

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Timothy R. Bonner, P. Michael Jones, :  
David H. Zimmerman, Barry J. :  
Jozwiak, Kathy L. Rapp, David : No. 364 M.D. 2022  
Maloney, Barbara Gleim, Robert :  
Brooks, Aaron J. Bernstine, Timothy F. : Argued: October 12, 2022  
Twardzik, Dawn W. Keefer, Dan :  
Moul, Francis X. Ryan, and Donald :  
“Bud” Cook, :  
Petitioners :  
v. :  
Leigh M. Chapman, in her official :  
capacity as Acting Secretary of the :  
Commonwealth of Pennsylvania, and :  
Commonwealth of Pennsylvania, :  
Department of State, :  
Respondents :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE CHRISTINE FIZZANO CANNON, Judge  
HONORABLE ELLEN CEISLER, Judge  
HONORABLE LORI A. DUMAS, Judge

CONCURRING OPINION  
BY JUDGE McCULLOUGH

FILED: June 27, 2023

Given that the Third Circuit Court of Appeals’ decision in *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), *vacated sub nom. Ritter v. Migliori*, 142 S. Ct. 1824 (2022), was vacated as moot, and the Pennsylvania Supreme Court was unable to reach a consensus in *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023), on the issue of whether the disqualification of ballots for failure to comply with the Dating Provisions of Act

77 of 2019 (Act 77),<sup>1</sup> 25 P.S. §§ 3146.6(a) (absentee ballots), 3150.16(a)<sup>2</sup> (mail-in ballots), violates federal law, I am constrained to agree with the Majority’s decision that Act 77 has not been invalidated by the majority of any court of competent jurisdiction. I write separately to enlarge upon the uncertainty that remains following *Ball*, specifically the Supreme Court not reaching a majority decision on this issue or overruling *Chapman v. Berks County Board of Elections* (Pa. Cmwlth., No. 355 M.D. 2022, filed August 19, 2022) (Cohn Jubelirer, P.J., single-judge op.) on that point.

In *Migliori*, the Third Circuit Court of Appeals held that a voter’s ballot cannot be rejected because he/she failed to comply with the Dating Provisions because to reject it on that basis would be a violation of the “Materiality Provision” set forth in Section 1971 of the Civil Rights Act of 1964, codified at 52 U.S.C. § 10101(a)(2)(B). The Third Circuit Court of Appeals concluded that the Materiality Provision was enforceable under 42 U.S.C. § 1983, and that disqualification of ballots for failure to comply with the date requirement violated that provision. Essentially, after *Migliori*, there were no consequences for voters who fail to comply with the Dating Provisions. A voter whose ballot was not counted because he/she failed to print the date on the outer envelope in accordance with the Dating Provisions had complete and total recourse in federal court under *Migliori* to have his/her vote counted thereby, leaving the Dating Provisions without an enforcement mechanism.

*Migliori* was decided on May 20, 2022. Three months later, finding *Migliori* persuasive and relying on *Migliori*’s analysis of the Dating Provisions, this Court in *Berks County* concluded that invalidating the ballots at issue for the sole reason that the declaration on the return envelope did not contain a handwritten date violates the Materiality Provision of the Civil Rights Act. *Chapman v. Berks County Board of*

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<sup>1</sup> Act of October 31, 2019, P.L. 552, No. 77.

<sup>2</sup> Sections 1303 and 1306-D of the Pennsylvania Election Code (Election Code), Act of June 3, 1937, P.L. 1333, *as amended*, added by the Act of March 6, 1951, P.L. 3, and Act 77, respectively.

*Elections* (Pa. Cmwlth., No. 355 M.D. 2022, filed Aug. 19, 2022), slip op. at 58-65. The *Berks County* Court ordered the Berks County Board of Elections, the Fayette County Board of Elections, and the Lancaster County Board of Elections to count the undated ballots for that reason.

On October 11, 2022, the United States Supreme Court vacated the Third Circuit's order in *Migliori* and directed the matter be dismissed as moot. *Ritter v. Migliori*, 143 S. Ct. 297 (2022).

On the issue of whether *Berks County* precludes, as a matter of state law, county boards of elections from enforcing the Dating Provisions, the Majority concludes, and I agree, that the United States Supreme Court's vacatur of *Migliori* on mootness grounds did not affect the *Berks County* decision. The Majority, however, concludes that our Supreme Court's decision in *Ball* stands in contrast to *Berks County*, thereby overruling it. This is where I must part ways from the Majority.

In *Ball*, our Supreme Court, due to an evenly divided vote, was unable to reach a consensus as to whether enforcing Pennsylvania law with respect to undated and incorrectly dated ballots would violate the Materiality Provision. Although a majority of the Justices of the Supreme Court are in agreement that the Election Code requires disqualification of undated absentee and mail-in ballots, the Court was divided evenly on the question of whether discounting undated and incorrectly dated ballots would violate the federal Materiality Provision and issued no order on that basis.

The Majority nevertheless concludes that *Ball* effectively overruled *Berks County* because *Ball* "answered the question of the Dating Provisions' interpretation, and that answer is at odds with *Berks County*, which, of course, must give way." *Bonner v. Chapman*, \_\_\_ A.3d \_\_\_ (Pa. Cmwlth., No. 364 M.D. 2022, filed June 27, 2023), slip op. at 21-22. I respectfully disagree that *Ball's* conclusion with respect to the statutory interpretation of the Election Code's Dating Provision sufficed to overrule

the portion of *Berks County* that held voters cannot be denied their right to vote based on an omission immaterial to determining their qualifications to vote.

First, our Supreme Court in *Ball* did not expressly overrule *Berks County*. Second, it did not implicitly overrule *Berks County* because it failed to definitively resolve the federal Materiality Provisions question, *i.e.*, whether the disqualification of ballots for failure to comply with the date requirement violates the Civil Rights Act, that *Berks County* resolved. Rather, *Ball's* instruction to the county elections boards not to count undated or incorrectly dated ballots was based strictly on its statutory interpretation of the Election Code, not on the federal Materiality Provision. *Ball* and *Berks County*, therefore, do not conflict.

*Berks County*, which appears to be good law in light of not being explicitly or implicitly overruled by a majority of our Supreme Court, recognized a claim for civil rights violation by not counting the undated ballots. Thus, after *Ball*, we are left with a statute that requires that a date be placed on the outside envelope (per *Ball*), but decisional law from this Court (*Berks County*), which, in effect, renders the requirement unenforceable under the Civil Rights Act.

My analysis also differs from the Majority as to the impact of *Berks County* by characterizing the decision as mere “interpretation” of the Dating Provisions. The *Berks County* Court did not just offer an interpretation of the Dating Provisions. Rather, it prohibited the election boards from discounting undated or incorrectly dated ballots. Moreover, by holding that the boards of elections must count the voters’ ballots even though they were undated/incorrectly dated, it appears that *Berks County* essentially invalidated the Dating Provisions for all intents and purposes, regardless that it did not expressly so state. *See, e.g., Free Speech Coalition, Inc. v. Attorney General of the United States*, 825 F.3d 149 (3d Cir. 2016) (holding that

inspection requirements in Child Protection and Obscenity Enforcement Acts<sup>3</sup> were facially unconstitutional without saying it was striking the provision); *Peake v. Commonwealth*, 132 A.3d 506, 521 (Pa. Cmwlth. 2015) (holding that the Older Adults Protective Services Act’s lifetime employment ban provision was unconstitutional on its face – but not striking it from the Act).

The consequences of not dating the outer envelope remain unclear. Hence, given the current state of the law, it appears that a voter, whose ballot is rejected in Pennsylvania because it is not dated on the outside envelope, may enforce the Materiality Provision of the Civil Rights Act by filing a private right of action under 42 U.S.C. § 1983. Voters whose ballots are rejected in Pennsylvania because they are not dated on the outside envelope are left in limbo as to whether they may enforce the Materiality Provision of the Civil Rights Act by filing a private action under 42 U.S.C. § 1983. Boards of elections in Pennsylvania lack clear guidance as to whether or not counting an undated ballot subjects them to a federal civil rights violation claim.

### **CONCLUSION**

The right of suffrage is a fundamental constitutional right as recognized by the Election Code. The citizens of Pennsylvania are entitled to elections that are fair and orderly and to be fully informed of the electoral process. In light of current precedent, I am constrained to concur with the Majority in the regards noted. The remaining state of flux confronting Pennsylvania citizens requires immediate establishment of clear direction in conformance with constitutional standards.

*s/ Patricia A. McCullough*  
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PATRICIA A. McCULLOUGH, Judge

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<sup>3</sup> 18 U.S.C. §§ 2251-2254; 2255; 2258-2260.