

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian T. Baxter and Susan T. Kinniry

v.

The Philadelphia Board of Elections,
Republican National Committee, and
Republican Party of Pennsylvania

Appeal of: The Philadelphia Board of
Elections

Brian T. Baxter and Susan T. Kinniry

v.

The Philadelphia Board of Elections,
Republican National Committee, and
Republican Party of Pennsylvania

Appeal of: Republican National
Committee, and Republican Party of
Pennsylvania

CASES CONSOLIDATED

Trial Ct. No. 2024 No. 02481

No. 1305 C.D. 2024

No. 1309 C.D. 2024

**BRIEF OF APPELLANT PHILADELPHIA COUNTY BOARD OF
ELECTIONS**

On Appeal from the Order of the Court of Common Pleas of Philadelphia County

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STATEMENT OF JURISDICTION

This is a direct appeal from the final Order by the Honorable James C. Crumlish, III of the Court of Common Pleas of Philadelphia County on September 26, 2024 (attached as Exhibit A). The Appellees (referred to as “the Voters” throughout this brief) initiated this case in the Court of Common Pleas under 25 P.S. § 3157. This Court has jurisdiction over this appeal under 42 Pa. C.S. § 762(a)(4)(i)(C). *Dayhoff v. Weaver*, 808 A.2d 1002, 1005-06 (Pa. Comwlth. 2002).

ORDER IN QUESTION

The Board seeks review of the Order of September 26, 2024, which states:

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: 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 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.” 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.

SCOPE AND STANDARD OF REVIEW

The Court’s “scope of review in election contest cases is limited to examination of the record to determine whether the trial court committed errors of law and whether the court’s findings were supported by adequate evidence.” *Dayhoff*, 808 A.2d at 1005 n.4. The standard of review for questions of law is *de novo*. See, e.g., *In re Benkoski*, 943 A.2d 212, 215 n.2 (Pa. 2007). There are no factual disputes in this case.

STATEMENT OF QUESTIONS INVOLVED

1. Whether the Free and Equal Elections Clause of the Pennsylvania Constitution prohibits county boards of elections from rejecting mail ballots because of dating errors on the outer declaration envelopes.

Answer of the court below: *Yes*.

Suggested answer: The Board takes no position on this issue but voted 2-1 to not count mail ballots with dating errors in the Special Election in reliance on the Pennsylvania Supreme Court’s interpretation of the Election Code in *Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022). The Board, however, urges the Court to expeditiously decide the question for the reasons set forth in this brief.

2. Did the Court of Common Pleas reversibly err when it proceeded to reach the merits of this direct statutory election appeal by voters regarding the validity of their ballots following the election?

Answer of the court below: *No*.

Suggested Answer: *No*. State courts have a judicial responsibility to decide direct statutory appeals involving vote-counting decision by the Board that do not change the rules impacting the voting process or voter behavior.

STATEMENT OF THE CASE

A. Form of Action and Procedural History

This is a statutory appeal under 25 P.S. § 3157, from a decision of the Board regarding the procedure for processing mail ballots that contain dating errors on outer declaration envelopes.

Philadelphia conducted a Special Election on September 17, 2024 to fill vacancies in the 195th and 201st Legislative Districts. Voter-Appellees Brian T. Baxter and Susan T. Kinniry are two of the sixty-nine voters whose timely mail ballots were not counted in the Special Election because those ballots contained dating errors on the outer declaration envelope. On September 23, 2024, they filed a Petition for Review in the Nature of a Statutory Appeal in the Philadelphia Court of Common Pleas, under 25 P.S. § 3157, challenging the Board's September 21, 2024 decision to not count their mail ballots. (Reproduced Record ("R.R.") at 8a-46a.)

On September 25, 2024, the trial court held a hearing on the Petition for Review. At the hearing, the trial court accepted the parties' stipulation that the facts in the Petition for Review were not disputed. (R.R. at 52a-53a; 5:23-6:6). The Republican National Committee and the Republican Party of Pennsylvania (collectively, "Intervenors") sought to intervene in the action and filed a Petition for Leave to Intervene. (R.R. at 5a). Intervenors also filed a "Motion to Dismiss" the Petition for Review. *Id.*

On September 26, 2024, the trial court granted the Petition for Review. *Id.* The trial court also later granted Intervenors' motion to intervene but denied their motion to dismiss. (R.R. at 6a). This Final Disposition Order, dated September 27, 2024, was entered on the docket on September 28, 2024. *Id.*

On October 1, 2024, the Board appealed. (R.R. at 6a). Two days later, Intervenors also appealed. *Id.* Intervenors' appeal is pending at 1309 C.D. 2024 and has been consolidated with the Board's appeal. (R.R. at 7a).

B. Prior Determinations in this Case

The prior determination in this case is the September 26, 2024 Order granting the Petition for Review, reversing the Board's September 21, 2024 decision to reject Voters' mail ballots along with sixty-seven other mail ballots with dating errors, and directing the Board to count mail ballots with dating errors that were cast in the September 17, 2024 Special Election. Ex. A at 1-2.

C. Name of Judge or Official Whose Determination Is to Be Reviewed

The Honorable Judge James C. Crumlish, III of the Philadelphia County Court of Common Pleas issued the determination to be reviewed by this Court.

D. Factual Chronology in this Case

The Board does not dispute—and has stipulated to—relevant facts in the Voters’ petition for review. (R.R. at 52a-53a, Tr. 5:23-6:6).

Philadelphia conducted a Special Election on September 17, 2024. The Voters are two Philadelphia County voters who submitted mail ballots ahead of the Special Election. (R.R. at 13a-15a, Pet. ¶¶ 11, 18). They neglected to date the declaration envelope of their mail ballot. (R.R. at 14a-15a, Pet. ¶¶ 16, 21). The Board received sixty-nine mail ballots with dating errors in the Special Election. (R.R. at 22a-23a, Pet. ¶ 46, 52). Twenty-three ballot envelopes had missing dates, and forty-six envelopes had dates determined to be incorrect. *Id.* All ballots were timely received and otherwise valid, and all the electors who submitted these ballots (including Voters) were otherwise qualified to vote in the Special Election.

On September 21, 2024, the Board convened at a public meeting to make sufficiency determinations about mail ballots with dating errors pursuant to 25 P.S. § 3146.8(f)(3). (R.R. at 22a, Pet. ¶ 45). In comments made before voting on undated and incorrectly dated mail ballots, the Board acknowledged that the dating provision is meaningless and serves no purpose in the administration of elections. (R.R. at 22a-

23a, Pet. ¶¶ 47-50). But the Board voted 2-1 to not count mail ballots with dating errors in reliance on the Pennsylvania Supreme Court’s decision in *Ball v. Chapman*, 284 A.3d 1189, 1192 (Pa. 2022) and its later vacatur of this Court’s opinion in *Black Political Empowerment Project v. Schmidt* (“*B-PEP*”) for lack of jurisdiction. (R.R. at 22a, 24a, Pet. ¶¶ 46-54).

Two days later, Voters appealed the Board’s decision to the Court of Common Pleas. (R.R. at 8a-46a). Following a hearing, the trial court granted the Petition for Review, granted the Republican Intervenors’ motion to intervene, and denied the Intervenors’ motion to dismiss. (R.R. at 6a). The trial court entered its Final Disposition Order on the docket on September 28, 2024. *Id.*

E. Order Or Other Determination Under Review

As relevant here, the trial court’s September 26, 2024 Order reversed the Board’s September 21, 2024 decision to not count mail ballots with dating errors, held that the Board’s decision violated the Pennsylvania Constitution, and ordered the Board to “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.” Ex. A.

SUMMARY OF ARGUMENT

1. The question of whether the Pennsylvania Constitution permits the Board to reject otherwise qualified mail ballots with dating errors on the declaration

envelope remains unsettled, and this Court should take this opportunity to resolve the uncertainty. Given the legal whiplash on this issue over the last several years, the Board has no conclusive resolution on whether it must or must not count mail ballots with dating errors. This continued uncertainty will result in even more litigation, further burdening county boards as they prepare for the imminent election. It will also force the Board to continue expending unnecessary resources by individually reviewing ballots—by hand—for inconsequential dating errors.

2. The Board anticipates Intervenors will argue that this Court either cannot or should not address the merits of this issue under the so-called *Purcell* doctrine or for other prudential reasons relating to the proximity of this appeal to the General Election. But the concerns that animated the United States Supreme Court in *Purcell* are not present here. This issue is, in effect, a vote-counting decision and not a change in the rules impacting the voting process or voter behavior. It is an ideal vehicle for resolving the important constitutional question presented here.

3. The Board also anticipates Intervenors will argue that, if this Court concludes that declining to count mail ballots with dating errors violates the Pennsylvania Constitution, then this Court should invalidate Act 77 in its entirety. This Court has rejected that argument before and should do so again here. *See, e.g., Bonner v. Chapman*, 298 A.3d 153, 168-69 (Pa. Cmwlth. 2023). Resolution of this appeal would not require invalidation of any part of Act 77, much less its entirety.

And in any event, this Court has the discretion to narrowly interpret the scope of nonseverability provisions because making all of Act 77 depend on an immaterial dating provision threatens judicial independence.

ARGUMENT

A. The Question of How Boards Should Handle Mail Ballots with Dating Errors Remains Unsettled.

This Court should decide whether the Pennsylvania Constitution permits the Board to reject otherwise qualified mail ballots with dating errors on the declaration envelope. The history of state and federal litigation over whether the Board should count or reject mail ballots with dating errors confirms that conclusive resolution of this issue is necessary. For years, the Board has been whipsawed in opposing directions, causing disruption and burdening its good-faith efforts to efficiently and fairly administer elections. Since November 2020, the jurisprudence on this question has shifted as many as eight times.

1. *Count ballots with dating errors in November 2020, but not after.* In 2020, this Court permitted county boards of elections to count mail ballots with dating errors in the November 2020 election, but required them to treat the date as a mandatory requirement “in future elections.” See *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election* (“*In re 2020*”), 241 A.3d 1058, 1076-79 (Pa. 2020), *cert. denied*, 141 S. Ct. 1451 (2021); *id.* at 1079 (Wecht, J., concurring).

2. *In May 2022, count ballots with dating errors.* In early 2022, a unanimous panel of the Third Circuit held that the Materiality Provision of the Civil Rights Act prohibited disenfranchisement based on the dating provision. *See Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir. 2022), *vacated as moot sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022). The U.S. Supreme Court then vacated that opinion for mootness. *Ritter*, 143 S. Ct. 297.

3. *In November 2022, do not count ballots with dating errors.* In November 2022, this Court in *Ball* held that the Pennsylvania Election Code required voters to correctly date their declaration envelopes and that county boards of elections had to enforce this requirement by disenfranchising voters by rejecting ballots with dating errors. 284 A.3d at 1192.

4. *In November 2023, count ballots with dating errors.* In November 2023, a federal district court held that disenfranchisement under the dating provision violated the Materiality Provision of the 1964 Civil Rights Act. *See Pa. State Conf. of NAACP v. Schmidt*, 703 F. Supp. 3d 632 (W.D. Pa. 2023) (“*NAACP I*”). The district court rendered its decision after the Board had computed and reported the results for the 2023 General Election, but before it had certified those results. After the decision, the Board had to re-compute the results to include mail ballots with dating errors, thus delaying certification to comply with the required five-day period between computation and certification under 25 P.S. § 3154(f). Due to this re-

computation, the Board was unable to comply with the statutory certification deadline of Monday, November 27, 2023, and instead certified three days later, on Thursday, November 30, 2023.¹

5. *In March 2024, do not count ballots with dating errors.* In 2024, a divided panel of the Third Circuit reversed on the issue of the Materiality Provision, and remanded for the parties to continue litigating whether disenfranchisement under the dating provision violates the United States Constitution. *See Pa. State Conf. of NAACP v. Schmidt*, 97 F.4th 120, 125 (3d Cir. 2024) (“*NAACP II*”). The Appellees in the Third Circuit recently petitioned for certiorari to the United States Supreme Court. *See* Petition for a Writ of Certiorari, *Pa. State Conf. of NAACP v. Schmidt*, No. 24-363.

6. *In August 2024, count ballots with dating errors.* In 2024, this Court held that enforcing the dating provision by disenfranchisement violates the Pennsylvania Constitution. As this Court explained, “[t]he refusal to count undated or incorrectly dated but timely ballots submitted by otherwise eligible voters because

¹ 25 P.S. § 2642(k) (requiring boards to certify elections no later than the third Monday following the election); November 30, 2023 Philadelphia Board of Elections Public Meeting Agenda & Transcript, *available at* <https://vote.phila.gov/resources-data/commissioner-meetings/commissioner-meetings/transcripts-for-2023-general-and-special-election/> (last accessed Oct. 13, 2024).

of meaningless and inconsequential paperwork errors violates the fundamental right to vote recognized in the free and equal elections clause.” *B-PEP*, 2024 WL 4002321, at *1. As a result, the Board was “**PERMANENTLY ENJOINED** from strictly enforcing the dating provisions of the Election Code.” *Id.* at *39.

7. *September 4, 2024, do not count ballots with dating errors.* In a *per curiam* opinion issued shortly thereafter, the Pennsylvania Supreme Court vacated this Court’s decision solely on jurisdictional grounds. *Black Pol. Empowerment Project v. Schmidt*, --- A.3d ----, 2024 WL 4181592, at *1 (Pa. Sept. 4, 2024). The Pennsylvania Supreme Court did not address the constitutional question on the merits.

8. *September 26, 2024, count ballots with dating errors.* And now, here, the trial court has held that disenfranchisement based on the dating provision *does* violate the Pennsylvania Constitution. It had ordered the Board to include mail ballots with dating errors in the final vote count for the Special Election.

* * * * *

The Board believes that the net effect of the current jurisprudence on this issue—including this Court’s persuasive, but subsequently vacated, decision in *B-PEP*—strongly suggests that the Board would violate voters’ constitutional rights if it were to refuse to count mail ballots with dating errors in the 2024 General Election. Even so, the constitutional question presented in this appeal is unsettled.

And less than one month from now, the Board will once again be tasked with deciding how to handle timely submitted mail ballots with dating errors submitted by qualified electors during the General Election—but this time the Board will be in a materially different situation than it was a month ago, due to the trial court’s order requiring it to count such ballots in the Special Election.

The trial court’s order places the Board in a unique position. The Board wishes to avoid handling mail ballots with dating errors in a manner that diverges from the approach taken by other county boards. Such a divergence will accentuate the attention on the Board’s canvassing of the 2024 General Election, potentially increasing the risk of election disruption and compromising its ability to efficiently canvass, compute, and certify election results. The Board also does not intend to handle such ballots one way in the Special Election but a different way, less than two months later, in the General Election.

For this reason—despite taking no position on the merits of the constitutional question presented—the Board has appealed the trial court’s grant of the Petition for Review and is nominally seeking reversal to avoid a scenario where: (i) the Board is an outlier from the other county boards on this issue, and (ii) the Board counts mail ballots with dating errors in the Special Election (as it must under the appealed-from order here), but then is ordered by this Court to reject the same category of ballots weeks later during the General Election. A ruling from this Court on the merits of

the constitutional issue will enable the Board to avoid inconsistency concerns, comply with the Election Code, uphold the voting rights of electors under the Pennsylvania Constitution, and avoid further litigation on this issue after the General Election.

B. There Is No Barrier to Resolving This Issue Now.

While Intervenors appear likely to argue that this Court should not or cannot resolve the merits, this Court should reject that argument. Nothing prohibits this Court from deciding, in this direct appeal over which it has jurisdiction, whether the Board was required to count mail ballots with dating errors in the September 17, 2024 Special Election.

This appeal does not seek to “disrupt” an imminent election. It addresses an earlier one that has already concluded. To be sure, federal courts may decline to grant requests for injunctions that seek to alter established election procedures near an election. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006) (per curiam) (vacating injunction that enjoined operation of Arizona voter identification procedures); *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (staying preliminary injunction). But the *Purcell* principle is limited to the context of preliminary injunctions without a developed factual record and “is probably best understood as a sensible refinement of ordinary stay principles.” *See Merrill v. Milligan*, 142 S.Ct. 879, 880 (2022) (Kavanaugh, J., concurring).

Unlike *Purcell* and *Crookston*, this case is a direct appeal from the Board's vote-counting decision following the Special Election, which took place on September 17, 2024. This case does not involve a request for a preliminary injunction, a situation where practical considerations relating to an election affect the balancing of the harms. Neither *Purcell*, *Crookston*, nor any other decision that the Board is aware of, instructs state courts to abdicate their judicial responsibility to decide direct appeals involving questions of constitutional importance in the ordinary course simply because it might affect elections. “*Purcell* is a consideration, not a prohibition.” *Kim v. Hanlon*, 99 F.4th 140, 160 (3d. Cir. 2024) (affirming injunction). It has no relevance here.

Nor are the factors that animated *Purcell*—voter confusion and election disruption—present here. *Purcell* embodies pre-election judicial restraint to avoid disrupting efforts by election administrators or imposing hardship or confusion on voters. *Democratic Nat’l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 30-32 (2020) (Kavanaugh, J., concurring). In *Purcell*, changes to voter-ID laws directly affected voters who might have been deterred from voting because they lacked the requisite documentation. *See* 549 U.S. at 2. And in *Crookston*, an injunction altering longstanding laws limiting cameras in polling places to protect ballot secrecy might have confused voters and poll workers alike, who would be unsure how to comply with or enforce the law. *See* 841 F.3d at 399. When those animating factors are not

present, there is no bar to a court’s exercise of its judicial duties. *See, e.g., Feldman v. Ariz. Sec’y of State’s Off.*, 843 F.3d 366, 368 (9th Cir. 2016) (affirming injunction when there was no risk of voter confusion); *Kim*, 99 F.4th at 160 (same).

Here, there is no danger of voter confusion or hardship on election administrators for either prior or future elections. The Special Election has already occurred, and all mail ballots have been cast and canvassed. *See Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 244 (6th Cir. 2011) (“Because this election has already occurred, we need not worry that conflicting court orders will generate ‘voter confusion and consequent incentive[s] to remain away from the polls.’” (alterations in original) (quoting *Purcell*, 549 U.S. at 4-5)). The only remaining question is whether to include mail ballots with dating errors in the final tally. This type of decision is a normal post-election occurrence, expressly contemplated by the Election Code. See 25 P.S. § 3050(a.4)(4). There is no risk of voter confusion, or hardship on election administrators. As the Sixth Circuit explained when it decided a post-election challenge, “[t]o the contrary, counting the ballots of qualified voters miscast as a result of poll-worker error may enhance ‘[c]onfidence in the integrity of our electoral processes[, which] is essential to the functioning of our participatory democracy.’” *Hunter*, 635 F.3d at 244-45 (quoting *Purcell*, 549 U.S. at 4).

Nor is there any risk of voter confusion or other hardship in future elections because prohibiting the Board from rejecting mail ballots with dating errors is

“feasible” without “significant cost, confusion, or hardship.” *See Merrill*, 142 S.Ct. at 881 (Kavanaugh, J., concurring). The status quo is that Board staff segregate mail ballots with dating errors, and after the canvassing process is completed, they then present these mail ballots to county boards of elections who decide whether to reject them or count them. This Court’s decision will affect only that last stage—*i.e.*, whether county boards of elections include those ballots in the final tally. This Court’s decision will not affect the voters who will still receive the same mail ballot with instructions to date the outer declaration envelope. It simply would allow the Board to count timely ballots cast by qualified electors.

This case is different than *Purcell* for several other reasons, too. *First*, unlike those cases where *Purcell* applied, there was no delay here. *See Feldman*, 843 F.3d at 368 (holding *Purcell* inapplicable when there is no delay). The Petition for Review was filed two days after the Board’s September 21, 2024, decision not to count mail ballots with dating errors by two voters whose ballots had been rejected. (R.R. at 3a, 11a). And all Appellants timely appealed. (R.R. at 6a).

Second, *Purcell* is designed to limit the “federal intrusion on state lawmaking processes.” *Democratic Nat’l Comm.*, 141 S. Ct. 28, 28 (2020) (Roberts, C.J., concurring). It imposes no constraints on state courts. State courts may adopt a *Purcell*-like principle as a matter of state law, and in fact the Pennsylvania Supreme Court recently referenced *Purcell* in declining to exercise King’s Bench jurisdiction.

See New PA Project Educ. Fund v. Schmidt, No. 112 MM 2024, 2024 WL 4410884, at *1 (Pa. Oct. 5, 2024). But this case does not involve a request for extraordinary jurisdiction. This case is a direct appeal in state court where the Pennsylvania Supreme Court specifically stated that it would “continue to exercise [its] appellate role with respect to lower court decisions that have already come before this Court in the ordinary course” as it has recently done in other appeals like this one. *Id.* at *1 n.2. That language strongly supports the view that this Court has a statutory and jurisdictional obligation to resolve this direct appeal on the merits.

Third, this is not a case where the law at issue has been clear and settled. As explained in Section A above, the last two years have seen continual litigation over whether county boards of elections can reject mail ballots with dating errors, and the law on this issue has changed as many as eight times. A definitive answer on whether disenfranchisement based on the dating provision violates the Pennsylvania Constitution will bolster the public’s confidence in elections and create certainty in a long-running disputed issue. *See Kim*, 99 F.4th at 160 (holding *Purcell* does not apply when a ruling would “reduce, if not eliminate voter confusion”). A decision would also decrease the likelihood of a situation where an electoral contest might turn on disputed ballots. *See, e.g., Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 734 (2021) (Thomas, J., dissenting) (observing that the lack of “clear rules” in an election “brews confusion” and allows competing candidate to “declare victory

under different sets of rules”); *Democratic Nat’l Comm.*, 141 S. Ct. at 31 (Kavanaugh, J., concurring) (“[T]he rules of the road should be clear and settled.”). “Swift resolution” by this Court will thus “promote confidence in the authority and integrity of our state and local institutions.” *Bd. of Revision of Taxes v. City of Philadelphia*, 4 A.3d 610, 620 (Pa. 2010).

There is no barrier to resolving this issue now, and this Court should do so.

C. The Facts here Are Not in Dispute, and the Handwritten Date Serves No Purpose.

The facts here are straightforward and not disputed. Voters timely returned mail ballots in the September 17, 2024 Special Election. (R.R. at 13a-15a, Pet. ¶¶ 11, 18). Both Voters neglected to include a handwritten date on their outer declaration envelopes. (R.R. at 13a-15a, Pet. ¶¶ 16, 21). On September 21, 2024, the Board voted not to count sixty-nine mail ballots with dating errors, including Voters’ mail ballots. (R.R. at 22a-24a, Pet. ¶¶ 46-54).

Despite this vote, the Election Code’s instruction to handwrite a date on the outer return envelope of a mail ballot does not offer any benefit to the administration of elections. The Board does not use the handwritten date to determine a voter’s qualification or the timeliness of the ballot. Nor can the Board 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. (R.R. at 18a, Pet. ¶ 29). When the Board receives an absentee or mail ballot, the ballot envelope is stamped with the date and time of receipt to confirm its timeliness.² (R.R. at 18a-19a, Pet. ¶¶ 33-34). Only ballots received by 8:00 p.m. on Election Day may be counted. 25 P.S. §§ 3146.6(c), 3150.16(c). If an absentee or mail ballot is timely received by a county board of elections, the ballot 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. Every court to consider this issue has concluded that the date is meaningless to election administration. *See, e.g., NAACP II*, 97 F.4th at 129 (“[N]ot one county board used the date on the return envelope to determine whether a ballot was timely received in the November 2022 election.”); *see also NAACP I*, 703 F. Supp. 3d at 679 (“Whether a mail ballot is timely, and therefore counted, is not determined by the date indicated by the voter on the outer return envelope, but instead by the time stamp and the SURE system scan indicating the date of its receipt by the county board.”).

The dating provision is thus a meaningless paperwork-related technicality, and it has been challenging and costly for the Board (and other county boards) to enforce it. *Cf. Amici Curiae Br. Cnty. Offs.* at 15-19, *B-PEP v. Schmidt*, No. 68 MAP

² 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).

2024 (Pa. 2024). To process the large volume of absentee and mail ballots received each election,³ the Board relies 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, the Board must devote more time and labor to manually inspect, identify, and set aside ballots that do not comply with the dating provision.

This unnecessary administrative burden does not contribute to the integrity or efficiency of the election process. The only effect of the date provision is to reject timely ballots of otherwise qualified voters.

D. Declining to Enforce the Dating Provision by Disenfranchisement in the Special Election Would Not Trigger Act 77’s Nonseverability Provision or Invalidate Act 77.

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

³ In the 2020 General Election, for example, Philadelphia County received more than 380,000 absentee and mail-in ballots before the Election Day deadline. *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).

At the outset, this Court’s holding in *Bonner v. Chapman* confirms that the dating provision need not be invalidated or stricken from Act 77 to grant Petitioners relief. In *Bonner*, as here, the issue was whether declining to enforce the dating provision by disenfranchisement triggered Act 77’s nonseverability provision. 298 A.3d. at 168-69. This Court determined that Act 77’s nonseverability provision was not triggered because a decision not to enforce the dating provision did not “str[ike] the Dating Provisions from the Election Code,” nor did it imply “that electors cannot or should not handwrite a date on the declaration in accordance with those provisions.” *Id.* at 168. Here, too, if the Voters prevail, Act 77’s nonseverability provision is “not triggered” because “the Dating Provisions” will “remain part of the Election Code and continue to instruct electors to date the declaration on the return mailing envelope, which, as history has shown, a majority of electors will do.” *Id.* Accordingly, *Bonner*’s holding alone refutes Intervenors’ anticipated “nonseverability” argument.

Moreover, concluding that enforcement of the dating provision 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 the Voters’ favor here would not “invalidate” the date provision, as voters

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.”

in future elections 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, 488-89 (2018) (Thomas, J., concurring) (“Invalidating a statute is not a ‘remedy,’ like an injunction, a declaration, or damages.”). Instead, any decision would be directed at preventing county boards from rejecting ballots based on the date provision, rather than altering the obligations of voters themselves.

Additionally, even if this Court were to conclude that the nonseverability provision was 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 that Intervenors have made recently to this Court would have dire consequences for Pennsylvania voters and the county boards of election 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 and a half million voters now

relying on mail voting to exercise their constitutional right to vote.⁵ The sudden elimination of this time-tested and proven method of voting—mere days before the 2024 General Election—would be devastating to those who are unable to vote in person, yet are not 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 v. Boockvar*, 238 A.3d 345, 397 n.4 (Pa. 2020) (Donohue, 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. With the General Election soon approaching, eliminating Act 77—which includes voting reforms that go well beyond the introduction of universal no-excuse mail voting—would be profoundly disruptive to those efforts and would place countless voters at risk of disenfranchisement.

In sum, if disenfranchisement based on the dating provision is declared unconstitutional, this Court can and should conclude that Act 77’s nonseverability

⁵ Commonwealth of Pennsylvania, Elections Data – Daily Mail Ballot Report, <https://www.pa.gov/en/agencies/vote/elections/elections-data.html> (last accessed October 14, 2024).

provision is either inapplicable or unenforceable. In either event, this Court should not invalidate all of Act 77.

CONCLUSION

The Board is unwaveringly committed to protecting the fundamental right to vote through the fair and orderly administration of elections in Philadelphia County. That commitment to the rule of law and the Pennsylvania Constitution has compelled it to file this direct appeal. To that end, the Board welcomes a swift decision from this Court on whether the Free and Equal Elections Clause permits County Boards to reject mail ballots with dating errors on their outer declaration envelopes.

Dated: October 14, 2024

Respectfully submitted,

/s/ Ilana H. Eisenstein

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EXHIBIT A

RECEIVED

SEP 26 2024
ROOM 521

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

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

DOCKETED
SEP 26 2024
R. POSTELL
COMMERCE PROGRAM

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

ORDER-Baxter Etal Vs Philadelphia Board Of Elections [RCP]



- 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.

CERTIFICATE OF WORD COUNT

I certify that this brief contains 5,676 words, not including the supplementary materials as defined by Pa.R.A.P. 2135(b).

Dated: October 14, 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: October 14, 2024

/s/ Ilana H. Eisenstein
Ilana H. Eisenstein

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2024, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

Dated: October 14, 2024

/s/ Ilana H. Eisenstein
Ilana H. Eisenstein

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian T. Baxter and Susan T. Kinniry

v.

The Philadelphia Board of Elections,
Republican National Committee, and
Republican Party of Pennsylvania

Appeal of: The Philadelphia Board of
Elections

Brian T. Baxter and Susan T. Kinniry

v.

The Philadelphia Board of Elections,
Republican National Committee, and
Republican Party of Pennsylvania

Appeal of: Republican National
Committee, and Republican Party of
Pennsylvania

CASES CONSOLIDATED

Trial Ct. No. 2024 No. 02481

No. 1305 C.D. 2024

No. 1309 C.D. 2024

REPRODUCED RECORD

On Appeal from the Order of the Court of Common Pleas of Philadelphia County

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EXHIBIT 4: FINAL ORDER71a

EXHIBIT 1: DOCKET SHEET

Docket Sheet

Case Description

Case ID: 240902481
Case Caption: BAXTER ETAL VS PHILADELPHIA BOARD OF ELECTIONS
Filing Date: Monday , September 23rd, 2024
Court: PETITIONS
Location: CITY HALL
Jury: NON JURY
Case Type: ELECTION MATTERS
Status: ORDER ENTERED - FINAL DISPOS

Related Cases

No related cases were found.

Case Event Schedule

No case events were found.

Case Motions

No motions were found.

Case Parties

Seq #	Assoc	Expn Date	Type	Name
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Docket Entries

Filing Date/Time	Docket Type	Filing Party	Disposition Amount	Approval/Entry Date
23-SEP-2024 04:12 PM	ACTIVE CASE			24-SEP-2024 11:34 AM
Docket Entry: E-Filing Number: 2409047953				
23-SEP-2024 04:12 PM	1 - COMMENCEMENT BY PETITION	DEPALMA, CLAUDIA		24-SEP-2024 11:34 AM

	Documents: Final Cover			
	Docket Entry: PETITION FOR ELECTION MATTERS FILED.			
23-SEP-2024 04:12 PM	2 - PETITION FILED	DEPALMA, CLAUDIA		24-SEP-2024 11:34 AM
	Documents: 24.09.23 Philadelphia 3157 combined for filing.pdf			
	Docket Entry: 66-24094566			
24-SEP-2024 11:35 AM	MOTION ASSIGNED			24-SEP-2024 11:35 AM
	Docket Entry: 66-24094566 PETITION FILED ASSIGNED TO JUDGE: PADILLA, NINA W. ON DATE: SEPTEMBER 24, 2024			
24-SEP-2024 04:48 PM	3 - ORDER ENTERED/236 NOTICE GIVEN	PADILLA, NINA W		24-SEP-2024 12:00 AM
	Documents: ORDER_5.pdf			
	Docket Entry: 66-24094566 UPON CONSIDERATION OF THE PETITION FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL, IT IS HEREBY ORDERED THAT A HEARING SHALL BE HELD ON SEPTEMBER 25, 2024, AT 3:00 P.M., IN COURTROOM 602, JUANITA KIDD STOUT CENTER FOR CRIMINAL JUSTICE, PHILADELPHIA, PENNSYLVANIA. A COPY OF THIS ORDER AND A COPY OF THE PETITION SHALL BE SERVED UPON THE COUNTY BOARD OF ELECTIONS BY PERSONAL SERVICE ON AN EMPLOYEE IN CHARGE, IN ROOM 142, CITY HALL, PHILADELPHIA, PENNSYLVANIA, NO LATER THAN SEPTEMBER 25, 2024, AT 9:00 A.M. ...BY THE COURT - WRIGHT PADILLA, P.J., 9-24-24			
24-SEP-2024 04:48 PM	NOTICE GIVEN UNDER RULE 236			24-SEP-2024 04:56 PM
	Docket Entry: NOTICE GIVEN ON 24-SEP-2024 OF ORDER ENTERED/236 NOTICE GIVEN ENTERED ON 24-SEP-2024.			
24-SEP-2024 04:55 PM	MOTION HEARING SCHEDULED			24-SEP-2024 04:55 PM
	Docket Entry: 66-24094566			
25-SEP-2024 06:01 AM	4 - ENTRY OF APPEARANCE	STOHR, ALISON L		25-SEP-2024 10:46 AM
	Documents: 24.09.25 - EOA_Stohr.pdf			
	Docket Entry: ENTRY OF APPEARANCE OF ALISON L STOHR FILED. (FILED ON BEHALF OF PHILADELPHIA BOARD OF ELECTIONS)			
25-SEP-2024 06:01 AM	CITY CHARGE SUBSEQUENT FILINGS	STOHR, ALISON L		25-SEP-2024 10:46 AM
	Docket Entry: None.			
25-SEP-2024 09:03 AM	5 - ENTRY OF APPEARANCE	JOSEFOVITS, M DAVID		25-SEP-2024 10:46 AM
	Documents: Baxter EOA - MDJ.pdf			
	Docket Entry: ENTRY OF APPEARANCE OF M DAVID JOSEFOVITS FILED. (FILED ON BEHALF OF PHILADELPHIA BOARD OF ELECTIONS)			
25-SEP-2024 09:17 AM	6 - ENTRY OF APPEARANCE	FABENS-LASSEN, BEN		25-SEP-2024 10:46 AM
	Documents: Baxter EOA - BFL.pdf			
	Docket Entry: ENTRY OF APPEARANCE OF BEN FABENS-LASSEN FILED. (FILED ON BEHALF OF PHILADELPHIA BOARD OF ELECTIONS)			
25-SEP-2024 09:44 AM	7 - ENTRY OF APPEARANCE	EISENSTEIN, ILANA H		25-SEP-2024 10:47 AM
	Documents: Baxter EOA - IHE.pdf			
	Docket Entry: ENTRY OF APPEARANCE OF ILANA H EISENSTEIN FILED. (FILED ON BEHALF OF PHILADELPHIA BOARD OF ELECTIONS)			
25-SEP-2024 10:04 AM	8 - ENTRY OF APPEARANCE	BENJET, BRIAN H		25-SEP-2024 10:47 AM
	Documents: Baxter EOA - BB.pdf			
	Docket Entry: ENTRY OF APPEARANCE OF BRIAN H BENJET FILED. (FILED ON BEHALF OF PHILADELPHIA BOARD OF ELECTIONS)			
25-SEP-2024 11:31 AM	MOTION ASSIGNMENT UPDATED			25-SEP-2024 11:31 AM
	Docket Entry: 66-24094566 REASSIGNED TO JUDGE CRUMLISH, JAMES ON 25-SEP-24			
25-SEP-2024 01:45 PM	9 - STIPULATION FILED	STOHR, ALISON L		26-SEP-2024 04:59 PM
	Documents: Baxter v. PCBOE - Consent Order Authorizing Certification (9-25-2024).pdf			
	Docket Entry: 28-24095328 STIPULATION TO ENTER CONSENT ORDER FILED. AWAITING JUDICIAL APPROVAL (FILED ON BEHALF OF PHILADELPHIA BOARD OF ELECTIONS) ENTRY OF APPEARANCE FILED ON BEHALF OF PHILADELPHIA BOARD OF ELECTIONS.			
25-SEP-2024 04:38 PM	10 - ORDER ENTERED/236 NOTICE GIVEN	CRUMLISH III, JAMES		25-SEP-2024 04:39 PM

Documents:	ORDER_15.pdf		
Docket Entry:	66-24094566 IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS: 1. THE PHILADELPHIA COUNTY BOARD OF ELECTIONS IS SUTHORIZED TO CERTIFY THE RESULTS OF THE SEPTEMBER 17, 2024 SPECIAL ELECTION TO THE PENNSYLVANIA DEPARTMENT OF STATE AND TO TAKE ANY AND ALL SUCH OTHER ACTIONS NECESSARY TO ACCOMPLISH THE SAME, WITHOTU IMPACTING THE PENDING LITIGATION; AND 2. THE PARTIES HAVE AGREED THAT IF EITHER OR BOTH OF THE PETITIONER ULTIMATELY PREVAIL ON THE MERTIS, THE PHILADELPHIA COUNTY BOURD OF ELECTIONS WILL OPEN AND CANVASS THEIR MAIL BALLOTS AND FILE AN AMENDED VOTE COUNT WITH THE PENNSYLVANIA DEPARTMENT OF STATE REFLECTING THEIR VOTES IN THE SEPTEMBER 17, 2024 SPECIAL ELECTION. ...BY THE COURT; CRUMLISH, J. 9-23-24		
25-SEP-2024 04:38 PM	NOTICE GIVEN UNDER RULE 236		26-SEP-2024 01:52 PM
Docket Entry:	NOTICE GIVEN ON 26-SEP-2024 OF ORDER ENTERED/236 NOTICE GIVEN ENTERED ON 25-SEP-2024.		
26-SEP-2024 01:10 PM	11 - PETITION TO INTERVENE	KERNS ESQ, LINDA A	26-SEP-2024 01:12 PM
Documents:	Baxter Petition for Leave to Intervene(1541320339.2).pdf Baxter v. Philly Motion to Dismiss(1541321597.1).pdf Brief in Support of Motion to Dismiss Petition (Baxter v. Philly)(1541321636.1).pdf Motion CoverSheet Form		
Docket Entry:	06-24095206 PETITION TO INTERVENE (FILED ON BEHALF OF REPUBLICAN PARTY OF PENNSYLVANIA AND REPUBLICAN NATIONAL COMMITTEE)		
26-SEP-2024 01:13 PM	MOTION ASSIGNED		26-SEP-2024 01:13 PM
Docket Entry:	06-24095206 PETITION TO INTERVENE ASSIGNED TO JUDGE: CRUMLISH, JAMES . ON DATE: SEPTEMBER 26, 2024		
26-SEP-2024 03:43 PM	12 - ORDER ENTERED/236 NOTICE GIVEN	CRUMLISH III, JAMES	26-SEP-2024 03:43 PM
Documents:	ORDER_19.pdf		
Docket Entry:	66-24094566 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. SECTION 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 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 26 P.S. SECTIONS 3146.6(A), VIOLATES ART. 1, SECTION 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: JUDGE CRUMLISH, III, 9/26/24.		
26-SEP-2024 03:43 PM	NOTICE GIVEN UNDER RULE 236		26-SEP-2024 04:28 PM
Docket Entry:	NOTICE GIVEN ON 26-SEP-2024 OF ORDER ENTERED/236 NOTICE GIVEN ENTERED ON 26-SEP-2024.		
26-SEP-2024 03:43 PM	13 - ORDER ENTERED/236 NOTICE GIVEN	CRUMLISH III, JAMES	26-SEP-2024 03:49 PM
Documents:	ORDER_20.pdf		
Docket Entry:	66-24094566 AND NOW, THIS 26TH DAY OF SEPTEMBER, 2024, A PETITION FOR LEAVE TO INTERVENE BY THE REPUBLICAN NATIONAL COMMITTEE AND THE REPUBLICAN PARTY OF PENNSYLVANIA HAVING BEEN FILED IN THE ABOVE ACTION FOLLOWING THE COURT HAVING COMPLETED A HEARING ON PETITIONERS' STATUTORY APPEAL FROM A DECISION OF RESPONDENT PHILADELPHIA BOARD OF ELECTIONS AND FOLLOWING THE COURT'S ENTRY OF AN ORDER GRANTING THE APPEAL AND REVERSING THE BOARD'S DECISION, IT IS HEREBY ORDERED THAT PETITIONERS AND RESPONDENT SHALL FILE A RESPONSE TO THE PETITION FOR LEAVE TO INTERVENE, IF ANY, WITHIN TEN (10) DAYS OF THE DATE OF THIS RULE TO SHOW CAUSE AND ALL INTERESTED PARTIES OR INTERVENORS SHALL APPEAR BEFORE THE UNDERSIGNED ON OCTOBER 10, 2024 AT 11:00 A.M. IN COURTROOM 636 CITY HALL TO SHOW CAUSE WHY THE PETITION FOR LEAVE TO INTERVENE SHOULD NOT BE GRANTED. BY THE COURT: JUDGE CRUMLISH, III, 9/26/24.		
26-SEP-2024 03:43 PM	NOTICE GIVEN UNDER RULE 236		26-SEP-2024 04:28 PM
Docket Entry:	NOTICE GIVEN ON 26-SEP-2024 OF ORDER ENTERED/236 NOTICE GIVEN ENTERED ON 26-SEP-2024.		
26-SEP-2024 03:54 PM	MOTION HEARING SCHEDULED		26-SEP-2024 03:54 PM
Docket Entry:	66-24094566 PETITION TO INTERVENE IS SCHEDULED FOR 10/10/24 AT 11:00 AM IN COURTROOM 636 CITY HALL.		
27-SEP-2024 10:02 AM	MOTION ASSIGNMENT UPDATED		27-SEP-2024 10:02 AM
Docket Entry:	28-24095328 REASSIGNED TO JUDGE CRUMLISH, JAMES ON 27-SEP-24		
27-SEP-2024 10:36 AM	14 - ENTRY OF APPEARANCE-CO COUNSEL	PFAUTZ, MICHAEL W	27-SEP-2024 10:50 AM
Documents:	24.09.27 - EOA_Pfautz.pdf		
Docket Entry:	ENTRY OF APPEARANCE OF MICHAEL W PFAUTZ AS CO-COUNSEL FILED. (FILED ON BEHALF OF PHILADELPHIA BOARD OF ELECTIONS)		
27-SEP-2024 11:50 AM	OTHER EVENT CANCELLED	CRUMLISH III, JAMES	27-SEP-2024 11:50 AM

Docket Entry: 28-24095328				
27-SEP-2024 01:10 PM	15 - ORDER ENTERED/236 NOTICE GIVEN	CRUMLISH III, JAMES		27-SEP-2024 12:00 AM
Documents: ORDER_28.pdf				
Docket Entry: 38-24095238 AND NOW, THIS 27TH DAY OF SEPTEMBER, 2024, THE COURT HAVING HELD A HEARING ON THE PETITIONERS' APPEAL OF THE DECISION OF THE PHILADELPHIA BOARD OF ELECTIONS, AND THE PARTIES HAVING PROVIDED THE COURT WITH A STIPULATED ORDER AT THE HEARING, IT IS HEREBY ORDERED THAT THE CONTENTS OF THE FILED STIPULATION HAVE BEEN INCORPORATED INTO THE COURT'S ORDER OF SEPTEMBER 25, 2024, AND, ACCORDINGLY, ANY FURTHER ACTION ON THE PROPOSED STIPULATION (24095238) WOULD BE DUPLICATIVE AND THEREFORE THE STIPULATED REQUEST TO ENTER THE CONSENT ORDER IS MOOT. BY THE COURT: JUDGE CRUMLISH, III, 9/27/24.				
27-SEP-2024 01:10 PM	NOTICE GIVEN UNDER RULE 236			01-OCT-2024 01:20 PM
Docket Entry: NOTICE GIVEN ON 01-OCT-2024 OF ORDER ENTERED/236 NOTICE GIVEN ENTERED ON 27-SEP-2024.				
27-SEP-2024 06:11 PM	16 - MOTION FOR RECONSIDERATION	PFAUTZ, MICHAEL W		30-SEP-2024 10:39 AM
Documents: Joint Emergency Motion for Reconsideration.pdf Proposed Order Reconsideration.pdf Motion CoverSheet Form				
Docket Entry: 62-24095662 MOTION FOR RECONSIDERATION OF JUDGE CRUMLISH'S ORDER DATED 9/26/2024 (FILED ON BEHALF OF PHILADELPHIA BOARD OF ELECTIONS, SUSAN T KINNIRY AND BRIAN T BAXTER)				
27-SEP-2024 06:11 PM	CITY CHARGE SUBSEQUENT FILINGS	PFAUTZ, MICHAEL W		30-SEP-2024 10:39 AM
Docket Entry: None.				
28-SEP-2024 01:35 PM	17 - ORDER ENTERED - FINAL DISPOS	CRUMLISH III, JAMES		28-SEP-2024 01:35 PM
Documents: ORDRF_29.pdf				
Docket Entry: 06-24095206 UPON CONSIDERATION OF THE PETITION OF REPUBLICAN NATIONAL COMMITTEE AND THE REPUBLICAN PARTY OF PENNSYLVANIA TO INTERVENE IN THE ABOVE ACTIONS AND THE JOINT EMERGENCY MOTION OF PETITIONERS BAXTER AND KINNIRY AND RESPONDENT PHILADELPHIA BOARD OF ELECTIONS WHEREIN THE PARTIES DO NOT OPPOSE THE PETITION TO INTERVENE, IT IS ORDERED THAT THE PETITION TO INTERVENE IS GRANTED AND THE EMERGENCY MOTION FOR RECONSIDERATION AND CLARIFICATION IS MOOT. IT IS FURTHER ORDERED AND DUE CONSIDERATION, THAT INTERVENOR'S MOTION TO DISMISS IS DENIED. ...BY THE COURT; CRUMLISH, J. 9-27-24				
28-SEP-2024 01:35 PM	NOTICE GIVEN UNDER RULE 236			28-SEP-2024 04:07 PM
Docket Entry: NOTICE GIVEN ON 28-SEP-2024 OF ORDER ENTERED - FINAL DISPOS ENTERED ON 28-SEP-2024.				
30-SEP-2024 10:39 AM	MOTION ASSIGNED			30-SEP-2024 10:39 AM
Docket Entry: 62-24095662 MOTION FOR RECONSIDERATION ASSIGNED TO JUDGE: EMERGENCY JUDGE, JUDGE . ON DATE: SEPTEMBER 30, 2024				
30-SEP-2024 12:05 PM	CORRECTIVE ENTRY	EMERGENCY JUDGE, JUDGE		30-SEP-2024 12:05 PM
Docket Entry: 62-24095662 ***PLEASE NOTE: THIS ENTRY IS BEING MADE TO CLOSE A MOTION RECORD WHICH REMAINED OPEN IN ERROR. SEE JUDICIAL ORDER ENTERED UNDER CONTROL NO. 24095206. ...OJR TXF				
01-OCT-2024 11:18 PM	18 - APPEAL TO COMMONWEALTH COURT	STOHR, ALISON L		02-OCT-2024 04:18 PM
Documents: 2024.10.1 Baxter v. PCBOE, NOA Packet to CmwltH - FINAL.pdf				
Docket Entry: 10/4/24 UPDATE - APPELLATE COURT CASE # ASSIGNED - 1305 CD 2024 NOTICE OF APPEAL FROM THE DECISION DATED 09/26/2024 AND DOCKETED ON 09/26/2024 BY JUDGE THE HONORABLE JAMES C. CRUMLISH, III. NOTICE OF APPEAL FROM THE DECISION DATED 09/27/2024 AND DOCKETED ON 09/28/2024 BY JUDGE JAMES C. CRUMLISH, III. PROOF OF SERVICE FILED. (FILED ON BEHALF OF PHILADELPHIA BOARD OF ELECTIONS)				
01-OCT-2024 11:18 PM	CITY CHARGE SUBSEQUENT FILINGS	STOHR, ALISON L		02-OCT-2024 04:18 PM
Docket Entry: None.				
03-OCT-2024 08:52 AM	19 - APPEAL TO COMMONWEALTH COURT	GALLAGHER, KATHLEEN A		03-OCT-2024 09:17 AM
Documents: 2024-10-03 Final for Filing - Baxter Notice Of Appeal(1541431760.1) reduced filed size.pdf				
Docket Entry: 10/4/24 UPDATE - APPELLATE COURT CASE # ASSIGNED - 1309 CD 2024 NOTICE OF APPEAL FROM THE DECISION DATED 09/26/2024 AND DOCKETED ON 09/26/2024 BY JUDGE THE HONORABLE JAMES C. CRUMLISH, III. NOTICE OF APPEAL FROM THE DECISION DATED 09/27/2024 AND DOCKETED ON 09/28/2024 BY JUDGE THE HONORABLE JAMES C. CRUMLISH, III. PROOF OF SERVICE FILED. (FILED ON BEHALF OF REPUBLICAN PARTY OF PENNSYLVANIA AND REPUBLICAN NATIONAL COMMITTEE)				
03-OCT-2024 11:00 AM	FEE PD PURSUANT TO ORDER			03-OCT-2024 12:00 AM
Docket Entry: CHECK #13385 IN THE AMOUNT OF \$90.25 WAS DISBURSED TO COMMONWEALTH COURT OF PENNSYLVANIA				
03-OCT-2024 01:45 PM	20 - ORDER ENTERED/236 NOTICE GIVEN	CRUMLISH III, JAMES		03-OCT-2024 12:00 AM
Documents: ORDER_42.pdf				

	<p>Docket Entry: ON SEPTEMBER 26, 2024, THE COURT ENTERED AN ORDER GRANTING THE PETITIONERS' REQUEST TO REVIEW A DECISION OF THE BOARD OF ELECTIONS NOT TO COUNT PETITIONERS' AND 67 OTHER ELECTORS' UNDATED AND INCORRECTLY DATED BALLOTS RELATED TO THE SEPTEMBER 17, 2024 SPECIAL ELECTION AND REVERSING THE DECISION AND DIRECTING THAT THE BALLOTS BE COUNTED. THEREAFTER, THE COURT ISSUED AN ORDER ON SEPTEMBER 28, 2024 ON PETITIONERS' AND RESPONDENT'S JOINT MOTION FOR RECONSIDERATION AND CLARIFICATION AND INTERVENORS' MOTION TO INTERVENE AND MOTION TO DISMISS. ON OCTOBER 2, 2024, INTERVENOR FILED A NOTICE OF APPEAL OF THE COURT'S RULINGS TO THE COMMONWEALTH COURT OF PENNSYLVANIA. AND NOW, THIS 3RD DAY OF OCTOBER, 2024 PURSUANT TO PA.R.A.P. 1925(B), THIS COURT ORDERS AS FOLLOWS: 1) INTERVENOR IS DIRECTED TO FILE OF RECORD WITH THE COURT A STATEMENT OF THE ERRORS COMPLAINED OF ON APPEAL (THE "STATEMENT"); 2) INTERVENOR SHALL SERVE SUCH STATEMENT UPON THE JUDGE PURSUANT TO PA.R.A.P. 1925(B)(1); 3. INTERVENOR SHALL FILE SUCH STATEMENT WITHIN TWENTY-ONE (21) DAYS OF THE FILING DATE OF THIS ORDER; AND 4) ANY ISSUE NOT PROPERLY INCLUDED IN THE STATEMENT TIMELY FILED AND SERVED PURSUANT TO SUBDIVISION (B) SHALL BE DEEMED WAIVED. BY THE COURT: JUDGE CRUMLISH, III, 10/3/24.</p>		
03-OCT-2024 01:45 PM	NOTICE GIVEN UNDER RULE 236		03-OCT-2024 04:35 PM
Docket Entry:	NOTICE GIVEN ON 03-OCT-2024 OF ORDER ENTERED/236 NOTICE GIVEN ENTERED ON 03-OCT-2024.		
03-OCT-2024 01:55 PM	NOTICE OF APPEAL SENT		03-OCT-2024 12:00 AM
Docket Entry:	NOTICE OF APPEAL SENT TO COMMONWEALTH COURT ON 10/3/24 PER APPEAL 10/1/24 VIA UPS# 1Z 5E3 003 03 0938 2929		
03-OCT-2024 01:56 PM	NOTICE OF APPEAL SENT		03-OCT-2024 12:00 AM
Docket Entry:	NOTICE OF APPEAL SENT TO COMMONWALTH COURT ON 10/3/24 PER APPEAL 10/3/24 VIA UPS# 1Z 5E3 003 03 0938 2929.		
03-OCT-2024 02:06 PM	21 - ORDER ENTERED/236 NOTICE GIVEN	CRUMLISH III, JAMES	03-OCT-2024 12:00 AM
Documents:	ORDER_43.pdf		
Docket Entry:	<p>ON SEPTEMBER 26, 2024, THE COURT ENTERED AN ORDER GRANTING THE PETITIONERS' REQUEST TO REVIEW A DECISION OF THE BOARD OF ELECTIONS NOT TO COUNT PETITIONERS' AND 67 OTHER ELECTORS' UNDATED AND INCORRECTLY DATED BALLOTS RELATED TO THE SEPTEMBER 17, 2024 SPECIAL ELECTION. THEREAFTER, THE COURT ISSUED AN ORDER ON SEPTEMBER 28, 2024 ON PETITIONERS' AND RESPONDENT'S JOINT MOTION FOR RECONSIDERATION AND CLARIFICATION AND INTERVENOR'S PETITION TO INTERVENE AND MOTION TO DISMISS. ON OCTOBER 1, 2024, RESPONDENT FILED A NOTICE OF APPEAL OF THE COURT'S RULINGS TO THE COMMONWEALTH COURT OF PENNSYLVANIA. AND NOW, THIS 3RD DAY OF OCTOBER, 2024 PURSUANT TO PA.R.A.P. 1925(B), THIS COURT ORDERS AS FOLLOWS: 1) RESPONDENT IS DIRECTED TO FILE OF RECORD WITH THE COURT A STATEMENT OF THE ERRORS COMPLAINED OF ON APPEAL (THE "STATEMENT"); 2) RESPONDENT SHALL SERVE SUCH STATEMENT UPON THE JUDGE PURSUANT TO PA.R.A.P. 1925(B)(1); 3. RESPONDENT SHALL FILE SUCH STATEMENT WITHIN TWENTY-ONE (21) DAYS OF THE FILING DATE OF THIS ORDER; AND 4) ANY ISSUE NOT PROPERLY INCLUDED IN THE STATEMENT TIMELY FILED AND SERVED PURSUANT TO SUBDIVISION (B) SHALL BE DEEMED WAIVED. BY THE COURT: JUDGE CRUMLISH, III, 10/3/24.</p>		
03-OCT-2024 02:06 PM	NOTICE GIVEN UNDER RULE 236		03-OCT-2024 04:35 PM
Docket Entry:	NOTICE GIVEN ON 03-OCT-2024 OF ORDER ENTERED/236 NOTICE GIVEN ENTERED ON 03-OCT-2024.		
04-OCT-2024 09:07 AM	22 - ORDER OF THE APPELLATE COURT		04-OCT-2024 12:00 AM
Documents:	APGEN_46.pdf		
Docket Entry:	<p>IN RE: 1305 CD 2024 AND 1309 CD 2024 - NOW, OCTOBER 3, 2024, IT IS ORDERED AS FOLLOWS: 1. THE ABOVE APPEALS ARE CONSOLIDATED SUA SPONTE. ALL FURTHER FILINGS IN THESE CONSOLIDATED MATTERS SHALL BE CAPTIONED AS SET FORTH ABOVE. THE PHILADELPHIA COUNTY BOARD OF ELECTIONS AND THE REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN PARTY OF PENNSYLVANIA ARE DESIGNATED APPELLANTS. PLEASE SEE ORDER FOR FULL TERMS. 10/3/24</p>		
10-OCT-2024 11:49 AM	23 - OPINION FILED/236 NOTICE GIVEN		10-OCT-2024 12:00 AM
Documents:	OPFLD_47.pdf		
Docket Entry:	1305 CD 2024 1309 CD 2024 OPINION FILED ON 10/10/24 BY J. CRUMLISH.		
10-OCT-2024 12:01 PM	24 - APPEAL INVENTORY RECORD SENT		10-OCT-2024 12:00 AM
Documents:	APILM_48.pdf		
Docket Entry:	PURSUANT TO PA. R.A.P. 1931 (d) APPEAL INVENTORY SENT.		
10-OCT-2024 12:01 PM	RECORD MAILED/TRANSMITTED		10-OCT-2024 12:00 AM
Docket Entry:	RECORD SENT TO COMMONWEALTH COURT ELECTRONICALLY VIA PACFILE UNDER 1305 CD 2024 AND 1309 CD 2024.		

EXHIBIT 2: PETITION FOR REVIEW

Court of Common Pleas of Philadelphia County
Trial Division

Civil Cover Sheet

For Prothonotary Use Only (Docket Number)
SEPTEMBER 2024
E-Filing Number: 2409047953 **02481**

PLAINTIFF'S NAME BRIAN T. BAXTER	DEFENDANT'S NAME PHILADELPHIA BOARD OF ELECTIONS
-------------------------------------	---

PLAINTIFF'S ADDRESS 2401 PENNSYLVANIA AVENUE UNIT 8A11 PHILADELPHIA PA 19130	DEFENDANT'S ADDRESS 1400 JFK BLVD., ROOM 142 CITY HALL PHILADELPHIA PA 19107
--	--

PLAINTIFF'S NAME SUSAN T. KINNIRY	DEFENDANT'S NAME
--------------------------------------	------------------

PLAINTIFF'S ADDRESS 859 N. STILLMAN STREET PHILADELPHIA PA 19130	DEFENDANT'S ADDRESS
--	---------------------

PLAINTIFF'S NAME	DEFENDANT'S NAME
------------------	------------------

PLAINTIFF'S ADDRESS	DEFENDANT'S ADDRESS
---------------------	---------------------

TOTAL NUMBER OF PLAINTIFFS 2	TOTAL NUMBER OF DEFENDANTS 1	COMMENCEMENT OF ACTION <input type="checkbox"/> Complaint <input checked="" type="checkbox"/> Petition Action <input type="checkbox"/> Notice of Appeal <input type="checkbox"/> Writ of Summons <input type="checkbox"/> Transfer From Other Jurisdictions
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AMOUNT IN CONTROVERSY <input type="checkbox"/> \$50,000.00 or less <input type="checkbox"/> More than \$50,000.00	COURT PROGRAMS <input type="checkbox"/> Arbitration <input type="checkbox"/> Mass Tort <input type="checkbox"/> Commerce <input type="checkbox"/> Settlement <input type="checkbox"/> Jury <input type="checkbox"/> Savings Action <input type="checkbox"/> Minor Court Appeal <input type="checkbox"/> Minors <input type="checkbox"/> Non-Jury <input checked="" type="checkbox"/> Petition <input type="checkbox"/> Statutory Appeals <input type="checkbox"/> W/D/Survival <input type="checkbox"/> Other: _____
---	--

CASE TYPE AND CODE
8E - ELECTION MATTERS

STATUTORY BASIS FOR CAUSE OF ACTION

RELATED PENDING CASES (LIST BY CASE CAPTION AND DOCKET NUMBER)	FILED PRO PROTHY SEP 23 2024 K. KALOGRIAS	IS CASE SUBJECT TO COORDINATION ORDER? YES NO
--	--	---

TO THE PROTHONOTARY:
Kindly enter my appearance on behalf of Plaintiff/Petitioner/Appellant: BRIAN T BAXTER , SUSAN T KINNIRY
Papers may be served at the address set forth below.

NAME OF PLAINTIFF'S/PETITIONER'S/APPELLANT'S ATTORNEY CLAUDIA DEPALMA	ADDRESS 2 PENN CENTER 1500 JFK BLVD. SUITE 802 PHILADELPHIA PA 19102
PHONE NUMBER (267) 546-1313	FAX NUMBER none entered

SUPREME COURT IDENTIFICATION NO. 320136	E-MAIL ADDRESS cdepalma@pubintl.org
--	--

SIGNATURE OF FILING ATTORNEY OR PARTY CLAUDIA DEPALMA	DATE SUBMITTED Monday, September 23, 2024, 04:12 pm
--	--

MARIAN K. SCHNEIDER (No. 50337)
STEPHEN A. LONEY (No. 202535)
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Counsel for Petitioners
**Pro hac vice application*
to be filed



**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY,
PENNSYLVANIA**

BRIAN T. BAXTER
2401 Pennsylvania Ave.
Philadelphia, PA 19130

and

SUSAN T. KINNIRY
859 N. Stillman St.
Philadelphia, PA 19130

Petitioners,

v.

PHILADELPHIA BOARD OF ELECTIONS
City Hall, 1400 JFK Blvd., Rm 142
Philadelphia, PA 19107

Respondents.

CIVIL DIVISION

No. _____

ELECTION APPEAL

PETITION FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL

Petitioners Brian T. Baxter and Susan T. Kinniry, qualified registered electors of Philadelphia County, by and through their undersigned counsel, appeal pursuant to 25 P.S. § 3157 from the decision of the Philadelphia Board of Elections (“Board”) on September 21, 2024, to not count their mail-in ballots in the September 17, 2024 Special Election, and aver as follows:¹

INTRODUCTION

1. Voting is the cornerstone of our democracy and the fundamental right upon which all our civil liberties rest. In Pennsylvania, the right to vote and have that vote count is enshrined and protected by the Free and Equal Elections Clause in the Pennsylvania Constitution, which provides that “no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5.

2. This appeal concerns the decision of the Board following the September 17, 2024 Special Election for State House Districts 195 and 201 to not count mail-in ballots because of a missing handwritten date on the outside declaration envelope. The Board set aside and did not count Petitioners’ mail-in ballots because both Petitioners inadvertently forgot to handwrite a date on the declaration envelope. 67 other ballots were also not counted because the voter either omitted the date or wrote a date that was deemed “incorrect” on the declaration envelope.

3. Since 2022, if a voter fails to handwrite the date on the outer declaration envelope of their mail ballot or writes a date that is deemed “incorrect,” their mail ballot is not counted.

See Ball v. Chapman, 289 A.3d 1 (Pa. 2023).

¹ As Petitioners do not seek a recount or canvass under §§ 1701, 1702, or 1703 of the Election Code, and the race in their election districts is not close enough for the affected voters’ mail-in ballots to potentially impact any outcomes, there is no need for the Court or the Commissioners to suspend certification of the election results in the special election. Rather, Petitioners seek an order declaring the Commissioners’ decision unlawful under the Pennsylvania Constitution and requiring the Commissioners to amend the final vote count to include the mail-in ballots of Petitioners. That said, given the upcoming November general election, time is of the essence to achieve clarity of the law before then.

4. However, in recent prior lawsuits multiple courts have found that the voter-written date is meaningless, unnecessary to establish voter eligibility or timely ballot receipt. *See, e.g., Pa. State Conf. of NAACP v. Schmidt* (“*NAACP P*”), 703 F. Supp. 3d 632, 668 (W.D. Pa. 2023), *rev’d on other grounds*, 97 F.4th 120 (3d Cir. 2024) (“County boards of elections acknowledge that they did not use the handwritten date on the voter declaration on the Return Envelope for any purpose related to determining a voter’s age..., citizenship..., county or duration of residence..., felony status..., or timeliness of receipt....” (internal record citations omitted)); *Pa. State Conf. of NAACP Branches v. Schmidt* (“*NAACP IP*”), 97 F.4th 120, 125, 127, 129 (3d Cir. 2024)(agreeing the handwritten date plays no role in determining a ballot’s timeliness or voter qualifications or in detecting fraud); *see also, e.g., Black Political Empowerment Project, et al. v. Schmidt, et al.* (“*B-PEP*”), No. 283 M.D. 2024, 2024 WL 4002321 at *32 (Pa. Cmwlth. Aug. 30, 2024), *vacated on other grounds*, No. 68 MAP 2024 (Pa. Sept. 13, 2024) (“As has been determined in prior litigation involving the dating provisions, the date on the outer absentee and mail-in ballot envelopes is not used to determine the timeliness of a ballot, a voter's qualifications/eligibility to vote, or fraud.”).

5. Accordingly, the refusal to count timely mail ballots submitted by otherwise eligible voters because of an inconsequential date error violates the fundamental right to vote enshrined in the Free and Equal Elections Clause. *See B-PEP*, 2024 WL 4002321, at *32-33; *see also Ball*, 289 A.3d at 27 n.156 (Pa. 2023) (plurality opinion) (acknowledging that the “failure to comply with the date requirement would not compel the discarding of votes in light of the Free and Equal Elections Clause, and our attendant jurisprudence that ambiguities are resolved in a way that will enfranchise, rather than disenfranchise, the electors of this Commonwealth”).

6. Enforcement of this envelope-date provision disenfranchised at least 10,000 voters in the 2022 general election and thousands more voters in the 2024 Presidential primary whose ballots were timely received by Election Day. In the September 17, 2024 Special Election—a low turnout election involving only two seats in the Pennsylvania House of Representatives—the Board disenfranchised 23 mail-in voters for failing to include the date on the outer declaration envelope and 46 mail-in voters for writing a date that was deemed to be “incorrect.”

7. Although previous cases addressed whether federal or state statutory law required enforcement of the handwritten date, the only case to assess whether enforcement of the meaningless envelope-date requirement violates the Free and Equal Elections Clause found that it did. *B-PEP*, 2024 WL 4002321, at *32-33. But that decision was recently vacated on procedural grounds. *See B-PEP*, No. 68 MAP 2024 (Pa. Sept. 13, 2024) (without reaching the merits, vacating lower court opinion on procedural grounds, holding that the Commonwealth Court lacked subject matter jurisdiction).

8. The Board’s decision to refuse to count Petitioners’ votes violates art.1, §5 of the Pennsylvania Constitution.

9. Petitioners are aggrieved by the Board’s decision and hereby appeal from it pursuant to 25 P.S. § 3157(a).

JURISDICTION

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

PARTIES

11. Petitioner Brian T. Baxter is an 81-year-old qualified registered voter who lives in Philadelphia. Mr. Baxter submitted a mail-in ballot ahead of the September 17, 2024 Special

Election for State Representative in the 195th state house district. *See* Declaration of Brian T. Baxter ¶¶ 1-3, 9 (“Baxter Decl.”).²

12. Mr. Baxter has a master’s degree in public policy and has had a long professional career in politics and public sector governance. *Id.*, ¶ 5.

13. Mr. Baxter votes in every election because voting is important to him and he believes it is a citizen’s responsibility to participate in shaping the policies under which we live. *Id.*, ¶¶ 6-7.

14. Mr. Baxter votes by mail because he appreciates the ability to take his time and research the candidates while deciding for whom to vote. He has been voting by mail for two years. *Id.*, ¶ 8.

15. About one month before the September 2024 Special Election, Mr. Baxter received a mail-in ballot from the Board. *Id.*, ¶ 9. He marked it, inserted it into the secrecy envelope and the outer return envelope. He thought he had filled out everything on the declaration envelope correctly when he submitted it. *Id.*, ¶ 10.

16. However, Mr. Baxter neglected to include a date on the outer declaration envelope when completing his mail-in ballot packet.³

17. As a consequence, the Board set aside and did not count his mail ballot in the September 2024 Special Election.

18. Petitioner Susan T. Kinniry is a 38-year-old qualified registered voter in Philadelphia who submitted a mail-in ballot in the September 17, 2024 Special Election for State

² A true and correct copy of Brian T. Baxter’s Declaration is attached hereto as Exhibit 1.

³ See Philadelphia Board of Elections, *List of Flawed Ballots, 2024 Special Election* (Sept. 15, 2024), https://vote.phila.gov/media/2024_Special_Election_Deficiency_List.pdf.

Representative in the 195th state house district. *See* Declaration of Susan T. Kinniry ¶¶ 1-3, 9 (“Kinniry Decl.”).⁴

19. Ms. Kinniry tries to vote in every election and especially in off-cycle, low turnout elections to show that voters are paying attention to what local officials are doing. Kinniry Decl. ¶¶ 6, 15.

20. Ms. Kinniry, who is a regular mail voter, received a mail-in ballot from the Board a few weeks before the September 2024 Special Election. *Id.*, ¶¶ 8-9. She marked her ballot and inserted it into the secrecy envelope and thought she properly filled out the declaration after she inserted everything into the return envelope. *Id.*, ¶ 10.

21. Ms. Kinniry received an email from the Board on August 27, 2024, informing her that she did not date her ballot return envelope and that her vote would not be counted. *Id.*, ¶ 12.

22. As a consequence, the Board set aside and did not count her mail ballot in the Special Election.

23. Respondent the Philadelphia Board of Elections is responsible for overseeing the conduct of all elections in Philadelphia County.⁵ Among other duties, County Boards are responsible for:

- a. Reviewing and processing applications for absentee and mail ballots.⁶ 25 P.S. §§ 3146.2b, 3150.12b.
- b. Confirming an absentee applicant’s qualifications by verifying their proof of identification and comparing the information on the application with information

⁴ A true and correct copy of Susan Kinniry’s Declaration is attached hereto as Exhibit 2.

⁵ The Board is composed of the three Philadelphia City Commissioners (the “Commissioners”), who are a bipartisan group of elected officials who oversee elections and voter registration in Philadelphia. Pursuant to the Philadelphia Home Rule Charter, the Commissioners serve as the county board of elections for Philadelphia County as provided in the Election Code. 25 P.S. § 2641.

⁶ The rules governing mail and absentee ballot processing are identical. For ease of reference, Petitioners will refer to both absentee and mail ballots as “mail ballots.”

contained in the voter's record. 25 P.S. §§ 3146.2b, 3150.12b; *see also id.* § 3146.8(g)(4).

- c. Sending a mail-ballot package that contains a ballot, a “secrecy envelope” marked with the words “Official Election Ballot,” and the pre-addressed outer return envelope, on which a voter declaration form is printed (the “Return Envelope”). *Id.* §§ 3146.6(a), 3150.16(a).
- d. Maintaining poll books that track which voters have requested mail ballots and which have returned them. *Id.* §§ 3146.6(b)(3), 3150.16(b)(3).
- e. Upon return of a mail ballot, stamping the Return Envelope with the date of receipt to confirm its timeliness.⁷
- f. Logging returned mail ballots in the Department of State’s Statewide Uniform Registry of Electors (“SURE”) system, the voter registration system. *Id.*
- g. Keeping returned mail ballots in sealed or locked containers until they are canvassed by the County Board. 25 P.S. § 3146.8(a).
- h. Pre-canvassing and canvassing mail ballots, including examining the voter declaration. *Id.* § 3146.8(g).
- i. Conducting a formal hearing to hear challenges as to all challenged absentee ballot applications and challenged absentee ballots. *Id.* § 3146.8(g)(5).

⁷ See Pa. Dep’t of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes*, at 2–3 (April 3, 2023), <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2023-04-03-Examination-Absentee-Mail-In-Ballot-Return-Envelopes-4.0.pdf>.

DECISION OF THE BOARD AT ISSUE

24. Pursuant to 25 P.S. § 3154(f), the Board met in a public meeting on Saturday, September 21, 2024 to review the mail ballots from the Special Election.⁸ Following a 2-1 vote, the Board orally announced its decision to refuse to count 69 ballots—including Petitioners’ ballots—with a missing or incorrect date.⁹

25. Petitioners appeal from that decision.

FACTUAL BACKGROUND

A. Voting by Mail in Pennsylvania

26. Pennsylvania has long provided absentee ballot options for voters who cannot attend a polling place on Election Day. *See* 25 P.S. §§ 3146.1–3146.9. In 2019, Pennsylvania enacted new mail-in voting provisions, extending the vote-by-mail option to *all* registered, eligible voters. Act of Oct. 31, 2019, P.L. 552, No. 77, § 8.

27. A voter seeking to vote by mail must complete an application that includes their name, address, and proof of identification and send it to their county board of elections. 25 P.S. §§ 3146.2, 3150.12. Such proof of identification must include a Pennsylvania driver’s license number, or non-driver identification number, if the voter has one. If the voter does not have a PennDOT-issued identification, they must provide the last four digits of the voter’s social security number. 25 P.S. § 2602(z.5)(3). As part of the application process, voters provide all the information necessary for county boards of elections to verify that they are qualified to vote in Pennsylvania, namely, that they are at least 18 years old, have been a U.S. citizen for at least one

⁸ *See* Philadelphia Board of Elections, *Agenda of the Philadelphia City Commissioners Return Board Meeting* (Sept. 21, 2024), https://vote.phila.gov/media/Agenda_for_09_21_2024.pdf.

⁹ *See* Philadelphia Board of Elections, *Livestream Meetings: Return of Board Meeting on 9-21-2024*, <https://vote.phila.gov/resources-data/commissioner-meetings/livestream-meetings/>.

month, have resided in the election district for at least 30 days, and are not currently incarcerated on a felony conviction. *See* 25 Pa.C.S. § 1301.

28. After the application is submitted, the county board of elections confirms applicants' qualifications by verifying their proof of identification and comparing the information on the application with information contained in a voter's record. 25 P.S. §§ 3146.2b, 3150.12b; *see also id.* § 3146.8(g)(4). The county board's determinations on that score are conclusive as to voter eligibility unless challenged prior to Election Day. *Id.*

29. Once the county board verifies the voter's identity and eligibility, it sends a mail-ballot package that contains a ballot, a "secrecy envelope" marked with the words "Official Election Ballot," and the pre-addressed outer return envelope, on which a voter declaration form is printed (the "Return Envelope"). *Id.* §§ 3146.6(a), 3150.16(a). Poll books kept by the county show which voters have requested mail ballots and which have returned them. *Id.* §§ 3146.6(b)(3), 3150.16(b)(3).

30. At "any time" after receiving their mail-ballot package, the voter marks their ballot, puts it inside the secrecy envelope, and places the secrecy envelope in the Return Envelope. 25 P.S. §§ 3146.6(a), 3150.16(a).

31. The Election Code provides that the voter "shall...fill out, date and sign the declaration" printed on the outer envelope used to return their mail ballots. *See* 25 P.S. §§ 3146.6(a), 3150.16(a).

32. The voter delivers the ballot, in the requisite envelopes, by mail or in person, or by other designated method, to their county board of elections.

33. A mail ballot is timely so long as the county board of elections receives it by 8 p.m. on Election Day. *Id.* §§ 3146.6(c), 3150.16(c). Upon receipt of a mail ballot, county boards

of elections stamp the Return Envelope with the date of receipt to confirm its timeliness and log it in the Department of State’s Statewide Uniform Registry of Electors (“SURE”) system, the statewide database counties use to, among other purposes, generate poll books.¹⁰

34. Timely mail-in ballots are then verified consistent with procedures set forth in 25 P.S. § 3146.8(g)(3). Any ballot that has been so verified by the county board of elections and has not been challenged is counted and included with the election results. *Id.* § 3146.8(d), (g)(4).

B. The Date Provision Serves No Purpose

35. Pennsylvania’s adoption of mail voting has been a boon for voter participation in the Commonwealth. For example, in 2020, 2.7 million Pennsylvanians voted by mail ballot.¹¹

36. In the 2024 primary election, more than 4,000 mail-in ballots across Pennsylvania were marked as canceled in the SURE system due to a missing or incorrect handwritten date. *See* Declaration of Ariel Shapell at ¶ 12(b).¹²

37. The enforcement of the dating provision results in the arbitrary and baseless rejection of thousands of timely ballots. *See NAACP I*, 703 F.Supp.3d at 680 (finding the record “replete with evidence that the county boards’ application of the [date requirement] in the November 2022 general election created inconsistencies across the Commonwealth in the way ‘correctly dated’ and ‘incorrectly dated’ ballots were rejected or counted by different counties”).

38. This is not new. In the 2022 election, over 10,000 timely absentee and mail-in ballots were rejected because of the dating provision. *See NAACP I*, 703 F. Supp.3d at 668.

¹⁰ Pa. Dep’t of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes*, at 2-3 (Apr. 3, 2023), <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2023-04-03-Examination-Absentee-Mail-In-Ballot-Return-Envelopes-4.0.pdf>.

¹¹ Pa. Dep’t of State, *Report on the 2020 General Election* at 9 (May 14, 2021), <https://www.dos.pa.gov/VotingElections/Documents/2020-General-Election-Report.pdf>.

¹² A true and correct copy of the Declaration of Ariel Shapell is attached hereto as Exhibit 3.

39. The date written on the envelope serves no purpose. In particular, it is not used to establish whether the mail ballot was submitted on time. Indeed, lawsuits in both state and federal court raising statutory challenges have conclusively demonstrated that the date is meaningless, necessary neither to establish voter eligibility nor timely ballot receipt. *See, e.g., NAACP II*, 97 F.4th at 129 (“Nor is [the handwritten date] used to determine the ballot’s timeliness because a ballot is timely if received before 8:00 p.m. on Election Day, and counties’ timestamping and scanning procedures serve to verify that. Indeed, not one county board used the date on the return envelope to determine whether a ballot was timely received in the November 2022 elections.”); *see also NAACP I*, 703 F. Supp.3d at 679 (“Whether a mail ballot is timely, and therefore counted, is not determined by the date indicated by the voter on the outer return envelope, but instead by the time stamp and the SURE system scan indicating the date of its receipt by the county board.”); *B-PEP*, 2024 WL 4002321, at *32 (“As has been determined in prior litigation involving the dating provisions, the date on the outer absentee and mail-in ballot envelopes is not used to determine the timeliness of a ballot, a voter's qualifications/eligibility to vote, or fraud.”).¹³

40. A voter whose mail ballot was timely received could have signed the voter declaration form *only* in between the date their county board sent the mail-ballot packages and the Election-Day deadline. Ballots received by county boards *after* 8 p.m. on Election Day are not counted regardless of the handwritten envelope date. *See NAACP I*, 703 F.Supp.3d at 679 (“Irrespective of any date written on the outer Return Envelope’s voter declaration, if a county board received and date-stamped a . . . mail ballot before 8:00 p.m. on Election Day, the

¹³ The courts’ findings in *NAACP I* and *NAACP II* that this voter-written date serves no purpose, plays no role in establishing a ballot’s timeliness or voter eligibility and is not used to prevent fraud are based on a complete record including discovery from all 67 county boards of elections, including Philadelphia.

ballot was deemed timely received...[I]f the county board received a mail ballot after 8:00 p.m. on Election Day, the ballot was not timely and was not counted, despite the date placed on the Return Envelope”), *rev’d on other grounds, NAACP II*, 97 F.4th 120 (3d Cir. 2024).

C. The Board Timely Received Petitioners’ Mail-In Ballots.

41. Petitioners are qualified voters who are registered to vote in Pennsylvania.

42. Petitioners validly applied for, received, and timely submitted their mail-in ballots prior to the Special Election on September 17, 2024.

43. Before the day of the Special Election and upon receipt of the mail-in ballots at issue here, the election staff reviewed the envelopes and determined that Petitioners had made an error that would prevent the Board from counting them under Pennsylvania law. Specifically, both Petitioners forgot to handwrite a date on the mail ballot declaration envelope.

44. On September 9, 2024, the Board posted a list of mail-in ballots on its website that had been received ahead of the 2024 Special Election that were “administratively determined to be potentially flawed.”¹⁴ The public notice stated that “[t]hese ballot submissions have the possibility of **NOT** being counted” and provided information about requesting a replacement ballot or casting a provisional ballot.¹⁵ Petitioners’ names appeared on this list of defective mail-in ballots received prior to Election Day, but they did not correct the error on their mail ballot envelopes before 8 p.m. on the day of the Special Election.

¹⁴ See Philadelphia Board of Elections, *2024 Special Election: Unverifiable Identification, Undeliverable and/or Potentially Flawed Ballots* (Sept. 9, 2024), <https://vote.phila.gov/news/2024/09/09/2024-special-election-unverifiable-identification-undeliverable-and-or-potentially-flawed-ballots/>.

¹⁵ *Id.*

D. The Board Voted to Not Count Petitioners' Mail-in Ballots in the 2024 Special Election

45. The Board convened at a public meeting on Saturday, September 21, 2024 to adjudicate mail-in ballots and make “sufficiency determinations” about mail ballot packets with flaws.¹⁶

46. The Board was informed that 23 mail-in ballots had been segregated due to a “missing date.” Commissioner Sabir moved that “this Board not accept ballots with a missing date.” The motion was seconded by Commissioner Bluestein.¹⁷

47. Commissioner Deeley responded to the motion by reading from the Commonwealth Court’s August 30, 2024 opinion in which the Board was named as a Respondent including that:

The fundamental right to vote guaranteed by our Constitution is at issue. For this reason, a strict scrutiny standard of review applies to the dating provisions’ restriction on that right. Under this standard of review, the government bears the heavy burden of proving that the law in question is narrowly tailored to serve a compelling government interest and where the governmental fails to satisfy its burden, the law or its application is unconstitutional. As has been determined in prior litigation, the date on the outer mail-in ballot envelopes is not used to determine the timeliness of a ballot, a voter’s qualifications/eligibility to vote, or fraud. Therefore, the dating provisions serve no compelling government interest. The refusal to count undated or incorrectly dated but timely mail ballots submitted by otherwise eligible voters because of meaningless and inconsequential paperwork errors violates the fundamental right to vote recognized in the Free and Equal Elections Clause.

48. Commissioner Deeley observed that the Commonwealth’s order was vacated “on technical grounds” by the Pennsylvania Supreme Court, which “did not rule on the merits of the

¹⁶ See Philadelphia Board of Elections, *Agenda of the Philadelphia City Commissioners Return Board Meeting* (Sept. 21, 2024), https://vote.phila.gov/media/Agenda_for_09_21_2024.pdf.

¹⁷ See Philadelphia Board of Elections, *Livestream Meetings: Return of Board Meeting on 9-21-2024*, <https://vote.phila.gov/resources-data/commissioner-meetings/livestream-meetings/>. The allegations in paragraphs 47-54, *infra*, recount the proceedings as recorded in this livestream.

constitutional arguments.” Commissioner Deeley concluded, in light of the Commonwealth Court’s ruling, that “not counting these ballots because of meaningless and inconsequential errors that do not affect determinations of the timeliness of a ballot, a voter’s eligibility to vote, or the prevention of fraud, would be a violation of the Pennsylvania Constitution.”

49. Commissioner Deeley further explained that as Commissioner she is legally required to swear an oath to uphold the Pennsylvania Constitution at the beginning of each term. “The Pennsylvania Constitution is one of the documents that we swear to support, obey, and defend. Therefore, I believe...that we should count these ballots.”

50. Commissioner Bluestein responded to the remarks by stating, “While I agree in principle with Vice-Chair Deeley that these ballots *should* count, the Pennsylvania Supreme Court vacated the Commonwealth Court ruling and we have an obligation to follow the law as it currently stands. Unfortunately, that means that we are not able to count these ballots in my opinion.”

51. The Board voted 2-1 to not count mail-in ballots that arrived in undated declaration envelopes.

52. The Board was then informed that 46 ballots had arrived in envelopes that were “incorrectly dated.” The Board moved to not count “incorrectly dated” ballots, and Commissioner Deeley again noted her objection in light of the *B-PEP* ruling, stating “I believe the Free and Equal Election Clause of the Pennsylvania Constitution requires us to count these ballots.”

53. Commissioner Sabir responded that he “agree[d] with the sentiments” expressed by his colleague.

54. The Board voted 2-1 to not count mail-in ballots that arrived in “incorrectly dated” declaration envelopes. Thus, Petitioners’ votes were not counted in the 2024 Special Election.

GROUND FOR APPEAL

55. The Board’s decision to not count Petitioners’ mail ballots violated Petitioners’ fundamental right to vote under the Free and Equal Elections Clause.

56. In Pennsylvania, the right to vote is enshrined in and protected by the Free and Equal Elections Clause, which states: “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.” Pa. Const. art. I, § 5. The Clause means not only that voters must have an equal opportunity to participate in elections, but also that: “each voter under the law has the right to cast [their] ballot and have it honestly counted.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914).

57. Under this guarantee “all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth.” *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018). Likewise, the Pennsylvania Constitution forbids the imposition of rules applicable to the right to vote when such regulation denies the franchise or subverts the right to vote. *Winston*, 91 A. at 523.

58. The Pennsylvania Supreme Court has repeatedly held that the right to vote guaranteed by the Free and Equal Elections Clause is fundamental. *See, e.g., Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 361 (Pa. 2020) (employing a construction of the Election Code that “favors the fundamental right to vote and enfranchises, rather than disenfranchises, the electorate”); *Banfield v. Cortés*, 110 A.3d 155, 176 (Pa. 2015) (observing

that “the right to vote is fundamental and ‘pervasive of other basic civil and political rights’”) (quoting *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999)).

59. Strict scrutiny applies to any restriction on this fundamental right. *See, e.g., Petition of Berg*, 712 A.2d 340, 342 (Pa. Cmwlth. 1998), *aff’d*, 713 A.2d 1106 (Pa. 1998) (“It is well settled that laws which affect a fundamental right, such as the right to vote..., are subject to strict scrutiny”); *Applewhite v. Commonwealth* (“*Applewhite II*”), No. 330 M.D. 2012, 2014 WL 184988, at *20 (Pa. Cmwlth. Jan. 17, 2014) (laws that “infringe[] upon qualified electors’ right to vote” are analyzed “under strict scrutiny.”); *James v. SEPTA*, 477 A.2d 1302, 1306 (Pa. 1984) (“[W]here a...fundamental right has been burdened, another standard of review is applied: that of strict scrutiny.”).

60. Under strict scrutiny, the party defending the challenged action must prove that it serves a compelling government interest. *Pap’s A.M. v. City of Erie*, 812 A.2d 591, 596 (Pa. 2002); *see also, e.g., In re Nader*, 858 A.2d 1167, 1180 (Pa. 2004), *abrogated on other grounds by In re Vodvarka*, 140 A.3d 639 (Pa. 2016) (“[W]here a precious freedom such as voting is involved, a compelling state interest must be demonstrated”).

61. The Board cannot demonstrate a compelling interest that justifies its complete disenfranchisement of voters where the handwritten date requirement on mail ballot envelopes serves absolutely no purpose in determining timeliness of receipt or voter qualifications. The Board acknowledged at the September 21 hearing that the date requirement serves no purpose.

62. The only court to have tested the envelope-date provisions in 25 P.S. §§ 3146.6(a), 3150.16(a) against the guarantee of the right to vote under Article I, § 5 concluded that the envelope-date provisions “serve no compelling government interest” and that the “refusal to count undated or incorrectly dated but timely mail ballots submitted by otherwise

eligible voters because of meaningless and inconsequential paperwork errors violates the fundamental right to vote recognized in the free and equal elections clause.” *B-PEP*, 2024 WL 4002321, at *1.

63. The Board’s application of the Election Code’s envelope dating provisions, 25 P.S. §§ 3146.6(a), 3150.16(a), to reject Petitioners’ timely mail ballots based solely on the inadvertent failure to add a meaningless, superfluous handwritten date next to their signature on the mail ballot Return Envelope is an unconstitutional interference with the exercise of the right to suffrage in violation of the Free and Equal Elections Clause.

WHEREFORE, Petitioners respectfully request that this Honorable Court enter an order reversing the decision of the Philadelphia Board of Elections, declaring that the Pennsylvania Constitution requires the counting of Petitioners’ ballots, directing the Board to count the mail ballots cast by Petitioners in the September 17, 2024 Special Election, and enter such other and further relief as provided by the Pennsylvania Election Code or as this Court deems just and appropriate.

Respectfully submitted,

Dated: September 23, 2024

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**Pro hac vice applications*
to be filed

CERTIFICATE OF COMPLIANCE

I certify that 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 23, 2024

/s/ Claudia De Palma
Claudia De Palma
Counsel for Petitioners

VERIFICATION

I, BRIAN T. BAXTER, hereby state:

1. The statements made in the foregoing *Petition for Review in the Nature of a Statutory Appeal* are true and correct to the best of my own personal knowledge, information, and belief; and
2. I understand that false statements herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Brian T. Baxter

Dated: September 23, 2024

VERIFICATION

I, Susan T. Kinniry, hereby state:

1. The statements made in the foregoing *Petition for Review in the Nature of a Statutory Appeal* are true and correct to the best of my own personal knowledge, information, and belief; and
2. I understand that false statements herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.



A handwritten signature in black ink, appearing to read "Susan T. Kinniry", is written over a horizontal line.

Dated: September 23rd, 2024

EXHIBIT

1

DECLARATION OF BRIAN T. BAXTER

I, Brian T. Baxter, hereby declare as follows:

1. I have personal knowledge of the matters in this declaration and this is what I would testify to if called as a witness in Court.

2. I am 81 years old and am otherwise competent to testify.

3. I live in Philadelphia, Pennsylvania.

4. I have lived in Philadelphia for fourteen years. I lived in Harrisburg in the 1980s and later resided in Cherry Hill, New Jersey before moving to Philadelphia. I am happily married to my wife Ilene and a proud father.

5. I am presently retired. For most of my career, I worked for elected officials, both Republicans and Democrats, at the state and local level in Pennsylvania, New Jersey, and New York. I have a master's degree in public policy from Princeton University, and I am very interested in politics and elections. Some of my professional roles include serving as city administrator of Trenton, New Jersey for nine years, working for Elizabeth Holtzman when she was the Comptroller of New York City, and working for Governor Christine Todd Whitman of New Jersey. I gained experience with political campaigns in the City of Philadelphia by supporting Joseph Rock's run for City Controller in 1989. I most recently worked as a lobbyist at S.R. Wojdak & Associates, the largest lobbying firm in the state. I continue to stay involved with political work by volunteering on the 35 Doors Project for Indivisible Pennsylvania.

6. I am a registered voter in Philadelphia. I vote in every election,

including primary and general elections.

7. Voting is very important to me and I believe it is the responsibility of every citizen to vote. Voting is a critical way to participate in shaping the policies under which we live.

8. I started voting by mail about two years ago. I prefer to vote by mail because it provides time to do internet research and gather information about the candidates and issues on the ballots before I submit my vote. I believe that voting around the kitchen table results in smarter voting because I can review the ballot in advance. I do not want to walk into the voting booth without the proper amount of information and vote on a ballot that I am seeing for the first time.

9. I voted by mail in the Philadelphia's Special Election this year for State Representative in the 195th District. About one month before the September 2024 special election, I received a mail-in ballot from the Philadelphia City Commissioners.

10. After I received my ballot, I marked it, inserted it into the secrecy envelope and the outer return envelope. I thought I had filled out everything on the ballot correctly when I submitted it. I was aware that there were lawsuits and efforts in the state legislature to change the envelope dating requirement and I tried to follow all the directions so that my vote would be counted.

11. As far as I know, I have never made a mistake that disqualified my ballot in prior elections when I voted by mail. I am getting older and more

forgetful, which may have contributed to my mistake when completing the mail-in ballot envelope.

12. I believe that my vote should be counted. After reading dozens of articles about this issue, I am not aware of any rationale for why the date is helpful or necessary. The date on the envelope is not important because it is the date that the ballot arrives in the election office that determines whether the vote is valid. I tried to comply with the mail-in ballot rules, but this bureaucratic stumbling block will prevent my vote from counting.

13. I returned my mail-in ballot on time and I believe that denying a citizen's vote because they didn't include the date on the mail-in ballot envelope is taking away that person's vote for no good reason.

I understand that false statements herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Executed this 22nd of September, 2024 in Philadelphia, Pennsylvania.

A handwritten signature in black ink that reads "Brian T. Baxter". The signature is written in a cursive style and is positioned above a horizontal line.

Brian T. Baxter

EXHIBIT

2

DECLARATION OF SUSAN T. KINNIRY

I, Susan T. Kinniry, hereby declare as follows:

1. I have personal knowledge of the matters in this declaration and this is what I would testify to if called as a witness in Court.

2. I am 38 years old and am otherwise competent to testify.

3. I am a resident of Philadelphia, Pennsylvania.

4. I grew up in Jenkintown, Pennsylvania. I attended high school and law school in Philadelphia.

5. I have worked as an attorney for the Social Security Administration since 2017. My work initially focused on the disability program and presently involves labor and employee relations issues.

6. I have been a registered voter in Philadelphia since around 2018. I try to vote in every primary and general election.

7. Voting is very important to me because it is one of the most direct ways that citizens can influence what kind of government we have and who represents our interests. I try not to pass up that opportunity to participate in governance.

8. I started voting by mail in Philadelphia in 2019. I prefer to vote by mail because it is more convenient than voting in person, and because I like having time to review the ballot at home before casting my vote.

9. I voted by mail this year in Philadelphia's Special Election for State Representative in the 195th District. I made an annual request for mail-in

ballots and received a mail-in ballot from the Philadelphia City Commissioners a few weeks before the September 2024 special election.

10. After I received my ballot, I marked it, inserted it into the secrecy envelope and the outer return envelope. I signed the declaration on the outer envelope. I thought I had filled out the outer envelope correctly when I submitted it. I was aware that elections offices in Pennsylvania cannot count ballots for immaterial reasons, so I am embarrassed that I forgot to include the date.

11. As far as I know, I have never made any mistakes on prior mail-in ballots. I do not recall ever receiving an email stating that my ballot was invalid before this September 2024 special election.

12. After I returned my ballot, I received an email from the Pennsylvania Department of State on August 27, informing me that I did not date my ballot return envelope and that my vote would not be counted if I didn't take additional steps to fix this mistake. A true and correct copy of the email dated August 27 is attached hereto as Exhibit A.

13. I was annoyed at myself when I learned that my ballot would not be counted because I forgot the date. I also thought that if I made this mistake, despite my experience with technical, legal requirements, many others must make the same mistake.

14. I did not attempt to fix my ballot because shortly after receiving the email stating that I forgot to date my ballot return envelope, I read in the news

about a recent Commonwealth Court decision finding that it was unconstitutional to reject ballots that do not comply with the date requirement. I thought that the Court had reached the right result.

15. I wish that my vote had been counted in this election. I think it is important to participate in off-cycle elections to show that voters are paying attention to what local officials are doing. Often voter turnout is low in these kinds of special elections, so I made an intentional effort to submit my ballot.

16. I believe that voting rules should encourage more participation, not less. The envelope dating requirement seems like an unnecessary stumbling block that will result in fewer ballots being counted. That is not the result that is in everyone's best interest.

I understand that false statements herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Executed this 22nd of September, 2024 in Philadelphia, Pennsylvania.

A handwritten signature in black ink, appearing to read "Susan T. Kinniry", written over a horizontal line.

Susan T. Kinniry

Declaration Exhibit A

From: <RA-voterregstatcert@state.pa.us>
Date: Tue, Aug 27, 2024, 4:58 PM
Subject: Your Ballot Status Has Changed – Check for Updates
To: <SUSANKINNIRY@gmail.com>

Dear SUSAN T KINNIRY,

After your ballot was received by PHILADELPHIA County, it received a new status.

Your ballot may not be counted because you did not date your ballot return envelope. If you receive this email on or before election day, you can go to your polling place on election day before 8 p.m. and request a provisional ballot.

You can get more information on your ballot's new status by going to <https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx>.

If you have questions or need more information after checking your ballot's status, please contact PHILADELPHIA County at (215) 686-VOTE.

Para leer esta información en español, vaya a <https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx> .
要閱讀此資訊的中文版，請造訪 <https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx>。

Thank you.

****Please do not reply to this email.****

EXHIBIT

3

**DECLARATION OF ARIEL SHAPELL
IN SUPPORT OF PETITIONERS' PETITION FOR REVIEW**

1. I, Ariel Shapell, am an attorney at the American Civil Liberties Union of Pennsylvania (“ACLU-PA”) and have a background in data analytics.

2. I received a B.S.B.A. with majors in mathematics and finance from Washington University in St. Louis in 2011 and a J.D. from the University of Pennsylvania Carey Law School in 2021.

3. In 2014 and 2015, I served as the Director of Business Intelligence at Beatport LLC, a digital music and entertainment company, where I was responsible for organizing, analyzing, and reporting the company’s business data. In my role, I performed data analyses and visualizations and developed systems to extract, transform, and load data. I also supervised a team of three data scientists and analysts.

4. From 2015 until 2018, I served as the lead product manager at Postlight LLC, a technology consultancy. At Postlight LLC, I oversaw data analytics and digital product development projects for large entertainment, finance, and cultural institutions.

5. From 2019 through the present, I have worked as a volunteer, intern, and now legal fellow at the ACLU-PA. During my time with the ACLU-PA, I have conducted numerous analyses of large data sets for both litigation and advocacy.

6. During my time with the ACLU-PA, I have conducted numerous analyses of large data sets for both litigation and advocacy.

7. I have been asked by the ACLU-PA, Arnold & Porter Kaye Scholer LLP, and the Public Interest Law Center (collectively, “Petitioners’ Counsel” or “Counsel”) to apply my training and expertise to assess the number of mail-ballots that were coded as canceled or pending because the voter neglected to write the date on the outer envelope or because the voter wrote a date that was deemed “incorrect.”

8. I have been informed and understand that on August 21, 2023, ACLU-PA attorney Kate Steiker-Ginzberg received access from the Pennsylvania Department of State to the “Pennsylvania Statewide Mail-Ballot File,” which contains point-in-time public information about each mail-ballot application and mail-ballot recorded in Pennsylvania’s Statewide Uniform Registry of Electors (“SURE”) system.

9. Attorney Steiker-Ginzberg made two versions of the Pennsylvania Statewide Mail-Ballot File available to me: (1) a version of the file generated on November 17, 2023 based on Department of State data from the SURE system corresponding to mail-ballots submitted in the November 2023 municipal election, under the file name VR_SWMailBallot_External 20231117.TXT; and (2) a version of the file generated on May 14, 2024 based on Department of State data from the SURE system corresponding to mail-ballots received in the April 2024 Pennsylvania

presidential primary election, under the file name VR_SWMailBallot_External 20240514.TXT.

10. For the May 14, 2024 SURE file, I identified mail ballots that were coded as canceled or pending because the voter neglected to write the date on the outer envelope by selecting the rows in the files where the “Ballot status reason” field was set to “CANC - NO DATE” or “PEND – NO DATE.” For the November 17, 2023 SURE file, I identified mail ballots that were coded as canceled because the voter neglected to write the date on the outer envelope by selecting the rows in the files where the “Ballot status reason” field was set to “CANC - NO DATE.” No “PEND – NO DATE” “Ballot status reason” values were present in the November 17, 2023 SURE file.

11. Similarly, for the May 14, 2024 SURE file, I identified mail ballots that were coded as canceled or pending because the voter wrote a date that was deemed “incorrect” by selecting the rows in the files where the “Ballot status reason” field was set to “CANC - INCORRECT DATE” or “PEND – INCORRECT DATE”. For the November 17, 2023 SURE file, I identified mail ballots that were coded as canceled because the voter wrote a date that was deemed “incorrect” by selecting the rows in the files where the “Ballot status reason” field was set to “CANC - INCORRECT DATE.” No “PEND – INCORRECT DATE” “Ballot status reason” values were present in the November 17, 2023 SURE file.

12. Based on the methodology described above, I determined that:
- a. As of November 17, 2023, **6,804 mail-ballots** submitted in the November 2023 municipal election had been coded in the SURE file as canceled because the voter neglected to write the date on the outer envelope or because the voter wrote a date that was deemed “incorrect.” Of that total, 4,849 ballots were coded as canceled because the voter neglected to write the date on the outer envelope, and 1,955 were coded as canceled because the voter wrote a date that was deemed “incorrect.”
 - b. As of May 14, 2024, **4,421 mail-ballots** submitted in the April 2024 Pennsylvania presidential primary election had been coded in the SURE file as canceled or pending because the voter neglected to write the date on the outer envelope or because the voter wrote a date that was deemed “incorrect.” Of that total, 1,216 ballots were coded as canceled or pending because the voter neglected to write the date on the outer envelope, and 3,205 were coded as canceled or pending because the voter wrote a date that was deemed “incorrect.”

13. My conclusions, and the bases for my conclusion, are presented in this declaration. My work on these matters is ongoing, and I may make necessary

revisions or additions to the conclusions in this declaration should new information become available or to respond to any opinions and analyses proffered by Respondents. I am prepared to testify on the conclusions in this declaration, as well as to provide any additional relevant background. I reserve the right to prepare additional exhibits to support any testimony.

The statements made in this Declaration are true and correct to the best of my knowledge, information, and belief. I understand that false statements made herein are subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.



Ariel Shapell

5/27/2024

**EXHIBIT 3: SEPTEMBER 25, 2024
HEARING TRANSCRIPT**

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

- - -
BRIAN T. BAXTER and : SEPTEMBER TERM 2024
SUSAN T. KINNIRY :
Petitioners, : NO. 02481
V. :
PHILADELPHIA BOARD OF : ELECTION APPEAL
ELECTIONS :
Respondent. :

- - -
September 25, 2024

- - -
Courtroom 602

The Juanita Kidd Stout Center for Criminal Justice
Philadelphia, Pennsylvania

- - -
BEFORE: THE HONORABLE JAMES C. CRUMLISH, J.

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PETITION
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APPEARANCES

- - -

STEPHEN A. LONEY, ESQUIRE
ACLU OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102
Attorney for Petitioners

ALISON L. STOHR, ESQUIRE
CITY OF PHILADELPHIA LAW DEPARTMENT
1515 Arch street
Philadelphia, PA 19102
Attorney for Respondent

Also present:

LINDA A. KERNS, ESQUIRE
LAW OFFICES OF LINDA A. KERNS LLC
1420 Locust Street, Suite 200
Philadelphia, PA 19102
Attorney for Republican National Committee and
Republican Party of Pennsylvania

1 (Call to order at 2:52 PM.)

2 THE COURT: Good afternoon. All parties
3 and representatives are here?

4 MR. LONEY: For petitioners, yes,
5 Your Honor.

6 MS. STOHR: Yes, Your Honor, for
7 respondent.

8 THE COURT: Good afternoon. My name is
9 Judge Crumlish. I am the trial judge assigned
10 to this matter by the president judge. I'm
11 sitting in the matter captioned as Baxter and
12 Kinniry v. the Philadelphia Board Of Elections.
13 This is case number 240902481. It is further
14 captioned as an election appeal.

15 It's a petition for review in the nature
16 of a statutory appeal, I assume under 3157 of
17 the Code.

18 MR. LONEY: Yes, Your Honor.

19 THE COURT: Will counsel please identify
20 themselves for the record and their clients.

21 MR. LONEY: Your Honor, Stephen Loney of
22 the ACLU on behalf of petitioners. To my right
23 are Susan Kinniry and Brian Baxter.

24 THE COURT: Thank you.

25 MS. STOHR: Alison Stohr on behalf of the

1 Board of Elections. I'm joined by counsel
2 Ilana Eisenstein and David Josefovits.

3 THE COURT: Welcome, everyone. You can be
4 seated. It's not necessary for counsel to
5 stand to address the Court.

6 I have had an opportunity to review the
7 petition, and I understand that it is a
8 petition supported by affidavits. That
9 precisely, I think, is grounded in Article 1
10 Section 5 of the Pennsylvania Constitution.

11 Do I have that right?

12 MR. LONEY: Yes, Your Honor.

13 THE COURT: Secondly, the city
14 commissioners sitting as the Board of Elections
15 for the City and County of Philadelphia ruled
16 and determined as a matter of the exercise of
17 their discretion to not count approximately 22
18 ballots that have part of the exterior
19 authentication, I'll call it, the date and
20 signature -- or either?

21 MR. LONEY: We're focused solely on the
22 date issue, Your Honor.

23 Our understanding is that 23 were set
24 aside because they did not have a date on the
25 outer envelope. An additional 46 were set

1 aside for some issue with the date, the date
2 being deemed to be the incorrect date.

3 Both of our petitioners, I believe, are in
4 the former category that there was no date
5 included on the date line.

6 THE COURT: So is it uncontested that
7 these absentee ballots were timely received
8 irrespective of the exterior date or signature?
9 That's not in dispute?

10 MS. STOHR: Correct, Your Honor. Mail-in
11 and absentee, yes.

12 THE COURT: Got it. Having said that,
13 I've reviewed the petition and also the
14 Commonwealth Court opinions, plural, both of
15 them not reported, however.

16 I've also reviewed the preceding case in
17 the Supreme Court of Pennsylvania. Therefore,
18 at least I am familiar with the legal arguments
19 that I expect to be presented.

20 Is there any dispute as to the verified
21 affidavits of your clients?

22 MR. LONEY: Not that we're aware of.

23 THE COURT: They say what they say, or do
24 we need live testimony?

25 MS. STOHR: In our opinion, we do not need

1 live testimony. We do not object to any of the
2 facts.

3 THE COURT: So for the record, those are
4 stipulated facts. If called to testify, the
5 affiants would testify as reflected in those
6 affidavits. Fair enough?

7 MR. LONEY: Yes, Your Honor.

8 THE COURT: Okay. As a matter --

9 MS. KERNS: Excuse me, Your Honor. If I
10 may.

11 THE COURT: Yes.

12 MS. KERNS: My name is Linda Kerns. I
13 represent the Republican National Committee.
14 The order that I received said this hearing
15 started at 3:00. I apologize if I got the
16 wrong order.

17 THE COURT: No need to apologize,
18 Ms. Kerns. You haven't intervened. I haven't
19 seen a docket --

20 MS. KERNS: We did. We filed an
21 intervention.

22 THE COURT: When?

23 MS. KERNS: About within the last hour.

24 THE COURT: Okay. I haven't had a chance
25 to review it or approve it, but you're

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certainly welcome to join us at least at this juncture as a participant, as a witness as to the regularity of the proceeding.

MS. KERNS: Just to be clear, Linda Kerns Supreme Court ID 84495 for the Republican National Committee and Republican Party of Pennsylvania.

THE COURT: Understood. Thank you. You can be seated.

Petitioner, you may address the Court.

MR. LONEY: Thank you, Your Honor. I know you said we didn't have to stand.

THE COURT: It's an old habit.

MR. LONEY: Yes. Old habit, and I'm a little jittery just baseline.

As Your Honor noted, our arguments are in the papers and the basis for our claims under the Pennsylvania Constitution. In some ways this is an issue of first impression, but in other ways an issue that has gone the petitioner's way every time it has come up.

Your Honor noted the recent opinion from the Commonwealth Court in the *Black Political Empowerment Project, et al. v. Schmidt* case, which has been vacated.

1 So I acknowledge that, but that was a 4-1
2 ruling from an en banc panel of the
3 Commonwealth Court ruling that all of the legal
4 claims we make in this case are valid, that it
5 is a violation of the fundamental right to vote
6 reflected in Article 1 Section 5 of the
7 Pennsylvania Constitution to disqualify ballots
8 based on a requirement or a rule or a provision
9 in the Election Code that serves no purpose
10 other than to disqualify.

11 We put in record evidence from the
12 petitioners indicating that these ballots we
13 are talking about are timely received. There's
14 no dispute of that.

15 THE COURT: Were they qualified electors?

16 MR. LONEY: Yes, Your Honor. There's no
17 dispute of that.

18 In fact, in order to get a mail ballot
19 package, they have to apply for it, and the
20 Board of Elections has to confirm their
21 qualifications before they even get the mail
22 ballot package. So there's no dispute they're
23 qualified electors.

24 There's no dispute that they returned the
25 mail ballot package on time. They signed the

1 outer envelope.

2 And there's also no dispute that the
3 envelopes themselves are not, broadly speaking,
4 undated. The Board of Elections date-stamps
5 the envelope as soon as they receive it. So
6 the handwritten date by the voter is a
7 superfluous requirement, and it's been
8 acknowledged to be such by multiple state and
9 federal courts.

10 The only question here that is left by
11 those prior opinions is whether that
12 constitutes a violation of the free and equal
13 elections clause. An en banc panel of the
14 Commonwealth Court has held that it does.

15 THE COURT: Unfortunately in an
16 unpublished opinion which limits our ability.
17 It may be persuasive in the Court's analysis of
18 this Article 1 Section 5 challenge. But again,
19 both opinions, Judge Wojcik's and also Judge
20 Ceisler's, are unpublished.

21 MR. LONEY: That's fair enough,
22 Your Honor.

23 I will note that the internal operating
24 procedures of the Commonwealth Court dictate
25 that in an election case they issue unpublished

1 opinions, dispense with the potentially
2 time-consuming step of getting full court
3 approval to publish, and they go back to it
4 later if one of the parties applies for
5 publication.

6 So the fact that it's --

7 THE COURT: I'm somewhat familiar with the
8 IOPs.

9 MR. LONEY: Understood, Your Honor.

10 THE COURT: I just want to be clear
11 because I am going to be asked to render an
12 opinion at least where I stand now.

13 And I include in at least my preliminary
14 analysis that Justice Wecht has expressed some
15 appreciation of the timeliness of this kind of
16 challenge. I am just facing that without
17 ruling on the merits just yet.

18 MR. LONEY: Understood, Your Honor. We
19 appreciate that as well.

20 I should, to be above-board, tell
21 Your Honor that also within the last hour in
22 response to the Supreme Court's acknowledgement
23 that it's important to decide the underlying
24 legal issue expeditiously, we did file a King's
25 Bench -- the ACLU of Pennsylvania and our

1 cocounsel, not petitioner sitting here.

2 THE COURT: On behalf of your client?

3 MR. LONEY: On behalf of different
4 clients.

5 THE COURT: Which was the invitation of
6 Judge Wecht, as I understood it.

7 MR. LONEY: That's how we read it as well.
8 This one, unlike the BPEP case, does include
9 all 67 counties' Boards of Elections and the
10 secretaries as respondents.

11 And we hope that the Pennsylvania Supreme
12 Court will take up the underlying
13 constitutional issue and put this to bed, but
14 we're dealing with the calendar that we're
15 dealing with.

16 We've got two voters who in the meantime
17 have voted in a special election that's kind of
18 off the normal calendar, and they are before
19 the Court asking that their votes be counted
20 and that their constitutional rights not be
21 violated.

22 And we also have no guarantee the court --
23 I tend to agree with Your Honor that at least
24 three of the justices kind of invited this
25 King's Bench as a next step, but that's not the

1 majority. We don't know if they will take this
2 up. We see no reason the Court shouldn't call
3 balls and strikes on the constitutional claim
4 in this case in the meantime.

5 I don't think you will hear from any party
6 that the critical facts are disputed as to the
7 timeliness and eligibility of the petitioners
8 and the other 67 or so folks whose mail ballots
9 were rejected on similar grounds or that there
10 is any fraud here, that anybody did anything
11 other --

12 THE COURT: There is no suggestion of
13 anything other than the utmost good faith and
14 regular proceedings under the Home Rule Act as
15 well as the Constitution of Pennsylvania of the
16 city commissioners who are making these
17 decisions. Fair enough?

18 MR. LONEY: Fair enough.

19 I will also note for the record, because
20 Your Honor did mention the commissioners voting
21 not to count these votes, that it was a 2-1
22 vote.

23 There was a dissenting commissioner who
24 made an impassioned plea to uphold their oath
25 as commissioners. We frankly think that

1 commissioner was correct on the law, but the
2 other two felt bound by the current state of
3 play in the appellate courts.

4 THE COURT: And there it falls to me under
5 the code to call the balls and strike in that
6 kind of dispute.

7 MR. LONEY: Yes, Your Honor. The only
8 thing I'll say to that is that in analyzing
9 whether this Court is bound by prior appellate
10 rulings, prior rulings from the Pennsylvania
11 Supreme Court simply did not address the issues
12 presented here.

13 THE COURT: I'm familiar with the
14 general -- that's why I suggested at the
15 beginning of the argument that this was a
16 unique fair exercise challenge as distinguished
17 from some others. Fair enough?

18 MS. STOHR: Yes, I think that's fair.

19 THE COURT: Again, I'm trying to create a
20 full record of undisputed -- and I understand
21 this is really a pure issue of law asserted in
22 good faith by the parties.

23 And I have to agree with counsel for the
24 petitioner that there's been a degree of
25 invitation from the appellate courts to advance

1 this for a final disposition.

2 Let me ask the solicitor. Is this a
3 circumstance at least from a purely legal
4 standpoint that I have a constitutional
5 imperative of what the exercise of the
6 franchise looks like in the case of ballots
7 omitting some kind of information?

8 MS. STOHR: Yes, Your Honor, statutory and
9 the case law interpreting that statute and the
10 conflict between those two.

11 THE COURT: But there's something of a
12 paucity in the Article 1 Section 5 argument and
13 the statute conflict.

14 MS. STOHR: Yes, that's correct.

15 In the lead-up to the vote that was taken
16 on Saturday on these undated and incorrectly
17 dated mail-in and absentee ballots, from the
18 beginning of the special election through the
19 actual counting, we started where *Ba11 v.*
20 *Chapman* was good law stating that boards should
21 not count undated and incorrectly dated
22 ballots.

23 Then we had the BPEP decision by the
24 Commonwealth Court. Then that was vacated by
25 the Supreme Court. So the Board is doing its

1 best to keep up with the state of the law.

2 THE COURT: I think we've now stipulated
3 that this the utmost good faith of the public
4 officials who oversee our elections here in the
5 City and County of Philadelphia.

6 MS. STOHR: And I appreciate that,
7 Your Honor. Yes. Attempting to, you know,
8 take all these decisions into account and vote
9 according to what they believe those decisions
10 require them to do.

11 THE COURT: There's no doubt in my mind,
12 having said all that, about the bona fides of
13 these public officials in discharging their
14 duties.

15 The statute also puts it in the hands of
16 this Court to make a fair and just
17 determination in applying the statutory
18 mandates of the Election Code, to paraphrase
19 slightly. I don't know if anyone would
20 disagree with that. Somebody might, as
21 advocates are entitled to do.

22 So we have a stipulated record of the
23 affiants. We have what I think is a pretty
24 clearly focused body of recent appellate law
25 that creates, at least right now for me, a

1 degree of uncertainty. There is no per se
2 controlling law on this conflict issue.

3 I think that Judge Ceisler and
4 Judge Wojcik wrote very persuasive opinions,
5 albeit non-reported and not necessarily the
6 subject of confirmation by the supremes.

7 The relief petitioner seeks is to reverse
8 the decision of the city commissioners sitting
9 as the Board of Elections and to allow the
10 counting of these ballots that have this
11 outward alleged defect in the dating.

12 Is that fair enough?

13 MR. LONEY: That's fair, Your Honor.

14 And I should note in case it hasn't been
15 clear on the record that we do not request as
16 part of our requested relief any slowdown or
17 stopping of the process of certification of
18 results.

19 The number of ballots at issue is not
20 enough to impact the outcome, especially in an
21 unopposed race, or two unopposed races. So
22 we've agreed with the respondents here, and I
23 believe there's a proposed order consented to
24 that's either been filed or is about to be
25 filed that certification can go forward

1 notwithstanding.

2 THE COURT: It would be really helpful to
3 me if someone could give that to me today.

4 MS. STOHR: It was filed.

5 THE COURT: Yes. But I was running from
6 the security in City Hall to this fine
7 environment.

8 MR. LONEY: The finer point on the
9 requested relief is to amend the final vote
10 count to include these votes. And that's --

11 THE COURT: The 2-1 vote of the
12 commissioners?

13 MR. LONEY: I'm sorry. To reverse the
14 vote of the commissioners and canvass these
15 unopened envelopes, count the ballots if they
16 are countable inside those envelopes, and then
17 if that happens after certification of the
18 results, to update the official vote count.

19 THE COURT: In effect, amend.

20 But is there a stipulation that it is
21 unlikely if not impossible that these would be
22 outcome determinative in the special election?

23 MS. STOHR: It is impossible, Your Honor.

24 THE COURT: So that's an important fact.

25 MS. STOHR: Yes.

1 THE COURT: All right. Based upon the
2 representations of counsel and the precision of
3 the record I am presented with, I do believe
4 the petitioners made out a claim for Article 1
5 Section 5 relief under the Pennsylvania
6 Constitution which always prevails over a
7 conflict in the statutory language, if any.

8 I am also presented with a joint consent
9 order which will allow expedited review by the
10 appellate courts if the parties so choose.

11 Again, this is upon the undeniable and
12 confirmatory position of the parties that this
13 will in no way prejudice the ordinary and
14 efficient process of the Board of Elections in
15 processing their faithful duty to the Election
16 Code.

17 Fair enough to everyone?

18 MR. LONEY: Yes, Your Honor.

19 MS. STOHR: Yes, Your Honor.

20 THE COURT: Have I missed anything?

21 MR. LONEY: For petitioners, no.

22 THE COURT: For respondent?

23 MS. STOHR: No, Your Honor.

24 THE COURT: Thank you very much for being
25 here on very short notice. As you know, we

1 have now an accelerated timetable for making
2 these decisions. I'm sure you all have a lot
3 of work ahead of you.

4 MR. LONEY: Ahead, behind, and around us,
5 yes.

6 THE COURT: As my dad always said, this is
7 an all-volunteer army.

8 MS. STOHR: True, Your Honor.

9 THE COURT: You're in faithful service to
10 the public. Thank you, everyone. Have a nice
11 evening.

12 Ms. Kerns?

13 MS. KERNS: Yes, Your Honor. I would just
14 like to preserve the Republican National
15 Committee's and the Republican Party of
16 Pennsylvania's petition to intervene in this
17 matter. I had contacted the petitioners, and
18 they said they did not take a position on the
19 matter. The City hadn't responded yet, which
20 I'm sure through no fault --

21 THE COURT: Nor have I.

22 MS. KERNS: Right.

23 THE COURT: Succinctly stated, you oppose
24 the petition that's before me today? Your
25 client does?

1 MS. KERNS: Yes, Your Honor.

2 THE COURT: Okay. You understand the
3 parties have stipulated to elemental facts.
4 This is a real true issue of law for the Court.

5 Do you understand that that is not with
6 prejudice toward the Republican Party of
7 Pennsylvania asserting any rights in the
8 appellate process?

9 MS. KERNS: Yes, Your Honor.

10 THE COURT: Fair enough to everyone?

11 MS. KERNS: I don't know what facts were
12 stipulated to. That would be --

13 THE COURT: Do you have the petition
14 you're trying to intervene in? There's a
15 petition that I just ruled on.

16 MS. KERNS: Yes.

17 THE COURT: Do you have that?

18 MS. KERNS: Yes.

19 THE COURT: Okay. Those are the
20 stipulated facts.

21 MS. KERNS: I understand, Your Honor.

22 MS. STOHR: May I make one clarification?

23 THE COURT: Absolutely.

24 MS. STOHR: Just that the Board doesn't
25 take a position on the merits of the arguments.

1 THE COURT: I understand that.

2 MS. STOHR: But we do stipulate to all the
3 facts, not the arguments.

4 THE COURT: The facts. Under the statute,
5 especially on a review from administrative
6 agency, under the code I have that duty to
7 conform the constitutional mandates with the
8 statutory mandates. That's all I was saying.

9 MS. STOHR: Thank you.

10 THE COURT: Fair enough to everyone?

11 MR. LONEY: Yes, Your Honor.

12 THE COURT: All right. You look like you
13 have one last word on your mind.

14 MS. KERNS: Well, I'm a lawyer.

15 THE COURT: Don't put me in extra innings
16 now.

17 MS. KERNS: Hopefully we'll have a Red
18 October. I just want to be clear, Your Honor.
19 Is there no ruling now on our petition to
20 intervene?

21 THE COURT: I haven't reviewed it, so I
22 don't know the nature of it. But I have
23 allowed to you advance your client's argument.
24 I'll decide on that in due course. I can't do
25 things making them up as I go.

1 MS. KERNS: I understand, Your Honor. I
2 just want to make sure I preserve my clients'
3 rights.

4 THE COURT: And you have. As I said, this
5 is a purely legal issue that I am ruling upon.
6 The parties have consented that the
7 constitutional mandate would require that these
8 ballots be counted and upon the factual record
9 before me and whatever appellate rights are
10 preserved. I'm sure, regrettably, the first in
11 line here making this decision.

12 MS. KERNS: Thank you, Your Honor. And
13 I'm sorry. Did the time move?

14 THE COURT: That's a second thing.

15 MS. KERNS: Did the time move and I did
16 not get that?

17 THE COURT: No. We were all here at 3:00.

18 MS. KERNS: Thank you.

19 THE COURT: Anything else?

20 MR. LONEY: No, Your Honor.

21 THE COURT: Thank you again.

22 (Hearing adjourned at 3:14 PM.)
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C E R T I F I C A T I O N

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above case and that this copy is a correct transcript of the same.

Leah Blum, RPR
Registered Professional Reporter
Official Court Reporter

(The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or supervision of the certifying reporter.)

EXHIBIT 4:
ORDER IN QUESTION

ORDER DATED SEPTEMBER 26, 2024

(Appended to Brief for Appellant)