

IN THE SUPREME COURT OF PENNSYLVANIA

No. 76 EM 2024 & No. 77 EM 2024

BRIAN BAXTER and SUSAN KINNIRY,
Plaintiffs-Respondents,

v.

PHILADELPHIA BOARD OF ELECTIONS,
Defendant-Respondent,

**REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN
PARTY OF PENNSYLVANIA**
Intervenor-Petitioners.

On Emergency Application for Extraordinary Relief

**AMICUS BRIEF OF THE DEPARTMENT OF STATE AND
SECRETARY OF THE COMMONWEALTH AL SCHMIDT**

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November 1, 2024

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INTEREST OF AMICI CURIAE

The Department of State and the Secretary of the Commonwealth respectfully submit this amicus brief to address certain points raised by the RNC's application for extraordinary jurisdiction.¹

The Secretary is required to prescribe the form of the declaration that appears on mail-ballot envelopes, and all counties are required to use the declaration he prescribes. *See* 25 P.S. §§ 3146.4, 3150.14(b). The central issue in this case concerns what voters must do to have “sufficiently” completed that declaration. *See id.* §§ 3146.6(a), 3150.16(a); *see also id.* § 3146.8(g)(3).

Similarly, the Secretary has broad authority to prescribe the form of the return envelope that carries the declaration as well as the form of the enclosed instructions. *See id.* §§ 3146.4, 3150.14(b) & (c). The Secretary has used this authority to redesign mail ballot materials to reduce the frequency of inadvertent voter errors, including dating errors. Despite these efforts, thousands of voters in each election continue to omit the declaration date or write an “incorrect” date.

¹ This brief was not authored or paid for, in whole or in part, by any person or entity other than *amici* and their counsel.

Furthermore, the Secretary has the duty “[t]o receive from county boards of elections the returns of primaries and elections, to canvass and compute the votes cast for candidates and upon questions as required by the provisions of this act; to proclaim the results of such primaries and elections, and to issue certificates of election to the successful candidates at such elections.” *Id.* § 2621(f); *see also id.* § 3159.

Finally, the Department is required to administer the Statewide Uniform Registry of Electors, or SURE system. 25 Pa.C.S. § 1222. In this role, the Department issues directives to county boards of elections regarding their use of the SURE system for recording information about Pennsylvania voters.

DISCUSSION

The Department has previously explained its view that the Election Code does not (and has not since 1968) allow counties to reject mail ballots based on declaration-date errors, and that doing so is inconsistent with the Pennsylvania Constitution. *See, e.g., Br. for Secy. of the Cmwlth. at 16-29, BPEP II* (Sept. 4, 2024). It does not repeat these arguments here, but instead focuses this brief on a few specific points relating to the application for stay filed by the RNC:

1. This case arises under a specific provision of the Election Code that allows “[a]ny person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election” to appeal from the decision to the Court of Common Pleas “within two days after such order or decision shall have been made.” 25 P.S. § 3157(a). Petitioners Brian Baxter and Susan Kinniry initiated this action under § 3157 after the Philadelphia Board of Elections refused to count ballots they had submitted in connection with two recent special elections for State Representative.

Such statutory appeals filed in courts of common pleas under § 3157 are common. In fact, they are the primary mechanism through which

decisions of county boards of elections are challenged in court following an election. By definition, the only parties to such appeals are the “person aggrieved” who initiates the action and the relevant county board of elections.

The RNC’s argument that all 67 counties must be parties to such actions is based on a decision about the limits of Commonwealth Court’s original jurisdiction, and would write § 3157 out of the Election Code entirely. *See App. at 20.* It is nonsensical, atextual, and contrary to this Court’s precedents to suggest that a voter who wishes to challenge a decision of an individual county board with respect to her ballot should be required to sue every county in the Commonwealth. Moreover, no court (save this Court) would have original jurisdiction over such an action. County boards all face similar decisions, and any § 3157 appeal that results in a reported decision of Commonwealth Court or a decision of this Court will bind all counties. But it certainly does not follow that all counties must be parties to every such action.

In fact, when this Court first addressed questions related to whether mail ballots with declaration-date errors should be counted, it did so in the context of two § 3157 appeals arising from Philadelphia and

Allegheny Counties. See *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. 2020). No Justice in that case suggested that the Court lacked jurisdiction because the other 65 counties were not before it. In just the last two months, this Court has similarly resolved two statutory appeals involving just a single county. *In re Canvass of Provisional Ballots in 2024 Primary Election*, 322 A.3d 900 (Pa. 2024); *Genser v. Butler Cnty. Bd. of Elections*, No. 26 WAP 2024, 2024 WL 4553285 (Pa. Oct. 23, 2024).

2. The Department recognizes this Court’s admonition that it will no longer “impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election.” See *New PA Project Educ. Fund v. Schmidt*, 112 MM 2024, 2024 WL 4410884, at *1 (Pa. Oct. 5, 2024). The Department agrees that such an approach is appropriate where late changes would disrupt election administration or confuse voters, and has previously argued as much.

But not all changes to election procedures are the same. The requirement that county boards set aside mail ballots with declaration-date errors—and particularly the requirement that they set aside mail ballot envelopes with “incorrect” dates—*imposed* a significant burden on

county boards. Election workers must manually review every ballot envelope to determine whether it has a “correct” date. That process takes time, and requires difficult decisions as to whether a date is “correct.”²

Directing county boards to *count* ballots with declaration-date errors would make their responsibilities easier by relieving them of this significant burden. And voters would be largely unaffected—except that those who inadvertently omit the date or write an incorrect date would not be disenfranchised. The RNC’s claims that Commonwealth Court’s opinion has “unleashed chaos” and “engender[ed] confusion and undermin[ed] public confidence” in the 2024 Election are typically overblown. App. 1 & 12.

² As summarized by the U.S. District Court for the Western District of Pennsylvania, counties have faced decisions regarding circumstances in which “the voter declaration date omitted the year; omitted the month; omitted the day; included a day that does not exist; put the date elsewhere on the envelope; or included a cross-out to correct an erroneous date.” *Pennsylvania State Conf. of NAACP v. Schmidt*, 703 F. Supp. 3d 632, 681 (W.D. Pa. 2023), *reversed*, *Pennsylvania State Conf. of NAACP Branches v. Secy. Commonwealth of Pennsylvania*, 97 F.4th 120 (3d Cir. 2024). Likewise, counties have faced decisions regarding how to treat declaration dates in which the voter used the European dating convention. *Id.* Where possible, the Secretary has sought to provide guidance to counties on how to address such situations. Of course, the Secretary cannot anticipate every possible question that might arise regarding whether a date is “incorrect,” and his guidance is not binding on the counties.

Furthermore, granting the RNC's stay request would not end litigation relating to this issue. A stay would not prevent the filing of new appeals under § 3157 to decisions of county boards not to count ballots with declaration-date errors in the 2024 General Election. Nor would it prevent new appeals challenging the determinations of county boards as to whether a particular date is "incorrect." *See supra* note 3. It is almost always better to address questions about which ballots will be counted before an election, when the impact on the results cannot be known.

The RNC's expressed concerns with last-minute changes to election procedures are difficult to take seriously, given that it was the RNC that upended the status quo in 2022, when it sought and obtained an order just one week before the election that required all counties to set aside ballots with omitted declaration dates (contrary to the practice of 66 counties at the time) as well as those with "incorrect" declaration dates (contrary to the practice of all counties). *See Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022). The order the RNC demanded applied to more than a million voters who had already returned their ballots under different rules, imposed new obligations on the counties, and required election

officials to invent new procedures in the middle of an ongoing election.³ Relieving counties of these obligations would not have the same result.

3. Finally, in the course of litigation over this issue, certain facts have become indisputable. First, thousands of voters in each election are disenfranchised because they make a simple mistake, by omitting the date on their ballot return envelope or by writing the wrong date. Second, elderly voters are disproportionately affected and have their votes thrown out at significantly higher rates than do younger voters.⁴ And third, the handwritten date serves no purpose under the Election Code, and no county election board relies on the date. The RNC protests this last conclusion, *see* App. 22–23, but it has had repeated opportunities to

³ *See* Bethany Rodgers, ‘Utter chaos’: Pa. counties hustle after Supreme Court order on mail-in ballots, GoErie.com, <https://www.goerie.com/story/news/politics/2022/11/05/pennsylvania-dealing-court-order-undated-ballots-election-day-voting/69620980007/>; Jonathan Lai, *Pennsylvania’s vote count will be slower and more ballots will be rejected after a new court ruling*, Philadelphia Inquirer (Nov. 3, 2022), <https://www.inquirer.com/politics/election/pennsylvania-vote-count-slower-incorrectly-dated-ballots-20221103.html>.

⁴ *See* Amicus Br. in Supp. of Appellees, *Baxter v. Philadelphia Bd. of Elections*, Nos. 1305 & 1309 C.D. 2024, at 4–7 (Pa. Cmwlth. Oct. 14, 2024).

offer evidence—rather than speculation—that the date serves a purpose under the Election Code, and it has repeatedly failed to do so.⁵

CONCLUSION

For the reasons set forth above, this Court should deny the RNC’s request for a stay. If the Court otherwise grants the application for extraordinary jurisdiction, it should affirm the decision of Commonwealth Court.

November 1, 2024

Respectfully submitted,

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⁵ For instance, the RNC refers to “the State’s interest in documenting the date the voter completed the ballot as part of trustworthy election administration or as a back-up for scanning errors or SURE system malfunctions.” App. 22. This “interest” is completely made up; the handwritten date serves no such purpose at all.

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.

Date: November 1, 2024

/s Michael J. Fischer
Michael J. Fischer

CERTIFICATE OF LENGTH

I certify that this brief complies with the word count requirement set forth in Pennsylvania Rule of Appellate Procedure 531(b)(3). Excluding matters identified in Pennsylvania Rule of Appellate Procedure 2135(b), this brief is 1709 words. I have relied on Word's word count function to determine the length of this brief.

Date: November 1, 2024

/s Michael J. Fischer
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