
IN THE SUPREME COURT OF PENNSYLVANIA

No. 112 MM 2024

NEW PA PROJECT EDUCATION FUND, *et. al.*,

Petitioners,

v.

AL SCHMIDT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE COMMONWEALTH,
and SIXTY-SEVEN COUNTY BOARDS OF ELECTIONS,

Respondents,

**RESPONDENTS ALLEGHENY, BUCKS, CHESTER, MONTGOMERY,
AND PHILADELPHIA COUNTY BOARDS OF ELECTIONS' RESPONSE
TO PETITIONERS' APPLICATION FOR EXTRAORDINARY RELIEF**

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INTRODUCTION

The Allegheny, Bucks, Chester, Montgomery, and Philadelphia County Boards of Elections (collectively, “Responding Counties”) are committed to protecting the fundamental right to vote through the fair and orderly administration of elections in their respective counties. Responding Counties take no position on the merits of Petitioners’ constitutional claim and generally oppose dilatory attempts to invoke this Court’s King’s Bench jurisdiction as a shortcut to the normal election litigation process. But Responding Counties acknowledge that the meaning, validity, and constitutionality of the dating requirement has been actively litigated in Pennsylvania state and federal courts for several years, and it is still without definitive resolution, and that this Court may choose to decide the state constitutional question posed in the Petition: whether the Free and Equal Elections Clause of the Pennsylvania Constitution prohibits Responding Counties from disenfranchising voters who submit mail ballots with dating errors.

Responding Counties submit this brief to explain how answering that question, in this litigation or in the context of a statutory appeal from Philadelphia’s recent Special Election, will enable them to administer the election in a manner that is faithful to both the Pennsylvania Constitution and the Election Code, as interpreted by this Court in *Ball v. Chapman*, 284 A.3d 1189, 1192 (Pa. 2022). Responding Counties also briefly reiterate the requirement’s lack of any meaningful

purpose, the administrative burdens associated with enforcing it, and why any resolution should not impact the functioning of the remaining mail voting system introduced by Act 77.

ARGUMENT

I. The Current Litigation and Philadelphia County

This Court’s King’s Bench authority is an extraordinary power, which allows the Court to “assume plenary jurisdiction over a matter even where no dispute is pending in a lower court.” *In re Bruno*, 101 A.3d 635, 669 (Pa. 2014). The power is invoked only in “exceptional circumstances,” *In re Estate of Smith*, 275 A.2d 323, 325 (Pa. 1971), and “exercised with extreme caution” because it “may be abused.” *Bruno*, 101 A.3d at 670 (quoting *Commonwealth v. Balph*, 3 A. 220, 230 (Pa. 1886)). Importantly, the purpose of King’s Bench authority “is not to permit or encourage parties to bypass an existing constitutional or statutory adjudicative process and have a matter decided by this Court.” *Id.*

One of the Responding Counties—Philadelphia—is currently litigating a statutory appeal involving the issue presented by the Petition here. In that case, *Baxter v. Philadelphia Board of Elections*, Phila. C.P. No. 240902481 (2024), Philadelphia’s decision from its recent Special Election not to count undated and incorrectly dated mail ballots in accordance with this Court’s decision in *Ball* has been appealed by two voters whose ballots were rejected on the grounds that the

decision violates the Free and Equal Elections Clause. The trial court issued a decision in the voters' favor this afternoon (attached as Exhibit A)—which required the Philadelphia County Board of Elections to count mail ballots with dating errors from the Special Election—and the matter may ultimately be appealed to this Court.

If the Court wishes to avoid exercising its King's Bench authority here, it will have these same issues before it if and when the *Baxter* case is appealed. Alternatively, this Court could exercise its authority in a more limited fashion and assume jurisdiction over the *Baxter* case after the trial court's decision.

If the Court, however, chooses to exercise its King's Bench authority here, Responding Counties note that the instant application can be easily distinguished from this Court's other pending application for extraordinary relief. Unlike the inexcusable delay of the recent application that sought to invalidate Responding Counties' notice and cure procedures under this Court's King's Bench jurisdiction, this application was brought immediately after this Court vacated (on jurisdictional grounds) the Commonwealth Court's decision that enforcing the date requirement would violate the Pennsylvania Constitution. Additionally, enforcement of the dating requirement poses a significant risk of disenfranchising qualified voters who inadvertently fail to comply with a meaningless technicality. The same cannot be said for Responding Counties' notice and cure procedures, which enfranchise voters by providing them with a means to have their votes counted.

II. Responding Counties Need to Expend Considerable Time, Labor, and Resources to Enforce a Meaningless Dating Requirement.

The Election Code’s requirement to handwrite a date on the outer return envelope of a mail ballot does not offer any benefit to the administration of elections. The handwritten date is not used by Responding Counties to determine a voter’s qualification or the timeliness of the ballot. Nor do Responding Counties rely on it to prevent or detect fraud.

After the ballot template is certified by the Pennsylvania Department of State, county boards of elections print and mail absentee and mail ballots to qualified voters who have successfully applied to receive such a ballot. (Appl. Extraordinary Relief Ct.’s King’s Bench Jurisdiction at 17-18 (“Application”).) When Responding Counties receive an absentee or mail ballot, the ballot envelope is stamped with the date and time of receipt to confirm its timeliness.¹ (Application at 18.) Only ballots stamped before 8:00 p.m. on Election Day may be counted. If an absentee or mail ballot is timely received by a county board of elections, it could only have been marked and dated between the time it was sent to a qualified voter and 8:00 p.m. on Election Day.

¹ This does not include military overseas ballots, which may be counted as timely if submitted for delivery no later than 11:59 p.m. the day before the election and received by a County Board of Elections by 5:00 p.m. on the seventh day following an election. *See* 25 P.S. §§ 3509(2), 3511(a).

The dating requirement is a meaningless paperwork-related technicality, and it has been challenging and costly for Responding Counties to enforce it. *Cf. Amici Curiae Br. Cnty. Offs. in B-PEP v. Schmidt*, No. 283 M.D. 2024 (Pa. Commw. Ct. Aug. 30, 2024) at 15-19. To process the large volume of absentee and mail ballots received each election,² Responding Counties rely on automated sorting machines to recognize when ballot envelopes are returned without handwritten signatures or without the internal secrecy envelope that is required by the Pennsylvania Election Code. These machines, however, cannot be configured to determine whether the date on the ballot’s outer return envelope is “correct.” As a result, Responding Counties must devote additional time and labor to manually inspect, identify, and set aside ballots that do not comply with the dating requirement.

This labor-intensive and time-consuming manual review is compounded by the lack of guidance as to what constitutes an “incorrect” date. To be clear, since this Court’s decision in *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023), Responding Counties have followed the mandate and invalidated ballots based on the non-substantive requirement in the Pennsylvania Election Code that voters handwrite a correct date

² In the 2020 General Election, for example, Philadelphia County received more than 380,000 absentee and mail ballots before the Election Day deadline, and Allegheny County received more than 350,000 absentee and mail ballots. *See* Pa. Dep’t of State, Rep. on the 2020 Gen. Election at 9, available at <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/reports/2020-General-Election-Report.pdf> (May 14, 2021).

on the outer return envelope of an absentee or mail ballot. *See* 25 P.S. §§ 3146.6(a), 3150.16(a). But this Court left it to county boards to “evaluate the ballots that they receive in future elections . . . for compliance” with the dating requirement. *Ball*, 289 A.3d at 23. This unnecessary administrative burden does not contribute to the integrity or efficiency of the election process within Responding Counties. The only effect of the date requirement is to reject timely ballots of otherwise qualified voters.³

³ The Dating Requirement disproportionately affects elderly Pennsylvania voters. Responding Counties’ experience establishes that the dating requirement disproportionately affects elderly Pennsylvania voters and resulted in the rejection of more than 10,000 Pennsylvania ballots in the 2022 General Election alone. *B-PEP*, No. 283 M.D. 2024, 2024 WL 4002321, at *6, *16 (Pa. Commw. Ct. Aug. 30, 2024). For example, when the Philadelphia County Board of Elections analyzed its own data for the 2022 General Election, it found: (i) 60.9% of undated ballots and 64.1% of misdated ballots were submitted by voters who were 60-years old or older, (ii) 37.5% of undated ballots and 40.9% of misdated ballots were submitted by voters who were 70 years old or older; (iii) 14.1% of undated ballots and 13.9% of misdated ballots were submitted by voters who were 80 years old or older; and (iv) 57 undated ballots and 15 misdated ballots were submitted by voters who were 90 years old or older. Nov. 18, 2022 Meeting of the Phila. Cnty. Bd. of Elections Tr. 4:21-6:9, available at https://vote.phila.gov/media/111822_Meeting_Transcript.pdf. “These percentages all are significantly higher than the percentage of Philadelphia’s registered voters that these age groups represent.” *Id.* at 6:2-5. Although Responding Counties have not taken a position on the merits of Petitioners’ constitutional claims, their experience demonstrates that enforcement of the dating requirement results in the practical disenfranchisement of thousands of elderly, qualified Pennsylvania voters who rely on mail voting to participate in elections.

III. Barring Disenfranchisement Based on the Dating Requirement Would Not Trigger Act 77’s Nonseverability Provision or Invalidate Act 77, Which Would Invite Electoral Chaos.

If this Court were to affirm that enforcement of the date requirement by disenfranchisement is unconstitutional, it need not also strike all of Act 77—including universal mail voting in Pennsylvania—as the Republican Intervenors recently argued to the Court in the *B-PEP* litigation and appear likely to do so again here.

At the outset, granting the application and concluding that enforcement of the dating requirement through disenfranchisement violates the Pennsylvania Constitution would not trigger the nonseverability provision of Act 77. Act of Oct. 31, 2019, P.L. 552, No. 77 (“Act 77”).⁴ A decision in Petitioners’ favor here would not “invalidate” the date requirement, as voters would still be required to date their declaration and would violate the Election Code by failing to do so. *B-PEP*, 2024 WL 4002321, at *37-38; see also *Murphy v. Nat’l Collegiate Athletic Ass’n*, 584 U.S. 453, 487-89 (2018) (Thomas, J., concurring) (“Invalidating a statute is not a ‘remedy,’ like an injunction, a declaration, or damages.”). Instead, it would simply mean the violation could be addressed by other means contemplated by the Code, as

⁴ That provision (*i.e.*, Section 11 of Act 77) 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.”

most other provisions are. In other words, the application is directed at preventing county boards from rejecting ballots based on the date requirement, rather than altering the obligations of the voters themselves.

Additionally, even if this Court were to conclude that the nonseverability provision were triggered, such a conclusion would not justify invalidating Act 77 in its entirety. Pennsylvania statutes are presumptively severable, and this Court has ample discretion to exercise its independent judgment with respect to how to interpret and apply Act 77's nonseverability provision. *See Stilp v. Commonwealth*, 905 A.2d 918, 970-75, 980 (Pa. 2006).

Accepting the extreme nonseverability argument presented by the Republican Intervenors would have dire consequences for Pennsylvania voters and the County Boards of Elections tasked by law with administering the 2024 General Election. Universal “no-excuse” mail voting has been a resounding success since the General Assembly adopted it in 2019. It has made voting more accessible and less burdensome to hundreds of thousands of voters, with more than one million voters now relying on mail voting to exercise their constitutional right to vote. The sudden elimination of this time-tested and proven method of voting—mere months before the 2024 General Election—would be devastating to those who are unable to vote in person yet are excluded from the narrow categories of those permitted to vote by absentee ballot. Indeed, invalidating Act 77 would, in effect, “disenfranchise a

massive number of Pennsylvanians from the right to vote in the upcoming election.” *Pa. Democratic Party*, 238 A.3d at 397 n.4 (Donohoe, J., concurring in part and dissenting in part).

Eliminating Act 77 would also be confusing to voters and extremely disruptive and chaotic to the electoral process. Act 77 is a comprehensive election modernization statute in which county boards of elections, elections officials, Pennsylvania voters, and candidates for office have developed significant reliance interests. Responding Counties alone have invested significant time and resources implementing and complying with Act 77, including by ensuring that mail ballots are available to all qualified applicants in Responding Counties and by developing robust processes for handling those ballots in a manner that complies with state and federal law. With the General Election soon approaching, eliminating Act 77 would be profoundly disruptive to those efforts.

At least 5.5 million Pennsylvanians have voted in each of the last five presidential elections dating back to 2004. As of April 23, 2024, nearly one million voters had already applied for mail ballots in the 2024 General Election⁵ and are therefore already relying on their access to mail ballots to exercise their right to vote

⁵ Commonwealth of Pennsylvania, Elections Data - Daily Mail Ballot Report, <https://www.pavoterservices.pa.gov/2024%20Primary%20Daily%20Mail%20Ballot%20Report.xlsx> (last accessed September 26, 2024).

in the upcoming election. And sending mail ballots to qualified applicants is a significant task that would be disrupted if this Court were to declare Act 77 invalid. 25 P.S. § 3150.12a(b). Invalidating all of Act 77—which includes voting reforms that go well beyond the introduction of universal no-excuse mail voting—would sow chaos and place countless voters at risk of disenfranchisement. This Court should decline the invitation to create mass election confusion and chaos shortly before a major presidential election.

In sum, if the dating requirement is declared unconstitutional, this Court can and should conclude that Act 77’s nonseverability provision is either inapplicable or unenforceable. In either event, this Court should not invalidate all of Act 77.

CONCLUSION

For these reasons, this Court should be judicious in exercising its King’s Bench jurisdiction, particularly in election matters on the eve of an election, even when deciding important constitutional questions like the one raised in the application. If this Court grants the application and sides with Petitioners on the merits of their constitutional claim, the Court should reject Republican Intervenors’ request to strike all of Act 77.

Dated: September 26, 2024

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CERTIFICATE OF WORD COUNT

I certify that this brief contains 2,387 words, not including the supplementary materials as defined by Pa.R.A.P. 2135(b).

Dated: September 26, 2024

/s/ Ilana H. Eisenstein
Ilana H. Eisenstein

CERTIFICATE OF COMPLIANCE

This filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: September 26, 2024

/s/ Ilana H. Eisenstein
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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2024, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

Dated: September 26, 2024

/s/ Ilana H. Eisenstein
Ilana H. Eisenstein

EXHIBIT A

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL**

BRIAN T. BAXTER and SUSAN T.	:	SEPTEMBER TERM, 2024
KINNIRY,	:	
	:	NO. 02481
Petitioners,	:	
	:	ELECTION MATTER
v.	:	
	:	Control No. 24094566
PHILADELPHIA BOARD OF	:	
ELECTIONS,	:	
	:	
Respondent.	:	

ORDER

AND NOW, this 26th day of September, 2024, upon consideration of petitioners’ Petition for Review in the Nature of a Statutory Appeal pursuant to 25 P.S. § 3157 from respondent’s decision on September 21, 2024, not to count petitioners’ and sixty-seven other registered voters’ mail-in ballots in the September 17, 2024 Special Election because the date written on the outer envelope was missing or incorrect, and after a hearing on the Petition at which petitioners and respondent stipulated to the operative facts underlying their dispute, it is **ORDERED** as follows:

1. The Petition is **GRANTED** and the September 21, 2024 decision of the Philadelphia Board of Elections in which it refused to count petitioners’ and the sixty-seven other registered voters’ mail-in ballots is **REVERSED**:
 - a. Based on the stipulation and representations made on the record as set forth in the transcript of the hearing held on September 25, 2024, which is attached hereto as an exhibit; and

- b. Because the refusal to count a ballot due to a voter's failure to "date . . . the declaration printed on [the outer] envelope" used to return his/her mail-in ballot, as directed in 25 P.S. §§ 3146.6(a) and 3150.16(a), violates Art. I, § 5 of the Constitution of the Commonwealth of Pennsylvania, which states that "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."
2. Respondent Board of Elections shall cause petitioners' and the sixty-seven other registered voters' date-disqualified mail-in ballots from the Special Election to be verified, counted if otherwise valid, and included in the results of the Special Election.

BY THE COURT:



CRUMLISH, III, J.