.C.S.A. § 1301(a), but she cannot be issued a mail-in ballot until turning 18 and becoming a qualified elector. *See* 25 Pa.C.S.A. § 1102; 25 P.S. § 3150.12(a). At the other end of the spectrum, a mail-in voter who has died before the polls open will not have his ballot counted, even though he was alive and eligible when voting. *See* 25 P.S. § 3146.8(d).
- c. Finally, Ritter contends that the handwritten date requirement “helps ensure the elector completed the ballot

² In its *amicus* brief to the Third Circuit, the Commonwealth of Pennsylvania concurs that the handwritten date requirement “does not in any way assist in determining a voter’s qualifications to vote under Pennsylvania law” and “is not a useful tool in preventing fraud.” 3d Cir. Dkt. 38-2, at 7-8, 12. The Commonwealth, too, has rebutted each proffered justification for the handwritten date requirement. *Id.* at 10-12.

within the proper time frame,” and “prevents third parties from collecting and “fraudulently back-dating votes.” Under current Pennsylvania law, as noted above, the relevant time frame for completing the ballot is from “any time after receiving an official mail-in ballot” through Election Day, 8pm. Either the ballot is or is not received by then and time-stamped as such; it cannot be back-dated once the window is closed. Moreover, third parties are already prohibited from handling mail-in ballots. *See* 25 P.S. § 3150.16(a) (“Such envelope shall then be securely sealed and the elector shall send same by mail ... or deliver it in person to said county board of election.”); *accord Pa. Democratic Party v. Boockvar*, 238 A. 3d 345, 379-80 (Pa. 2020).

Judge Matey, concurring below, properly noted that there may be future cases or controversies, involving different facts, evidence, or administrative guidance, indicating the relevance of a handwritten date. 19a-20a. But none are present here.

And again, there is no possible rationale for requiring voters to write *any date at all* on the mail ballot return envelope in order to have their ballots counted, as happened in this case. Because on the facts in this record there is no basis whatsoever for finding the handwritten date requirement to be material, this case is a poor vehicle to resolve any important question of federal law.

2. There is no intra-Pennsylvania conflict which this Court needs to resolve.

Contrary to Ritter’s assertions, the Third Circuit’s decision is consistent with the Pennsylvania Supreme Court’s expressed views on

the Materiality Provision. Moreover, Pennsylvania's courts are concurrently reviewing these issues and given the Pennsylvania Supreme Court's previously expressed views as to the applicability of the Materiality Provision, no conflict is likely. Nor does any pending recount necessitate this Court's intervention, as there appear to be too few undated ballots extant to be outcome determinative.

When the Pennsylvania Supreme Court reviewed the undated ballot issue after the 2020 election in In Re Canvass Of Absentee And Mail-In Ballots Of November 3, 2020 General Election, 241 A.3d 1058 (2020) (hereinafter "In re 2020 Canvass"), the Court resolved the dispute strictly on statutory construction grounds: was *shall* mandatory or directory when it came to the language that a voter "shall fill out, sign and date" the envelope? ³

Nonetheless, because one of the intervenors had raised the Materiality Provision, two of the three opinions in In re 2020 Canvass addressed its applicability. The three Justices comprising the In re 2020 Canvass plurality, which held that *shall* should be deemed directory in nature, noted in the Opinion Announcing the Judgment of the Court that it was bound by the Materiality Provision, and that would also likely

³ Per the opinion, if merely *directory* in nature, the language would constitute "a directive from the Legislature that should be followed but the failure to provide the information does not result in invalidation of the ballot." Id. at 1062.

doom this handwritten date requirement. In re 2020 Canvass at 1074 n.5 (citing cases).

The pivotal vote in that decision was cast by Justice Wecht, who concurred with the OAJC that the ballots should be counted in 2020 because voters had not been adequately warned, but joined the dissenters in their belief that, going forward, *shall* should be deemed mandatory as a matter of state law, provided that voters received adequate notice that they could be disqualified for failure to include the envelope date.⁴

Moreover, Justice Wecht's separate opinion made clear that the Materiality Provision could well apply to the envelope date requirement if it was used to disqualify voters:

⁴ Indeed, this is why Justice Wecht decided as a matter of state law that the envelope date rule could only apply prospectively, because there were not "*conspicuous warnings regarding the consequences for failing strictly to adhere' to those requirements.*" Id. at 1089 (emphasis in original).

Here, any warning that the date was required were provided in small font which was easy to ignore. Members of the Lehigh County Board of Elections considered this very point in their deliberations, in light of Justice Wecht's reasoning, before unanimously deciding to count these ballots. Board member Jane Ervin, before voting, asked the chief elections clerk, "Now, if I vote that direction it could be qualified to say to the election process, can we beef up the instructions on the next ballot to make it like blinking red lights, sign here, and date here, or something along those lines?" Board member Doris Glaessmann concurred: "I'll only agree to this year, and with the proviso so that we look at revising the envelope to make it much more visible to the voters." *See* 3d Cir JA 250-51.

I certainly would expect the General Assembly to bear that binding provision [i.e., the Materiality Provision] in mind when it reviews our Election Code. It is inconsistent with protecting the right to vote to insert more impediments to its exercise than considerations of fraud, election security, and voter qualifications require.

Id. at 1089 n.54.

As far as any impact on 2022's primary elections, Ritter is overstating the point. This morning, the Commonwealth Court of Pennsylvania is hearing argument on whether undated ballots should be counted in the United States Senate primary. *See Dave McCormick for Senate v. Chapman*, 286 MD 2022 (Pa. Commw. Ct., filed May 23, 2022). Because the margin between the candidates is presently larger than the total number of undated ballots, this question is likely to be moot before the recount is completed on June 7.⁵ Any conflict remains hypothetical,

⁵ The Doctor Oz for Senate *amici*, who did not seek Intervenor-Respondent Cohen's permission to file their brief, concede this point. (Cohen does not object to its filing.) "The total number of undated absentee and mail-in ballots cast in the May Republican primary election in 65 of Pennsylvania's 67 counties is only around 860—fewer than the 922-vote margin of Dr. Oz's apparent victory.... Moreover, of course, no candidate would receive 100% of the votes cast on such ballots ... Thus, the undated ballots alone appear to be insufficient to overturn Mr. McCormick's apparent loss in the May 17, 2022 primary election." Id. at 3-4.

The same is the case in the other Lehigh County races cited by Ritter, where has been no post-election litigation or nor is any recount pending. *See* Katherine Reinhard, "Jarrett Coleman declares victory over
(*cont'd next page...*)

and in all events would be the subject matter of a different case, not this one.

CONCLUSION

For all these reasons, and especially for the reasons set forth by the Migliori plaintiff-respondents, this Court should deny the application.

Respectfully submitted,

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Pa. Sen Browne in Lehigh Valley GOP primary,” PENNSYLVANIA CAPITAL-STAR (May 26, 2022), available online at <https://www.penncapital-star.com/campaigns-elections/jarrett-coleman-declares-victory-over-pa-sen-browne-in-lehigh-valley-gop-primary/> (Undated ballots have been opened and segregated in both counties; Coleman leads by 24 votes if undated ballots are counted, and by 19 if they are excluded.)