

IN THE SUPREME COURT OF PENNSYLVANIA

No. 112 MM 2024

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

Petitioners,

v.

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

Respondent,

and

REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY OF PENNSYLVANIA,

Intervenors.

**RESPONDENT PHILADELPHIA COUNTY BOARDS OF ELECTIONS'
SUPPLEMENTAL NOTICE**

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Respondent Philadelphia County Board of Elections (the Board) submits this supplemental notice to advise the Court of developments in a currently pending statutory appeal that presents the same issue as the instant Petition: whether the Free and Equal Elections Clause of the Pennsylvania Constitution prohibits the rejection of mail ballots with dating errors on the outer declaration envelopes. Until this Court issues a final decision on this question of exceptional public importance, the Board faces the consequences of uncertainty throughout the Commonwealth on this issue.

Baxter v. Philadelphia Board of Elections is a statutory appeal involving the Board's decision to not count mail ballots with dating errors on their declaration envelopes in its September 17, 2024 Special Election. Petitioners—two voters whose ballots were rejected for dating errors—appealed the Board's decision, arguing that not counting such ballots violates the Free and Equal Elections Clause. The Republican National Committee and Republican Party of Pennsylvania (Republican Intervenors) intervened.

On September 26, 2024, the Philadelphia Court of Common Pleas held in *Baxter* that the Board's refusal to count mail ballots due to voters' failure to date the declaration envelope, as directed by 25 P.S. §§ 3146.6(a) and 3150.16(a), “violates Article I, 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.’” (September

26, 2024 Order, attached hereto as Exhibit A.) Based on that conclusion, the Court of Common Pleas: (i) reversed the Board's decision to not count the ballots in the Special Election, and (ii) directed the Board to verify, count if otherwise valid, and include the Petitioners' and sixty-seven other registered voters' date-disqualified mail ballots in the results of the Special Election.

Both the Board and Republican Intervenors have appealed. The Commonwealth Court issued a Briefing Order on October 3, 2024. (Briefing Order, attached hereto as Exhibit B.) Under the schedule, the case will be fully briefed in the Commonwealth Court by October 15, 2024 at 12:00 p.m.

October 15, 2024 is exactly three weeks before the November 5, 2024 General Election. Regardless of the outcome in Commonwealth Court, once that decision is rendered, one (or more) of the parties will almost certainly appeal to this Court. It is possible this schedule would not permit sufficient time for this Court to review and decide any additional appeal before the November 5, 2024 General Election. While at this time, the Board is not formally asking the Court to assume extraordinary jurisdiction over this pending matter, there are compelling reasons for this Court to consider doing so *sua sponte*. 42 Pa. C.S. § 726.

As a vehicle for appellate review, *Baxter* is distinguishable from the instant Petition—as well as potential future litigation on this question—in important ways. First, just as in the appeals from Luzerne and Butler Counties accepted by this Court,

the parties in *Baxter* seek resolution of a specific election dispute with a straightforward record, rather than requesting an advisory opinion. *In re Canvass of Provisional Ballots in 2024 Primary Election*, --- A.3d ----, 2024 WL 4181584, at *1 (Pa. Sept. 13, 2024); *Genser v. Butler Cnty. Bd. of Elections*, No. 240 WAL 2024, 2024 WL 4248971, at *1 (Pa. Sept. 20, 2024). Additionally, *Baxter* concerns a state-only election conducted by a single county board. Because it does not involve a federal election, it avoids the potential jurisdictional complications and tertiary federal issues that may follow a General Election challenge. And importantly, because the results of the Special Election have been certified and are not disputed,¹ the impact of this Court’s review will be limited to only the question of whether electors’ mail ballots will count, not who will win an election.

In addition, the continuing uncertainty over the question presented here and in *Baxter* may place the Board in a precarious position absent this Court’s conclusive resolution of this issue before the General Election. Given the Common Pleas Court’s ruling in *Baxter*, the Board’s approach to handling mail ballots with dating errors may diverge from the approaches other county boards take in the 2024 General Election, virtually guaranteeing further litigation on this issue. That prospect will

¹ The two races in the Special Election were both uncontested, and the Board certified the outcome on September 30, 2024. The results of this litigation will not affect the outcome. Once this litigation is complete, the Board will update the certified results if necessary, as permitted by the September 25, 2024 Order entered by the trial court.

also 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 quickly and efficiently canvass, compute, and certify election results.

The Board wishes to avoid handling mail ballots with dating errors in a manner that conflicts with the approach taken by other county boards. But the reality is that the Board now finds itself uniquely situated from all other county boards—a mere month before the General Election—because a court order has required it to count mail ballots with dating errors. Only a precedential decision of this Court can provide certainty on this issue in advance of Election Day.

Like this Court, the Board is unwaveringly committed to protecting the fundamental right to vote through the fair and orderly administration of elections, and it respectfully submits this supplemental notice with the aim of ensuring that this Court has full information as it considers the litigation before it.

Dated: October 4, 2024

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Respectfully submitted,

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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 4, 2024

/s/ Alison L. Stohr
Alison L. Stohr

EXHIBIT “A”

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SEP 26 2024
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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]



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- 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.

EXHIBIT “B”

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.