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**IN THE SUPREME COURT OF PENNSYLVANIA**

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No. 136 EM 2024

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THE REPUBLICAN NATIONAL COMMITTEE and THE REPUBLICAN PARTY OF  
PENNSYLVANIA,

Petitioners,

v.

ALL 67 COUNTY BOARDS OF ELECTIONS,  
*(\*Caption listing County Respondents continued on inner cover)*

Respondents.

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**RESPONDENTS PHILADELPHIA, MONTGOMERY, AND BUCKS  
COUNTY BOARDS OF ELECTIONS' ANSWER TO APPLICATION FOR  
THE EXERCISE OF KING'S BENCH POWER OR EXTRAORDINARY  
JURISDICTION**

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Respondents.

The Republican National Committee and the Republican Party of Pennsylvania (collectively, “Petitioners”) urge this Court to exercise King’s Bench or extraordinary jurisdiction, vacate the lawful ballot-counting decisions of three county boards of elections, and order each of the sixty-seven County Boards of Elections to reject all mail ballots with dating errors cast in the November 5, 2024 General Election. For the following reasons, Respondents Philadelphia County Board of Elections (“Philadelphia”), Montgomery County Board of Elections (“Montgomery”), and Bucks County Board of Elections (“Bucks”) (collectively, “Respondents”) respectfully submit that this Court should decline the extraordinary invitation, deny the Application, and allow these issues to be resolved through the ordinary appellate process prescribed in 25 Pa. Stat. § 3157.

### **BACKGROUND**

This Court is familiar with the history of extensive federal and state court litigation over whether county boards must count or reject mail ballots with dating errors. Respondents accordingly set forth only the facts material to the Application.

*The Baxter Litigation.* Philadelphia conducted a Special Election on September 17, 2024 to fill vacancies in the 195th and 201st Legislative Districts. *Baxter v. Phila. Bd. of Elecs.*, Nos. 1305 C.D. 2024 & 1309 C.D. 2024, 2024 WL 461489, at \*1 (Pa. Cmwlth. Oct. 30, 2024). Two voters—Brian T. Baxter and Susan T. Kinniry (collectively, “the Voters”)—whose timely mail ballots were not counted

in the Special Election because the outer declaration envelope contained dating errors, filed a statutory appeal challenging Philadelphia’s decision not to count their ballots. *Id.* at \*3.

After holding a hearing, the trial court granted the Petition for Review, reversed Philadelphia’s September 21, 2024 decision to reject the Voters’ mail ballots (along with sixty-seven other mail ballots with dating errors), and directed Philadelphia to count each of those ballots in the final, certified results of the Special Election. *Id.* at \*5.

The Commonwealth Court affirmed the trial court’s decision on October 30, 2024. *Id.* On the merits, the Commonwealth Court agreed with the Voters that the Free and Equal Elections Clause of the Pennsylvania Constitution prohibited the Board from rejecting mail ballots solely because those ballots contained dating errors on the outer declaration envelopes. *Id.* at \*14-\*18.

Petitioners here were intervening parties to that case. On October 31, 2024, they filed an Emergency Application for Extraordinary Relief Pending Filing of a Petition for Allowance of Appeal with this Court.

On November 1, 2024, this Court issued a per curiam order granting the Application “only to the extent that the Commonwealth Court’s decision . . . is stayed and shall not be applied to the November 5, 2024 General Election.” *Baxter v. Phila. Bd. of Elecs.*, Nos. 76 EM 2024 & 77 EM 2024, 2024 WL 4650792, at \*1 (Pa. Nov.

1, 2024). The Court did not decide the merits of the underlying constitutional question and entered its stay “without prejudice to the filing and due consideration on the merits of any petition for allowance of appeal that the parties may file or the disposition of an appeal should this Court grant such petition.” *Id.*

Petitioners filed their Petition for Allowance of Appeal on November 12, 2024. *Baxter v. Phila. Bd. of Elecs.*, 395 EAL 2024 – 396 EAL 2024 (Nov. 12, 2024).

***The Challenged Post-Election Sufficiency Determinations by County Boards.*** On November 13, 2024, the Philadelphia County Board of Elections convened at a public meeting to make sufficiency determinations under 25 P.S. § 3146.8(g) regarding 607 mail ballots with dating errors that had been cast by qualified electors during the General Election. *See Philadelphia Board Meeting (Nov. 13, 2024)*, <https://youtu.be/-AP-NFjtA1Q>. The Board voted 2-1 to count those ballots, with the majority taking the position that rejecting them would violate the voters’ rights under the Free and Equal Elections Clause of the Pennsylvania.

The Bucks County Boards of Elections and the Montgomery County Board of Elections have likewise voted to count mail ballots with dating errors cast during the General Election. Bucks County Meeting, Board of Elections (Nov. 12, 2024), <https://bucksopa.portal.civicclerk.com/event/505/media>; Montgomery County

Meeting, Board of Elections (Nov. 14, 2024),  
<https://www.youtube.com/live/KToOmzRjIT4?t=11804s>.

***Petitioners’ Statutory Appeals.*** On November 13, 2024, Petitioners filed a statutory appeal under Section 3157 challenging the vote of the Bucks County Board of Elections. *David McCormick v. Bucks Cnty. Bd. of Elecs.*, No. 2024-7228 (C.C.P. Bucks) (filed Nov. 13, 2024). They filed an appeal of Philadelphia’s decision this morning, and they have indicated that they plan to appeal any other county board vote to count mail ballots with dating errors. (App. 10).

***This Application.*** Even though Petitioners are actively pursuing multiple statutory appeals on an expedited basis, they filed this Application for the Exercise of Extraordinary Jurisdiction or King’s Bench Power on the ground that “time is of the essence.” (App. 4, 10). The sole support in their Application for the claim that “time is of the essence” is a single mention regarding one race from the General Election—a race in which they claim there is “an insurmountable margin” between the candidates. (App. 4).

Moreover, Petitioners asked this Court for an expedited, sweeping edict directing all sixty-seven “county boards of elections not to count undated or misdated mail ballots submitted in the 2024 General Election” in an expedited proceeding that Petitioners admit will not impact the results of any race in the General Election. (App. 19). Petitioners’ request ignores the fact that there are

multiple cases percolating through the system that will provide an opportunity for this Court to address these issues in an orderly fashion and on a full record, including *Baxter* and the recently filed statutory appeals. Simply put, no action that this Court would take in this proceeding will impact the results of the November 5, 2024 General Election; thus, there is no basis for the extraordinary relief sought.

**THIS COURT SHOULD DECLINE TO EXERCISE KING’S BENCH  
AUTHORITY OR EXTRAORDINARY JURISDICTION.**

Petitioners have not provided a justification for this Court to depart from the normal appellate process and resolve the issues presented in their Petition.

**I. The Issues Raised in the Petition Can and Should Be Resolved Through  
the Normal Appellate Process.**

The statutory appeal process set forth in 25 P.S. § 3157 provides the appropriate vehicle for Petitioners to resolve the issues raised in the Application. Indeed, this Court has repeatedly rejected similar attempts to circumvent the typical appellate process in election cases filed in the lead up to the 2024 General Election. *See, e.g., New Pa. Project Educ. Fund v. Schmidt*, 112 MM 2024, 2024 WL 4410884, at \*1 (Pa. Oct. 5, 2024) (per curiam); *Republican Nat’l Comm. v. Schmidt*, 108 MM 2024, 2024 WL 4406909, at \*1 (Pa. Oct. 5, 2024) (per curiam). It should do so here, too.

The normal appellate process is not only the preferred course, but is also particularly sensible here. Petitioners have already appealed two county board

decisions to count mail ballots with dating errors (Petition for Review in the Nature of a Statutory Appeal, *David McCormick*, No. 2024-7228), and they have vowed to appeal any others as well. (App. at 10). Earlier this week, moreover, Petitioners also asked this Court to grant allocatur in *Baxter*—a Section 3157 appeal brought in the ordinary course and raising the same question at issue here: whether the Pennsylvania Constitution prohibits county boards of elections from rejecting mail ballots with dating errors. *See* Petition for Allowance of Appeal, *Baxter*, 395 EAL 2024 – 396 EAL 2024. In other words, these same Petitioners are thus making the same arguments in multiple pending statutory appeals proceeding in the ordinary course under Section 3157. Petition for Review, *David McCormick*, No. 2024-7228. There is no reason to believe those arguments cannot be resolved expeditiously by the common pleas courts and the Commonwealth Court through traditional channels of judicial and appellate review—rather than through the extraordinary appellate process. Indeed, under the expedited appeal timelines in this Court's August 27, 2024 Administrative Order currently in effect, those appeals may reach this Court soon. This alone warrants denying the Application. *See Bd. of Revision of Taxes v. City of Philadelphia*, 4 A.3d 610. 629 (Pa. 2010) (holding that the Court would not exercise extraordinary jurisdiction where the matter was “more properly relegated to the court of common pleas in the first instance” because the dispute, while



important, did “not require accelerated review by this Court out of the ordinary course”).

## **II. There Are No Exigent Circumstances Warranting this Court’s Extraordinary and Immediate Intervention.**

King’s Bench authority is inappropriate when the issue does not “*require[] timely intervention* by the court.” *In re Bruno*, 101 A.3d 635, 670 (Pa. 2014) (emphasis added)). Petitioners identify no such need or exigency. While Petitioners claim that “time is of the essence,” they do not explain why that is so. (App. 4). They have not identified a single statewide or county-specific election in which mail ballots with dating errors would be even close to outcome determinative. The only race in the General Election they mention in their Application is the U.S. Senate race. (App. 4, 12). But they contend that the “Republican Dave McCormick currently leads his Democratic opponent, Bob Casey, *by an insurmountable margin.*” (App. 4) (emphasis added). Thus, no election-outcome-related exigency exists that warrants extraordinary review—much less one implicating Petitioners’ stated interest in the results of any election involving “Republican candidates seeking election or appointment to federal, state, and local office in Pennsylvania.” (App. 5); *see Bodack v. Law Enf’t All. of Am.*, 790 A.2d 277, 277 (Pa. 2001) (denying application for extraordinary relief relating to election speech in which respondents and petitioners disputed whether an exigency existed); *id.* at 278 (Castille, J.,

dissenting). Petitioners have not explained how any interest they are seeking to vindicate requires this Court to presently intercede on an extraordinary basis.

### **III. This Court Does Not Need to Intervene to Enforce or Interpret Its Prior Orders.**

Petitioners' primary argument is that this Court must grant the Application as a means of enforcing its October 5 and November 1 Orders (in *New Pa. Project* and *Baxter*, respectively) on a statewide basis. Not so.

For one, Petitioners have made the same arguments about the dispositive effect of those Orders in their pending statutory appeal. *David McCormick*, No. 2024-7228, Pet. for Review ¶¶ 2–5, 27, 30. The lower courts are well equipped to interpret them and address Petitioners' arguments about their meaning in the first instance, as explained above. *See In re Bruno*, 101 A.3d at 670 (King's bench authority should be employed “when the issue requires timely intervention by the court of last resort of the Commonwealth”) (emphasis added); *Bd. of Revision of Taxes*, 4 A.3d at 629 (“We agree with the City that this matter is more properly relegated to the court of common pleas in the first instance.”).

In any event, Petitioners' arguments about the Orders overlooks that each county board (and each of the Commissioners who constitute those boards) has an independent obligation to consider whether the Constitution requires counting these ballots with dating errors—an issue that this Court has not resolved on the merits. All government officials in the Commonwealth, including the Commissioners of

county boards of elections, take an oath of office to “support, obey and defend . . . the Constitution of this Commonwealth.” Pa. Const. art. VI, § 3. Two Philadelphia Commissioners concluded that rejecting these ballots would violate the voters’ constitutional rights. The third Commissioner reached a contrary conclusion. Some other boards and commissioners have made different determinations about this issue. The ordinary appellate process is designed to address this type of good-faith disagreement over the meaning of the Pennsylvania Constitution and the concomitant obligations of government officials seeking to uphold it.

Finally, the accusatory tone of the Application improperly imputes bad faith to well-intended public servants where none exists. Respondents respectfully submit that, in their view, there is no inconsistency between this Court’s October 5 and November 1 Orders, on the one hand, and their conclusions that rejecting mail ballots with dating errors would violate the Pennsylvania Constitution, on the other.

*First*, the November 1, 2024 Order provides that “the Commonwealth Court’s decision” in *Baxter* “is stayed and shall not be applied to the November 5, 2024 General Election” and that the “stay is entered without prejudice to the filing and due consideration on the merits of any petition for allowance of appeal that the parties may file or the disposition of an appeal should this Court grant such petition.” *Baxter*, 2024 WL 4650792, at \*1. As Respondents understand this language, the Court declined to address the merits of the constitutional question but instructed

county boards not to rely on the Commonwealth Court’s decision in *Baxter* when determining whether to count mail ballots with dating errors. In fact, Petitioners’ pending Request for Allowance of Appeal reflects the fact that this Court did not address the merits of the underlying legal issue. Like Petitioners, Respondents understood that this is an unsettled area of the law; thus, the Commissioners properly made sufficiency determinations regarding such ballots based on an independent judgment of what the law requires (without treating the Commonwealth Court’s decision as controlling on that question), subject to later judicial review. Put differently, Respondents do not understand this Court’s admonition that “the Commonwealth Court’s *decision . . . shall not be applied to*” the General Election to mean, in the absence of binding guidance from this Court, that county boards were prohibited from independently assessing whether rejecting mail ballots with voting errors cast is consistent with the Pennsylvania Constitution and the statutorily prescribed process for counting votes.

*Second*, the Court’s October 5, 2024 Order admonishes that “[t]his Court will neither impose nor countenance substantial alterations to existing laws and procedures *during the pendency of an ongoing election.*” *Schmidt*, 2024 WL 4410884, at \*1 (emphasis added). But Election Day is no longer “ongoing.” It is over. There is no risk of voter chaos or confusion. *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) (citation omitted)). The Pennsylvania Election Code provides an orderly and transparent process for disputes such as these to be resolved in the Commonwealth’s courts without chaos or confusion. 25 Pa. Stat. § 3157. Respondents do not interpret the Court's October 5 per curiam order to preclude all post-election litigation over justiciable election issues properly raised under Section 3157. While Petitioners claim that “changes to election rules ‘after election day’ create suspicions that election officials and courts are interfering with the election results” (App. 3), there is no basis for such suspicions here: Petitioners do not identify any “election results” that would or could be affected by Respondents’ decisions to count mail ballots with dating errors. There is no reason to believe that *any* Commissioner of *any* County Board in *any* part of the Commonwealth voted to count (or not count) certain ballots for purposes of affecting the outcome of *any* race in the election.

Respondents worked diligently to administer this election on behalf of the voters. Petitioners have used their brief to baselessly impute partisan motives to nonpartisan boards, improperly and inaccurately casting public servants as partisan operatives. Respondents have been committed to conducting the General Election with integrity and fairness and in a manner that comports with the law. At all times,

they have attempted to interpret and comply with the Election Code and this Court's Orders in good faith—and to do so in a manner that upholds the constitutional rights of the 607 (Philadelphia), 405 (Bucks), and 501 (Montgomery) qualified voters who cast timely mail ballots with dating errors during the General Election. If Respondents have misread those Orders in good faith, then Petitioners' anticipated statutory appeal under Section 3157 provides the appropriate vehicle to resolve that issue, without the accusation of bad faith—which generates more heat than light—and without requiring this Court to depart from the ordinary principles of appellate review.

### **CONCLUSION**

This Court should deny Petitioners' Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction.

Dated: November 15, 2024

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE AND WORD COUNT

This filing complies with 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.

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Answer contains 2,686, excluding the supplementary matter as defined by Pa. R.A.P. 2135(b).

Dated: November 15, 2024

/s/ Ilana H. Eisenstein  
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