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
	:	Submitted: October 15, 2024

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE ELLEN CEISLER, Judge
HONORABLE MATTHEW S. WOLF, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE McCULLOUGH FILED: October 30, 2024

This Court once again has unnecessarily hurried to change the mail-in voting rules in Pennsylvania, this time mere days before the consummation of a hotly

contested general election. The ballots at issue in this appeal were cast in an *uncontested* special election in Philadelphia County, and, although important in their own right, those ballots could not and will not change the outcome. Nevertheless, the Court of Common Pleas of Philadelphia County (trial court), and now this Court, have accepted the invitation of Brian T. Baxter and Susan T. Kinniry (Designated Appellees) to vitiate as unconstitutional the enforceability of the requirements in Sections 1306 and 1306-D of the Pennsylvania Election Code (Election Code)[1] that mail voters date the declarations on the envelopes enclosing their ballots (Declaration Dating Provisions). There simply was and is no reason to decide this question now, and the Majority certainly has not done so in ordinary course. Both the trial court and this Court should have declined to issue rushed and novel constitutional rulings that surely will confuse the expectations of both voters and county boards of elections alike. The rulings could and should have waited.

Further, and even to the extent that we could[2] or should rule on the merits of this appeal now, the Majority's decision suffers fatally from the same errors

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[1] Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591. Section 1306 was added to the Election Code by the Act of March 6, 1951, P.L. 3, and was amended by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77). Section 1306 applies to votes cast by absentee electors and pertinently requires that they fill out, sign, and date the declaration on the outer envelope enclosing their ballots. 25 P.S. § 3146.6(a). Section 1306-D was added to the Election Code by Act 77 and includes the same language as Section 1306 with respect to votes cast by mail-in electors. 25 P.S. § 3150.16(a). For ease of discussion, I refer herein to both absentee and mail-in voting as "mail" voting.

[2] I agree with Judge Wolf's conclusion in his dissenting opinion that the Majority did not adequately address the question of whether this Court should have transferred this appeal directly to the Supreme Court for consideration pursuant to Section 722(7) of the Judicial Code, 42 Pa. C.S. § 722(7). Section 722(7) provides, in pertinent part, that the Supreme Court shall have exclusive jurisdiction over any "matters where the court of common pleas has held invalid as repugnant to the . . . [c]onstitution of this Commonwealth . . . any provision of . . . any statute of[] this Commonwealth[.]" *Id.* Here, although the trial court's order directs the counting of the

(Footnote continued on next page…)

that beset the now-vacated majority decision in *Black Political Empowerment Project v. Schmidt* (Pa. Cmwlth., No. 283 M.D. 2024, filed August 30, 2024) (*BPEP II*), *vacated*, 322 A.3d 221 (Pa. 2024). I discussed at length in my dissenting opinion in *BPEP II*, and reiterate again here, that the Majority devises out of whole cloth a strict scrutiny standard that it wields to preclude the enforcement of generic, universally applicable ballot-casting requirements that do not "disenfranchise" any voters or burden or affect their "right" to vote to any degree.

Wrong decisions issued at the wrong time are doubly threatening to the integrity of Pennsylvania's elections and the public's confidence in them. Because the Majority here countenances, nay, orders, a substantial change to voting rules at the eleventh hour and on specious grounds, I must respectfully dissent.

I. The Majority Changes the Rules For the Upcoming General Election.

Designated Appellants Republican National Committee and Republican Party of Pennsylvania argue, and I agree, that the Pennsylvania Supreme Court only a few weeks ago ruled that it would "neither impose nor countenance substantial alternations to existing laws and procedures during the pendency of an ongoing election." *New PA Project Education Fund, NAACP v. Schmidt* (Pa., No. 112 MM 2024, filed October 5, 2024), slip op. at 1. Citing to both *Purcell v.*

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contested mail ballots on the ground that to do otherwise would violate the free and equal elections clause, the trial court did not invalidate the Declaration Dating Provisions on their face. The Supreme Court nevertheless appears to have accepted jurisdiction under Section 722(7) to address as-applied constitutional rulings, *see, e.g.*, *Department of Transportation, Bureau of Driver Licensing v. Hettich*, 669 A.2d 323 (Pa. 1995), and I agree with Judge Wolf that a strong argument can be made that transfer was appropriate here. Nevertheless, given the thin record, the curt analysis below, and no express holding from the trial court as to the Provisions' validity, I leave the ultimate question of this Court's jurisdiction to our Supreme Court for a final determination. In the event that the Supreme Court determines that we do have jurisdiction, I proceed below to analyze the issues in this case.

Gonzalez, 549 U.S. 1, 4-5 (2006), and *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016), the High Court relied on the *Purcell*[3] principle, laches, and/or common sense (an increasingly scarce quality in our election law jurisprudence) to deny an application asking the Court to exercise King's Bench or extraordinary jurisdiction to invalidate under the free and equal elections clause[4] the enforceability of the same

[3] *Purcell* involved an Arizona election law that arguably discriminated against some voters because it required proof of citizenship to cast an in-person ballot on election day. Voting rights groups challenged the law, seeking to enjoin its implementation two years after it was approved but only months before the next election. They brought suit in federal district court, which summarily denied the motion. 549 U.S. at 2-3. On appeal, a two-judge motions panel of the Ninth Circuit Court of Appeals granted an injunction pending appeal, which had the effect of reversing the decision below and precluding enforcement of the law. In a *per curium* opinion, the United States Supreme Court vacated the Ninth Circuit's order just days before the 2006 election, once again restoring the status quo. *Id.* at *6.* In vacating the Ninth Circuit's order, the Supreme Court stated:

> Faced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase. So the Court of Appeals may have deemed this consideration to be grounds for prompt action. Furthermore, it might have given some weight to the possibility that the nonprevailing parties would want to seek *en banc* review. . . . These considerations, however, cannot be controlling here. It was still necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court. We find no indication that it did so, and we conclude this was error.

Id. at 5. Finally, the Court concluded that, "[g]iven the imminence of the election and the inadequate time to resolve the factual issues, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules." *Id.* at 5-6.

[4] "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.

Declaration Dating Provisions at issue in both *BPEP II* and this case. *New PA Project*, slip op. at 1. Quite obviously, then, the Court determined that precluding as unconstitutional the enforceability of the Declaration Dating Provisions was a substantial change to the election rules that it would neither make itself nor permit in the lower courts. It went on to note that it would nevertheless "continue to exercise [its] appellate role with respect to lower court decisions that *have already come before this Court in the ordinary course*," referencing the appeals it already had granted in *Genser v. Butler County Board of Elections*, ___ A.3d ___ (Pa., No. 26 & 27 WAP 2024, filed October 24, 2024), and *Center for Coalfield Justice v. Washington County Board of Elections* (Pa., No. 28 WAP 2024) (emphasis added).

Justice Donohue concurred, noting that both *Genser* and *Center for Coalfield Justice* were pending in that Court and could impact the determination of whether enforcement of the Declaration Dating Provisions violates the free and equal elections clause. *Id.* (Donohue, J., concurring), slip op. at 3-4. She further noted that "[t]ime will tell if there is a future challenge, *in the ordinary course*, in a court of common pleas." (emphasis added). *Id.*, slip op. at 4. Justice Brobson also concurred, stressing that the petitioners in *New PA Project* had delayed challenging the Declaration Dating Provisions until the last minute, which precluded the development of a record on the question. They accordingly were barred by the equitable doctrine of laches from seeking the exercise of King's Bench jurisdiction. *New PA Project* (Brobson, J., concurring), slip op. at 3-4. *See also id.*, slip op. at 5 ("This Court's disposition of the King's Bench applications in this matter and in [*Republican National Committee v. Schmidt* (Pa., No. 108 MM 2024, filed October 5, 2024),] should discourage all who look to the courts of the Commonwealth to change the rules in the middle of an ongoing election.").

The Supreme Court's pronouncements straightforwardly apply in this case to preclude the Majority's hasty ruling. The Majority today affords the exact relief that the Supreme Court refused to consider or afford in *New PA Project* precisely because it changes the rules in the middle of a general election. Not only does the Majority's decision change how election boards will count mail ballots with undated or misdated declarations, but it also changes the voting rules after thousands, if not millions, of mail ballots already have been completed and cast by Pennsylvania voters. Many, if not all, counties have procedures in place to notify mail voters if their declarations are undated or misdated and afford them the ability to either request a new mail ballot or vote by provisional ballot. *See Genser*; *Center for Coalfield Justice v. Washington County Board of Elections* (Pa. Cmwlth., No. 1172 C.D. 2024, filed September 24, 2023). What happens to the ballots already cast with undated or misdated declarations? Are they now valid? What do county boards of elections do with replacement mail ballots that have been cast with corrected or filled-in declaration dates? Are the replacement ballots counted, are the original, defective ballots counted, or both? And what about the voters who, due to the defects in the declarations on their mail ballots, have now elected to go to their polling place on election day and cast a provisional ballot, which they now unquestionably may do under the Election Code. *See Genser*. May they do that? Must they do that? Will their prior, defective ballots now be counted?

The Majority fails to consider or sidesteps entirely all of these questions and summarily concludes that *New PA Project* and the *Purcell* do not apply in this case because this case comes to us in our appellate jurisdiction and concerns ballots cast in a now-completed and uncontested special election. But that precisely is the point. The ballots at issue in this appeal, whether or not counted, cannot change the

outcome of the special election. We could rule on these issues next month, next year, or in five years, and the outcome for the special election would be the same in each instance. The ***only*** reason that either the trial court or the Majority would rule on this question now ***is precisely to change the rules for the already underway general election.*** The Majority at best fails to consider the weight of the principles underlying *New PA Project* and *Purcell*, and at worst refuses to comply with a clear and unequivocal directive of our Supreme Court.

Finally, the Supreme Court's recent decision in *Genser* does not compel a different conclusion. The Supreme Court in *New PA Project* identified *Genser* as one of two cases that "already had come before [that] Court in ordinary course." *New PA Project*, slip op. at 1 n.2. *Genser* involved the question of whether voters whose defective mail ballots are received but not counted by a county board of elections may still go to their polling place on election day and cast a provisional ballot. The majority in *Genser*, interpreting the pertinent provisions of Sections 1210 and 1306-D of the Election Code, 25 P.S. §§ 3050, 3150.16, concluded that they may. *See Genser*, ___ A.3d at ___ , slip op. at 44-45. The Court in *Genser* did not change any voting rules or strike any provisions from the Election Code, but, rather, interpreted and enforced them consistently with its prior precedents (and with what appears to be standard practice in most, if not all, counties in the Commonwealth).[5]

[5] Notably, the Supreme Court in *Genser* reiterated that defective mail ballots, including those with undated or misdated declarations, must not be counted because the failure to follow the rules for mail voting nullifies the mail ballot. ___ A.3d at ___ , slip op. at 33 & n.29, 44 (citing, in part, *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) (*Pennsylvania Democratic Party*)).

In sum, given the timing of this appeal and the Supreme Court's clear directive in *New PA Project*, I would vacate the trial court's order and remand for the development of an adequate record and the issuance of a new decision with adequate reasoning after the completion of the 2024 General Election.

II. Enforcement of the Declaration Dating Provisions does not violate the free and equal elections clause.

On the merits, the Majority labors under the same errors that were present in *BPEP II*. First, and although this point ultimately is irrelevant to the proper analysis of a free and equal elections clause challenge, it is far from undisputed here that the Declaration Dating Provisions serve no purpose. The Majority references other court decisions and the stipulated facts below to assume throughout its opinion that the dating provisions are "meaningless." *See Baxter v. Philadelphia Board of Elections* (Pa. Cmwlth., Nos. 1305 & 1309 C.D. 2024, filed October 30, 2024) (MO), slip op. at 4-5. But chanting that word over and over again does not make it reality. Only the operative facts as set forth in the affidavits of Designated Appellees were stipulated in the trial court. *See* Notes of Testimony (N.T.), 9/25/24, at 5-6. Contrary to what the Majority seems to assume, many of the allegations in Designated Appellees' petition for review in the trial court remain disputed, including the purpose of the Declaration Dating Provisions. The record from the trial court is scant, and the Majority's tacit assumption throughout its opinion that the General Assembly wrote meaningless provisions into the Election Code is unwarranted and forced. *See also BPEP II*, slip op. at 32-35 (McCullough J., dissenting).

Second, the Majority here once again concludes that the Declaration Dating Provisions create two classes of voters—those who comply with the Provisions and those who do not. The Majority then concludes that not counting

ballots accompanied by misdated and undated declarations disenfranchises those voters and significantly burdens their right to vote, all in violation of the free and equal elections clause. (MO, slip op. at 35-39.) The Majority accomplishes this by applying "strict scrutiny," a standard typically reserved for challenges to laws that either apply differently to different classes of people or restrict or eliminate altogether the *exercise* of a fundamental right. To such challenges, the Pennsylvania Supreme Court applied such scrutiny in *Pennsylvania Democratic Party*. 238 A.3d at 380, 384-85. It did not, however, apply strict scrutiny or anything like it to the free and equal elections clause challenges that were before it. *Id.* at 372-74.

As I illustrated at length in my dissent in *BPEP II*, the Pennsylvania Supreme Court does not apply and has never applied strict scrutiny in these kinds of cases where facially nonburdensome and neutral ballot-casting rules result in the disqualification of non-compliant ballots. *See BPEP II*, slip op. at 41-48 (McCullough, J., dissenting). The reason for this is patent: if I cast a mail ballot and fail or refuse to follow the rules for doing so, I have not been "disenfranchised" because my *right to vote* remains unaffected, unabridged, and intact. *See Disenfranchise*, Black's Law Dictionary (12th ed. 2024) (defining "disenfranchise" as "depriv[ing] (someone) of a right, esp[ecially] the right to vote; to prevent (a person or group of people) from having the right to vote"). Instead, my *ballot* is disqualified because I did not follow the rules. *Genser*; *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); *Pennsylvania Democratic Party*. That is not disenfranchisement; that is the rule of law.

Just weeks ago, in *In re Canvass of Provisional Ballots in the 2024 Primary Election*, 322 A.3d 900 (Pa. 2024) (*Walsh*), Justice Mundy, writing for our Supreme Court, reaffirmed that strict scrutiny does not apply to free and equal

elections clause challenges to neutral, universally-applicable ballot-casting rules. In *Walsh*, the Court considered, *inter alia*, whether the Luzerne County Board of Elections should be required to count a provisional ballot cast by a voter who did not sign the outer ballot envelope as Section 1210 of the Election Code requires. The board contended that, under the free and equal elections clause, the electoral process must be kept open and unrestricted to the greatest degree possible and that voting regulations are constitutionally suspect if they "deny the franchise itself, or make it so difficult as to amount to a denial." 322 A.3d at 905 (citation omitted). In rejecting this argument, the Court did not apply a strict scrutiny analysis and was not persuaded that the constitution required it to ignore clear statutory ballot requirements. *Id.* at 907-09. In fact, the Court did not mention the "scrutiny" analysis at all, further underscoring my point that it does not apply to free and equal elections clause challenges.

Justice Wecht wrote separately in *Walsh* to emphasize that the "Election Code really means what it says" and that its plain statutory language cannot not be disregarded by the courts in order to count non-compliant votes. *Id.* at 913 (Wecht, J., concurring). Justice Wecht implored litigants to redirect their pleadings challenging voting requirements from the judiciary to the General Assembly and Governor, who are charged with drafting and approving the legal prerequisites to having a ballot count. *Id.* at 915. With respect to the free and equal elections clause, Justice Wecht explained:

> Within the bounds of constitutional protections, the legislature is free to impose technicalities, and the courts are bound to apply them. Although the Election Code will be interpreted "with unstinting fidelity to its terms," considerations under the [c]onstitution's [f]ree and [e]qual [e]lection [c]lause may moderate its enforcement in particular cases. Arguments advanced under federal

> statutes, such as the Voting Rights Act, may also require additional considerations and analyses. *Neither the Pennsylvania Constitution nor federal law is implicated in this case.*

Id. at 920 (emphasis added).

Despite this recent and clear guidance from our Supreme Court, the Majority, as it must, gives short shrift to the *Walsh* decision and relegates its discussion to a footnote. (MO, slip op. at 35 n.37.) It simply ignores the fact that no "scrutiny" analysis is mentioned in *Walsh* and proceeds to apply it anyway. Moreover, although the Majority attempts to distinguish *Walsh* on the basis that it involved provisional ballots (and for other, unidentified reasons), the principle in *Walsh* controls perfectly well here, namely, that strict scrutiny in the traditional sense simply does not apply to free and equal elections clause challenges to neutral and nonburdensome ballot-casting rules.

III. The Majority's holding invalidates the entirety of Act 77.

Although the Majority's invalidation of the application of Act 77's provisions triggers Act 77's nonseverability clause (Section 11 of Act 77), the Majority nevertheless exercises its "discretion" to ignore the nonseverability clause and, once again, changes by judicial fiat how that legislation is to operate. I disagreed with the exact same missteps taken by the Majority in *BPEP II*, and my analysis there applies equally well here. *See BPEP II*, slip op. at 51-55 (McCullough, J., dissenting). Act 77, and the whole mail voting scheme it created, is now defunct.

IV. Conclusion.

This Court has rushed this decision on virtually no record and without any analysis from the trial court. The Majority's holding disrupts the rules applicable to the already-underway 2024 General Election and, in my view, directly

contradicts the Supreme Court's admonition in *New PA Project* that these decisions ought to be made after that election has concluded and on a developed record. I detailed at length in my dissent in *BPEP II* why the Declaration Dating Provisions do not disenfranchise anyone, do not burden the right to vote, and are not subject to strict scrutiny. I also detailed why the Majority's holding in *BPEP II* invalidating the enforcement of the Declaration Dating Provisions results in the wholesale invalidation of Act 77 and mail voting with it. Given the undeniable consequences of the Majority's holding today, I bid county boards of elections and Pennsylvania voters the best of luck in trying to decipher what they are supposed to do now.

The Election Code's rules in this regard are clear. We should have left them that way.

s/ Patricia A. McCullough
PATRICIA A. McCULLOUGH, Judge