

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 112 MM 2024

NEW PA PROJECT EDUCATION FUND, ET AL.,

Petitioners,

v.

AL SCHMIDT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE COMMONWEALTH,
AND 67 COUNTY BOARDS OF ELECTIONS

Respondents.

NOTICE OF SUPPLEMENTAL AUTHORITY

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* *Pro hac vice* applications
to be filed

Counsel for Petitioners

Petitioners New PA Project Education Fund, NAACP Pennsylvania State Conference, Common Cause Pennsylvania, League of Women Voters of Pennsylvania, Black Political Empowerment Project, POWER Interfaith, Make the Road Pennsylvania, OnePA Activists United, Casa San José, and Pittsburgh United respectfully notify the Court of supplemental authority arising out of a constitutional challenge substantively similar filed by individual voters in the Pennsylvania Court of Common Pleas for Philadelphia County. *Baxter, et al. v. Phila. Bd. of Elections*, Phila. C.P. No. 240902481. The decision of the Court of Common Pleas (orders attached) is now on appeal to the Commonwealth Court. *Baxter, et al. v. Phila. Bd. of Elections*, Cmwlt. Ct. Nos. 1305 CD 2024, 1309 CD 2024.

Baxter arose out of a Philadelphia-only Special Election held on September 17, 2024, to fill two open seats in the Pennsylvania House of Representatives. The Philadelphia Board of Elections received over 4,000 timely mail ballots in that Special Election and set aside 69 of them (approximately 1.5%) due to missing or purportedly incorrect voter-written dates on the return envelopes. After the Board voted 2-1 to disqualify those ballots, two impacted eligible voters filed a Petition for Review in the nature of a Statutory Appeal pursuant to 25 P.S. § 3157, claiming that the Board's decision to disqualify timely votes because of the envelope-dating issue violated their fundamental rights under the Free and Equal Elections Clause. The Court of Common Pleas issued a final order granting the voters' Petition for Review

on September 28, 2024, agreeing on the merits with their arguments under the Pennsylvania Constitution, and directing the Board to canvass the ballots set aside due to noncompliance with the envelope dating provision in the Special Election.

Both the Philadelphia Board of Elections and Republican Party Intervenors appealed to the Commonwealth Court this week. The Commonwealth Court consolidated the appeals and issued a Scheduling Order (attached) calling for simultaneous briefing on the merits on October 15, 2024.

Should *Baxter* reach this Court, it may present an opportunity to decide the constitutional question presented in the context of a § 3157 Election Code appeal arising out of State House races. In any event, with the November general election looming, the lower court's application of the Free and Equal Elections Clause to reverse the Philadelphia Board of Elections' treatment of envelope-dating errors highlights the need for a precedential decision on the underlying constitutional question by a court of general jurisdiction to establish a rule that will apply statewide.

Dated: October 4, 2024

Respectfully submitted,

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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.

/s/ Stephen Loney

**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
	:	
Petitioners,	:	NO. 02481
	:	
v.	:	ELECTION MATTER
	:	
PHILADELPHIA BOARD OF ELECTIONS,	:	Control No. 24094566
	:	
Respondent.	:	

ORDER

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

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

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

BY THE COURT:



CRUMLISH, III, J.

**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. 24095206
PHILADELPHIA BOARD OF ELECTIONS,	:	
	:	
	:	
Respondent,	:	
	:	
And	:	
	:	
REPUBLICAN NATIONAL COMMITTEE :	:	
and REPUBLICAN PARTY OF :	:	
PENNSYLVANIA,	:	
	:	
	:	
Intervenors.	:	

ORDER

AND NOW, this 27th day of September, 2024, upon consideration of Petition of Republican National Committee and Republican Party of Pennsylvania to Intervene in the above action (filed September 26, 2024 the day after the hearing in the above matter) 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 hereby **ORDERED** that the Petition to Intervene is **GRANTED**¹ and the Emergency Motion for Reconsideration and Clarification is **MOOT**.

¹ Intervenor disadvantaged under the time constraints of review, the court when counsel appeared at the hearing after it had already concluded and, for the first time, advised the court it had *already* filed a Petition to Intervene. Counsel advised the court that although a Petition “had been filed”, before the hearing but, it could not provide the court any such any filing on the 25th.

It is further ordered and due consideration, that Intervenor's Motion to Dismiss is **DENIED**.

BY THE COURT:



Crumlish, III, J.

The court deferred considering Intervenor's Petition in this matter and repeatedly consulted the docket for a filing, but no Petition was reflected on the record as of the time the court submitted its order and its order was entered on the docket at 4:38 p.m. on September 25. The docket thereafter revealed that Petitioner's filing was not made (despite representations to the court to the contrary) until 1:13 pm the following day after the hearing had been concluded. Petitioner's delay disadvantaged the court insofar as the court had no basis at the trial to review the Intervenor's Petition and issue a ruling until such filing was made of record and the delay further has caused inconvenience to the parties in obtaining finality in the court's ruling and necessitating further proceedings to dispose of the Petition to Intervene.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian T. Baxter and Susan T. Kinniry	:	CASES CONSOLIDATED
	:	
v.	:	Trial Ct. No. 2024 No. 02481
	:	
Philadelphia Board of Elections, Republican National Committee, and Republican Party of Pennsylvania	:	
	:	
Appeal of: Philadelphia County Board of Elections	:	No. 1305 C.D. 2024

Brian T. Baxter and Susan T. Kinniry	:	
	:	
v.	:	
	:	
Philadelphia Board of Elections, Republican National Committee, and Republican Party of Pennsylvania	:	
	:	
Appeal of: Republican National Committee and Republican Party of Pennsylvania	:	No. 1309 C.D. 2024

PER CURIAM

ORDER

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.

2. Designated Appellants shall each file a Statement of Issues to be Presented on Appeal by **October 8, 2024, at 12:00 p.m.**, in the Prothonotary's Office in Harrisburg. The Statement of Issues may be filed in person or through the Court's electronic filing system (PACFile). The Statement of Issues may not be filed by facsimile without express prior permission from the Court. The Statement of Issues shall be served on all parties and the presiding judge in the Court of Common Pleas of Philadelphia County (trial court), and a proof of service shall be promptly filed with the Court.

3. The trial court shall **no later than October 10, 2024, at 12:00 p.m.**, transmit to this Court the record in this matter, including an opinion or statement in support of its order and the hearing transcript. Transmission shall not be delayed by proceeding under Pa.R.A.P. 1925(b).

4. Designated Appellants and Appellees shall file (4 copies) and serve (1 copy) simultaneous briefs on the merits of the appeal **no later than October 15, 2024, at 12:00 p.m.**, in the Prothonotary's Office in Harrisburg. Briefs may be filed in person or through the Court's electronic filing system (PACFile). Briefs may not be filed by facsimile without express prior permission from the Court. If a brief is filed through the Court's electronic filing system, the party or counsel shall also provide the Prothonotary's Office within one business day, 3 paper copies of the brief.

5. Motions may not be filed by facsimile without the express prior permission of the Court.

6. Designated Appellants are excused from filing reproduced records.

7. These appeals shall be submitted for decision on the briefs filed without oral argument, unless otherwise ordered.

8. In addition to transmitting and mailing copies of this Order to counsel of record and any pro se party, the Prothonotary is directed to transmit and mail a copy to the Honorable James C. Crumlish, III, of the Philadelphia County Court of Common Pleas and to the Office of Judicial Records - Civil of that court.