

IN THE SUPREME COURT OF PENNSYLVANIA

No. 395 EAL 2024 – 396 EAL 2024

BRIAN T. BAXTER and SUSAN T. KINNIRY

Respondents,

v.

PHILADELPHIA COUNTY BOARD OF ELECTIONS,

Respondent,

REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY
OF PENNSYLVANIA,

Intervenor-Petitioners.

**PHILADELPHIA COUNTY BOARD OF ELECTIONS' ANSWER TO
INTERVENOR-PETITIONERS' PETITION FOR ALLOWANCE OF
APPEAL**

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INTRODUCTION

This Court should grant, in part, Intervenor-Petitioners’ Petition for Allowance of Appeal and decide, once and for all, a single question of first impression and exceptional public importance: whether the Free and Equal Elections Clause prohibits county boards of elections from rejecting mail ballots with dating errors on the declaration envelope. The Commonwealth Court answered that question affirmatively in the underlying proceedings. But the Philadelphia County Board of Elections (the “Board”)—and the Commonwealth as a whole—would greatly benefit from this Court’s guidance.

The Board respects this Court’s authority to declare what Pennsylvania law requires and submits that this Court should exercise that authority here, where the underlying constitutional issue remains unsettled for future elections. After this Court’s November 18 order directed the Board not to count mail ballots with dating errors in the 2024 General Election, the Board promptly complied by voting—at its November 19, 2024 public meeting—not to count such ballots. That order, however, was limited to “the election held on November 5, 2024.” *See Republican Nat’l Committee v. All 67 County Boards of Elections*, 2024 WL 4814174, at *1 (Pa. Nov. 18, 2024).

While the Court resolved the issue for the 2024 General Election, it has not addressed the issue for future elections. Without a final resolution by this Court, the

only guidance the Board will have on this issue during the next election cycle will be the Commonwealth Court's no-longer-stayed opinion, holding that rejecting mail ballots with dating errors violates the Pennsylvania Constitution, and a decision from the Philadelphia Court of Common Pleas, holding the same.

Resolution of the underlying constitutional question on the merits in this case (but not the other non-merits questions presented in the Petition) will therefore benefit everyone—electors, candidates, county boards, the Department of State, and political parties alike. Declining to grant this application—or granting the application on any of the other questions presented and deciding the case without reaching the merits—will benefit no one. Because this Court is the only one with authority to finally resolve the constitutional question presented and this case provides an appropriate vehicle to do so, the Board respectfully submits that this Court should agree to review this case but to limit the appeal to resolving the constitutional question presented on the merits. This Court should deny allocatur on the non-merits, peripheral questions presented in the Petition.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Whether the Free and Equal Elections Clause of the Pennsylvania Constitution permits county boards of elections to reject otherwise valid mail-in ballots because of dating errors on the outer declaration envelope.

Suggested answer: The Board takes no position on the constitutional question but urges the Court to decide the question on the merits for the reasons set forth in this Answer.

COUNTERSTATEMENT OF THE CASE

This is a statutory appeal under 25 P.S. § 3157 from a decision of the Board not to count mail ballots that contain dating errors on outer declaration envelopes. *See Baxter v. Philadelphia Bd. of Elections*, Nos. 1305 C.D. 2024, 2024 WL 4614689, at *1 (Pa. Cmwh. Ct. Oct. 30, 2024).

On September 17, 2024, the Board conducted a Special Election to fill vacancies in the 195th and 201st Legislative Districts. *Id.* at *1. Two voters—Brian T. Baxter and Susan T. Kinniry (collectively, “the Voters”)—whose timely mail ballots were not counted in the Special Election because their outer declaration envelopes contained dating errors—filed a statutory appeal challenging the Board’s decision not to count their ballots. *Id.* at *3.

At a September 25, 2024 hearing, the trial court accepted the parties’ stipulation that the facts in the Petition for Review were not disputed, including the fact that the Voters are qualified electors who validly applied for, received, and timely submitted their mail-in ballots before the Special Election. *Id.* The Republican National Committee and the Republican Party of Pennsylvania (collectively, “Intervenor-Petitioners”) sought to intervene at the hearing and filed a

Petition for Leave to Intervene. *Id.* at *4. The next day, the trial court granted the Petition for Review, reversed the Board’s September 21, 2024 decision to reject the Voters’ mail ballots (along with sixty-seven other mail ballots with dating errors), and directed the Board to count each of those ballots. *Id.* at *5. The trial court also later granted Intervenor-Petitioners’ motion to intervene. *Id.*

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.

On October 31, 2024, Intervenor-Petitioners 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, which stayed the Commonwealth Court’s decision and prevented county boards from applying that “decision . . . to the November 5, 2024 General Election.” *Baxter v. Philadelphia Bd. of Elections*, Nos. 76 EM 2024 & 77 EM 2024, 2024 WL 4650792, at *1 (Pa. Nov. 1, 2024); *see RNC v. All 67 County Boards of Elections*, 2024 WL 4814174, at *1 (Pa. Nov. 18, 2024). The Court did not decide the merits of the underlying constitutional question.

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

REASONS FOR PARTIAL ALLOWANCE OF APPEAL

I. Prior litigation demonstrates the need for a definitive resolution of the constitutional question.

The continuing uncertainty surrounding the dating requirement makes resolving the constitutional question here a matter of “substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court.” *See* Pa. R.A.P. 1114(b)(4).¹ In the context of elections, “the rules of the road should be clear and settled.” *Democratic Nat’l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). The rules about mail ballots with dating errors are anything but. Since November 2020, the federal and state law jurisprudence on the dating requirement has shifted as many as nine times. In the last year alone, the Board has been whipsawed in opposing directions on whether the Pennsylvania Constitution permits county boards to reject mail ballots with dating errors. Courts’ directions to the Board on how to treat ballots with dating errors have been in constant flux in just the past three months:

¹ The Commonwealth Court’s decision does not “conflict[] with a holding of the Pennsylvania Supreme Court,” within the meaning of Pa. R.A.P. 1114(b)(2), as this Court has never addressed the constitutional question at issue in this appeal.

1. *August 30, 2024: Count ballots with dating errors.* In 2024, the Commonwealth Court held that enforcing the dating provision by disenfranchisement violates the Pennsylvania Constitution. *Black Pol. Empowerment Project v. Schmidt* (“*B-PEP I*”), No. 283 M.D. 2024, 2024 WL 4002321, at *1 (Pa. Cmwlth. Aug. 30, 2024), *vacated on other grounds*, No. 68 MAP 2024 (Pa. Sept. 13, 2024) (“*B-PEP II*”). As a result, the Board was “PERMANENTLY ENJOINED from strictly enforcing the dating provisions of the Election Code.” *Id.* at *39.
2. *September 4, 2024: Do not count ballots with dating errors.* In a *per curiam* opinion issued shortly thereafter, this Court vacated the Commonwealth Court’s decision solely on jurisdictional grounds. *Black Pol. Empowerment Project v. Schmidt*, 322 A.3d 221, 222 (Pa. Sept. 4, 2024). This Court did not address the constitutional question on the merits.
3. *September 26, 2024: Count ballots with dating errors.* Three weeks later, the trial court here held that rejecting mail ballots because of dating errors violates the Pennsylvania Constitution and ordered the Board to count mail ballots with dating errors in the September 17, 2024 Special Election.
4. *October 30, 2024: Count ballots with dating errors.* The Commonwealth Court affirmed the trial court’s order, holding that the Board’s rejection of mail ballots with dating errors would violate the Pennsylvania Constitution.

Baxter v. Philadelphia Bd. of Elections, No. 1305 C.D. 2024, 2024 WL 4614689 (Pa. Cmwh. Ct. Oct. 30, 2024).

5. *November 18, 2024: Do not count ballots with dating errors.* This Court directed all county boards of election not to count undated and incorrectly dated mail ballots in the November 5, 2024 General Election. *RNC v. All 67 County Bds. of Elecs.*, No. 136 MM 2024 (Pa. Nov. 18, 2024).² This Court did not address the constitutional question on the merits.

Without a definitive ruling from this Court, this pattern will continue to repeat itself, with the Board being repeatedly named in protracted emergency litigation before and after each election on the underlying constitutional question presented here. The lack of “clear rules” will “brew[] confusion” that may further undermine the public’s confidence in the authority and integrity of state and local institutions. *See, e.g., Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 734 (2021) (Thomas, J., dissenting). Conclusive resolution of the constitutional question is thus necessary and a matter of substantial public importance. *Cf. Black Pol. Empowerment Project v. Schmidt*, No. 68 MAP 2024 (“A prompt and definitive ruling on the constitutional question presented in this appeal is of paramount public importance.”) (Wecht, J., dissenting).

² *See also Baxter v. Philadelphia Bd. of Elecs.*, Nos. 76 EM 2024 & 77 EM 2024, 2024 WL 4650792, at *1 (Pa. Nov. 1, 2024).

II. This appeal is appropriate for addressing the constitutional question.

This statutory appeal is the most appropriate vehicle for this Court to resolve the constitutional question. This Court has made clear that it will not tolerate substantial alterations to existing laws and procedures during the pendency of an ongoing election. This Court has also conveyed that it would not countenance attempts to end-run the ordinary appellate process. *See New Pa. Project Educ. Fund v. Schmidt*, 112 MM 2024, 2024 WL 4410884, at *1 (Pa. Oct. 5, 2024) (per curiam) (rejecting attempt to circumvent typical appellate process in election cases in the run up to an election); *Republican Nat’l Comm. v. Schmidt*, 108 MM 2024, 2024 WL 4406909, at *1 (Pa. Oct. 5, 2024) (per curiam) (same). Given that Pennsylvania holds an election roughly every six months, however, it will be difficult for this Court to find a case where it can address the constitutional question through the ordinary appellate process—while giving this important question the time, attention, and proper consideration that it deserves—in a manner that does not impact ongoing elections. This appeal allows this Court to do so.

This case is a Section 3157 appeal brought by voters challenging the vote-counting decision of a single county board relating to a particular category of ballots that were cast in a non-federal Special Election in Philadelphia County. The Special Election has already occurred, and all mail ballots have been cast and canvassed. The two candidates in the Special Election—one in the 195th and one in the 201st

legislative district—ran unopposed, and the number of affected mail ballots at issue cannot affect the outcome.³ The only remaining question is whether to include mail ballots with dating errors in the final tally. This type of decision is a normal post-election occurrence, expressly contemplated by the Election Code. *See* 25 P.S. § 3157.

This appeal also has a stipulated factual record, with no material facts in dispute. Intervenor-Petitioners claim to dispute whether the date requirement burdens voters, yet they overlook the undeniable fact that dating the outer declaration envelope is an extra step, and that failure to complete it results in the rejection of the enclosed mail ballot. (Petition at 18). Their assertion that further factual development is needed regarding the state’s interest in solemnity is equally perplexing, as if it were possible to hire an expert to determine legislative intent, a quintessential legal question. (Petition at 19). And in recent federal court litigation, they had ample opportunity to take robust discovery from all 67 counties regarding how each county approaches the dating requirement and mail ballots with dating errors. *See Pa. State Conf. of NAACP v. Schmidt*, 703 F. Supp. 3d 632, 680 (W.D. Pa. 2023) (detailing the evidence from the county boards of elections’ use of the date on the return envelope). The only concrete area of further factual development

³ Indeed, the terms for both of these elected officials ends on November 30, 2024. *See* Pa. Const. art. II, § 2.

claimed by Intervenor-Petitioners is their wish to depose the Voters to understand why they did not comply with the date requirement. But they fail to explain why a voter's reasons for not dating their mail ballot would matter here.

The underlying constitutional question here has yet to be decided on the merits and is an issue “of grave importance.” *New Pa. Project Educ. Fund*, 2024 WL 4410884, at *2 (Todd, J., dissenting). It has been adequately preserved and presented “in the ordinary course, in a court of common pleas.” *Id.* (Donohue, J., concurring). It “should not be left on a back burner to await resolution at some unknown point in the future.” *Commonwealth v. Ricker*, 170 A.3d 494, 508 (Pa. 2017) (Wecht, J., dissenting). This Court should grant the application to decisively resolve the underlying constitutional issue on the merits under the typical appellate process, thus “limit[ing] the potential for chaos and uncertainty” in future elections. *Baxter v. Philadelphia Bd. of Elections*, No. 76 EM 2024, 2024 WL 4650792, at *7 (Pa. Nov. 1, 2024) (Dougherty, J., concurring). Doing so will provide clear guidance for county boards, voters, candidates, and political parties to comply with the Pennsylvania Constitution and avoid any further litigation on this question.

REASONS FOR PARTIAL DENIAL OF ALLOWANCE OF APPEAL

This Court should exercise its discretion and decline to allow an appeal on the other peripheral, non-merits questions designated by Intervenor-Petitioners. Deciding this case on any basis other than the merits of the constitutional question

all but guarantees further litigation, confusion, and challenges in future elections. This Court is aware of the procedural and jurisdictional hurdles that have regrettably impeded this Court's ability to decide the constitutional question on the merits before the November 5, 2024 General Election. Those hurdles do not exist here, as explained above.

And perhaps more important, none of the other questions designated by Intervenor-Petitioners satisfy the standard for allowance of appeal.

I. There is no need to address Intervenor-Petitioners' proposed superfluous procedural or jurisdictional questions.

For Intervenor-Petitioners' first⁴ and third⁵ questions, whether a Section 3157 appeal requires joinder of all 67 county boards of elections, is not a matter that requires "prompt and definitive resolution" by this Court. Pa. R.A.P. 1114(b)(4); (Petition at 12-14). It is standard that Section 3157 appeals are filed against only the election board whose decision is challenged. *See, e.g., Genser v. Butler Cnty. Bd. of*

⁴ "Whether, as this Court held in *B-PEP*, 322 A.3d at 222, the Commonwealth Court lacked jurisdiction and the majority improperly issued a decision on the merits, where Individuals [*sic*] Respondents joined only a single county board of elections to this suit and not the other 66 county boards that are indispensable parties?" (Petition at 5).

⁵ "Whether the majority erred when it rules in favor of Individual Respondents when the 66 absent county boards of elections and the Republican Committees were denied any opportunity to develop the factual record?" (Petition at 5).

Elections, No. 26 WAP 2024, 2024 WL 4553285 (Pa. Oct. 23, 2024).⁶ Intervenor-Petitioners themselves have filed multiple Section 3157 appeals arising out of the 2024 General Election in various Common Pleas Courts throughout the Commonwealth that do *not* include all 67 counties as parties. *See, e.g., McCormick v. Philadelphia Bd. Of Elections*, No. 2065-November Term, 2024 (Phila. Cnty. Ct. Com. Pl. Nov. 19, 2024); *McCormick v. Monroe Bd. of Elections*, No. 00007-cv-2024 (Monroe Cnty. Ct. Com. Pl. Nov.16, 2024); *McCormick v. Chester Bd. of Elections*, No. 2024-10291-EL (Chester Cnty. Ct. Com. Pl. Nov. 16, 2024). In any event, there simply is no procedural, factual, or legal basis for any other county board to have been named as a respondent in this appeal. The election at issue was a

⁶ *See also Shambach v. Bickhart*, 845 A.2d 793 (Pa. 2004) (holding that part of the Election Code “must be liberally construed to allow for the calculation of write-in votes made on behalf of a candidate already listed on a ballot where there is no evidence of fraud and the voter’s intent is clear” on a Section 3157 appeal not including all county boards of election); *In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. 2020) (deciding a Section 3157 appeal without joining every county board of elections); *In re Reading Sch. Bd. Election*, 634 A.2d 170 (Pa. 1993) (same); *In re Recount of Ballots Cast in Gen. Election on Nov. 6, 1973*, 325 A.2d 303 (Pa. 1974) (same); *In re Gen. Election Nov. 6, 1971*, 296 A.2d 782 (Pa. 1972) (same); *In re Primary Election of Somerset Twp., Wash. Cnty.*, 174 A.2d 25 (Pa. 1961) (same); *In re Recanvass f Eleventh Ward, Third Dist., City of Nanticoke*, 174 A.2d 106 (Pa. 1961); *Appeal of Meell*, 174 A.2d 110 (Pa. 1961) (same); *In re Burrell Twp.*, 108 A.2d 696 (Pa. 1954) (same); *Petition of Kehler*, 256 A.2d 623 (Pa. 1969) (interpreting statute to determine number of days permitted to make appeal under Section 3157 that thus affected all county boards of election); *Petition of Jones*, 346 A.2d 260 (Pa. 1975) (discussing court’s previous decision in case brought under Section 3157 where not all county boards of election were parties).

county-specific Special Election conducted only in Philadelphia County with no statewide implications.⁷

For Intervenor-Petitioners' second question⁸ there is no need for this Court to address whether the Commonwealth Court had jurisdiction, as there is no dispute that this appeal is properly before this Court. (Petition at 15-17).

II. The federal constitutional clauses are irrelevant to the present question, while Act 77's severability provision is not implicated.

In response to Intervenor-Petitioners' fifth question,⁹ the Electors and Elections Clauses of the U.S. Constitution—which applies only to federal elections—is irrelevant to this case, which involved only a Special Election to fill vacated seats in the state legislature. (Petition at 34-35).

Finally, for Intervenor-Petitioners' sixth question,¹⁰ this Court need not address whether failing to reverse the Commonwealth Court's decision strikes down all of Act 77 and universal mail voting in Pennsylvania. (Petition at 35-38). This

⁷ And if this Court decides to hear this appeal on the merits, each county can be heard from by submitting an amicus brief. *See* Pa. R.A.P. 531.

⁸ “Whether the Commonwealth Court erred in issuing a decision on the merits where this Court has exclusive subject-matter jurisdiction over this appeal under 42 Pa. C.S. § 722(7)?” (Petition at 5).

⁹ “Whether, to the extent it binds or permits any county board not to enforce the date requirement, the majority’s order violates the Electors and Elections Clauses of the U.S. Constitution?” (Petition at 6).

¹⁰ “Whether failing to reverse the majority’s decision strikes down all of Act 77 and universal mail voting in Pennsylvania?” (Petition at 6).

appeal does not implicate the severability provision, as the Commonwealth Court correctly concluded. That provision states: “Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void.” Act 77 § 11. A decision in Intervenor-Petitioners’ favor here would not “invalidate” the date provision, because voters would still be required to date their declaration. *Murphy v. NCAA*, 584 U.S. 453, 487-89 (2018) (Thomas, J., concurring) (“Invalidating a statute is not a ‘remedy,’ like an injunction, a declaration, or damages.”). In other words, the Petition is directed at preventing county boards from rejecting ballots based on the date provision, rather than altering the obligations of the voters themselves. In any case, a lower court’s decision regarding severability doctrine is not worthy of allocatur.

In sum, this Court should decline to allow an appeal on Intervenor-Petitioners’ proposed peripheral, non-merits questions.

CONCLUSION

This Court should grant the Petition in part and decide the matter only on its constitutional merits.

Dated: November 22, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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.

Dated: November 22, 2024

/s/ Ilana H. Eisenstein
Ilana H. Eisenstein

CERTIFICATE OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Answer to Petition for Allowance of Appeal contains 3,391 words, exclusive of the supplementary matter as defined by Pa. R.A.P. 2135(b).

Dated: November 22, 2024

/s/ Ilana H. Eisenstein
Ilana H. Eisenstein

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2024, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

Dated: November 22, 2024

/s/ Ilana H. Eisenstein
Ilana H. Eisenstein