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 WOLF

FILED: October 30, 2024

The Majority Opinion will risk causing confusion on the eve of the 2024 General Election and, therefore, I must dissent.

This appeal concerns a special election that is over. At issue are 69 undated and incorrectly dated absentee and mail-in ballots cast in a special election held on September 17, 2024, in Philadelphia County. The Philadelphia County Board of Elections' counting (or not counting) of those ballots will not impact the outcome of that election. Notwithstanding, this Court has forged on to "decide a constitutional issue of first impression regarding whether the application of certain provisions of our Election Code,[1] held to be unambiguous and mandatory but found to be otherwise meaningless, violates the free and equal elections clause of our Constitution." *Baxter v. Phila. Bd. of Elections* (Pa. Cmwlth., Nos. 1305, 1307 C.D. 2024, filed _____), slip op. at 41-42 (Maj. Op. at ___). Because this Court's decision is ill-timed, proceeding on an unnecessarily expedited track, has the potential to confuse the electorate, and deprives the Pennsylvania Supreme Court of a reasonable opportunity to review, I am left with no choice but to dissent.

I. Unnecessarily Expedited Track

The Majority Opinion states several times that its holding is limited to "the circumstances of these appeals." *See* Maj. Op. at 4, 41. Despite the disclaimer, the Majority, in no uncertain terms, concludes that any county board of elections' decision not to count undated or incorrectly dated mail-in and absentee ballots violates the free and equal elections clause of the Pennsylvania Constitution. *See* PA. CONST. art. I, § 5. This holding is not limited or "as applied." *See Clifton v. Allegheny Cnty.*, 969 A.2d 1197, 1222 (Pa. 2009) ("A statute is facially unconstitutional only where no set of circumstances exist under which the statute

[1] Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

would be valid."). As of October 30, 2024, there is no set of circumstances in which a county board of elections' decision not to count undated or incorrected dated mail-in and absentee ballots will pass constitutional muster.

The expedited nature of this landmark decision caused the Majority to gloss over important procedural issues—some raised by the parties and some not. First and foremost, the Majority does not fully consider the threshold issue of whether this Court has appellate jurisdiction. Under Section 762 of the Judicial Code, this Court generally has exclusive appellate jurisdiction of election appeals from court of common pleas because they affect the "application, interpretation or enforcement of [a] . . . statute relating to elections." 42 Pa.C.S. § 762(a)(4)(i)(c); *see Dayhoff v. Weaver*, 808 A.2d 1002, 1004-06 (Pa. Cmwlth. 2002) (confirming that the Election Code does not alter this rule *in general*). The Majority states that general rule. *See* Maj. Op. at 20 n.22 (quoting *Dayhoff*).

But there is an exception that the Majority does not address. It is from the Judicial Code, not the Election Code. If a matter is "by [S]ection 722 [of the Judicial Code] . . . within the exclusive jurisdiction of the Supreme Court," this Court lacks appellate jurisdiction. 42 Pa.C.S. § 762(b). Section 722(7) of the Judicial Code gives our Supreme Court <u>exclusive</u> appellate jurisdiction over "[m]atters where the court of common pleas has held invalid as repugnant to . . . the Constitution of this Commonwealth, any . . . provision of . . . any statute of[] this Commonwealth." 42 Pa.C.S. § 722(7). In this case, the court of common pleas "determined that the refusal to count" certain mail-in ballots due to incorrect dating "violates the free and equal elections clause set forth in [A]rticle I, [S]ection 5 of the Pennsylvania Constitution." Maj. Op. at 3. This amounts to a holding of constitutional invalidity of a statute (specifically, the Election Code's dating

provision) that triggers exclusive Supreme Court review under Section 722(7) of the Judicial Code, and thus prohibits this Court's appellate jurisdiction. This could be true notwithstanding that the trial court did not expressly say it was declaring any part of the Election Code unconstitutional.[2]

Though the parties do not raise that jurisdictional question, we are obligated to ensure jurisdiction *sua sponte*. *See Commonwealth v. Blystone*, 119 A.3d 306, 311 (Pa. 2015); *see also Zimmerman v. Schmidt*, ___ A.3d ___ (Pa., No. 63 MAP 2024, filed Sept. 25, 2024) (per curiam order) (vacating this Court's decision for want of subject matter jurisdiction after this Court failed to consider the jurisdictional issue *sua sponte*). And although parties can waive jurisdictional defects and thus perfect appellate jurisdiction in any appellate court in our Unified Judicial System, we need not accept the waiver because we retain the authority to "otherwise order[]"—i.e., to transfer the matter to the court with proper appellate jurisdiction. 42 Pa.C.S. § 704 (waiver of jurisdictional objections); *see id.* § 5103(a) (transfer).

Thus, there is an open question about whether the Court should transfer this matter to the Supreme Court for it to exercise the exclusive appellate jurisdiction arguably committed to it in the Judicial Code.[3] The Majority does not address that

[2] The jurisdictional rule of Section 722(7) appears to apply regardless whether the underlying constitutional holding is facial or as applied. *See Commonwealth v. Torsilieri*, 316 A.3d 77, 97 (Pa. 2024) (describing earlier Supreme Court decision on direct appeal from common pleas court as an "as applied" matter (citing *Commonwealth v. Torsilieri*, 232 A.3d 567, 572 (Pa. 2020))). Debating whether the trial court found the dating provision itself unconstitutional, or only its application or enforcement unconstitutional, seems to be a distinction without a difference, at least for jurisdictional purposes.

[3] Indeed, this Court could have done so immediately, which would have given the Supreme Court more time to review—and if necessary, to correct—the trial court's decision here.

question.[4] Because the constitutional issues dealt with by the trial court will have such an immediate and potentially significant impact on Pennsylvania elections, and the immediate November 5th election in particular, I believe this matter should be before the Pennsylvania Supreme Court without our opinion.

Second, the Majority identifies a distinct procedural issue that some Designated Appellants here have raised: the failure to name or join the other 66 purportedly indispensable county boards in the appeal filed in the trial court. Maj. Op. at 17 (summarizing parties' arguments). Although that issue could implicate the trial court's jurisdiction, the Majority discusses it only in a footnote, without significant analysis or citation to caselaw. *See* Maj. Op. at 23 n.25. In this Commonwealth's decentralized election system, where elections are managed individually in each of the 67 counties, local election officials look to this Court's decisions for guidance on legal requirements for counting and not counting votes. It does not take a stretch of the imagination to anticipate that the Majority Opinion will have an effect on election officials throughout the Commonwealth, six days before the November 5th General Election. Regardless of the merits of the indispensability issue, it deserves explanation the Majority does not give.

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[4] In this case in particular, there are compelling reasons for us to exercise any discretion we have to transfer. The trial court's decision now stands. It has not been stayed, vacated, or otherwise disturbed. It binds the Philadelphia County Board of Elections to count the ballots at issue here in contravention of the Election Code, on the basis that not counting them would violate the Pennsylvania Constitution. As I explain further below, this Court's decision in this case will contribute to confusion affecting voter behavior across the Commonwealth, but for those same reasons, the trial court's decision already causes confusion in Philadelphia County. That is a more-than-usually compelling reason for us to promptly transfer this matter to the Supreme Court, which arguably has exclusive jurisdiction anyway under Section 722(7) and is best suited as the Commonwealth's supervisory court to clear the existing confusion. Of course, the Supreme Court, like this one, need not decide the merits right now. It could stay or vacate the decision below, or restrict its prospective effects. The point is that there is one court that is best situated—and arguably statutorily empowered—to do that, and it is not this Court.

II. Confusion to the Electorate & Impediment to Further High Court Review

Procedural issues aside, the Majority Opinion will have significant real-world ramifications. As recently as this month, our Supreme Court denied an application for the exercise of King's Bench jurisdiction to answer the precise question raised in the instant appeals, stating it "will neither impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election." *New PA Project Educ. Fund v. Schmidt* (Pa., No. 112 MM 2024, filed Oct. 5, 2024) (*New PA Project*); *see also Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) ("Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so."); *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) ("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.").

The Pennsylvania Supreme Court's *New PA Project* decision was issued 30 days before the November 5th General Election. We are now six days before said election. Despite the crystal-clear directive from our Supreme Court, this Court is now handing down a sweeping constitutional decision disposing of an issue of first impression to settle the counting of votes that will not impact the outcome of a past special election, but which will cause a significant sea change in the election processes effectuated by the county boards.

All this aside, I am most concerned with how this Court's decision may influence voter behavior. On October 23, 2024, the Supreme Court handed down a decision in *Genser v. Butler County Board of Elections*, ___ A.3d ___ (Pa., Nos. 26 & 27 WAP 2024, filed Oct. 23, 2024), making clear that certain errors which result

in mail-in and absentee ballots being voided may be addressed by provisional voting. Voters and election officials are bound by *Genser*. But now, this Court's last-minute decision calls into question voters' need to vote by provisional ballot if they suspect an issue with the date on their mail-in or absentee ballot. When word of the "*Baxter* decision" gets out, it may lead an elector or election official to believe that an undated or incorrectly dated ballot will be counted despite its defect, counseling away from appearing on election day to vote provisionally. And this may stand true. But this Court, an intermediate appellate court, will most likely not be the last to speak on the issue, and the timing of this intermediate appellate Court's decision puts the Pennsylvania Supreme Court in a near-impossible position. *See New PA Project*, slip op. at 5 (Brobson, J., concurring statement) ("This Court's disposition of the King's Bench applications in this matter [] should discourage all who look to the courts of the Commonwealth to change the rules in the middle of an ongoing election.").

One need not look any further than the facts of this case to see how this Court's decisions on vote counting influence voter behavior:

> Designated Appellee Kinniry additionally attested to the fact that she received an email from the County Board on August 27, 2024, informing her that her vote would not be counted if she did not take additional steps to fix her omission of the date. However, she did not attempt to fix her mail-in ballot because she read the news about this Court's decision in [*Black Political Empowerment Project v. Schmidt* (Pa. Cmwlth., No. 283 M.D. 2024, filed Aug. 30, 2024) (*en banc*), *vacated*, 322 A.3d 221 (Pa. 2024)], in which this Court held that it is unconstitutional for county boards of elections to reject mail ballots for noncompliance with the Election Code's dating provisions.

Maj. Op. at 6-7. The Majority Opinion will undoubtedly influence the behavior of voters and election officials across the Commonwealth and will do so in a timeframe that all but forecloses further appellate review from our High Court.

While I am cognizant that the issue here was presented to this Court via statutory appeal,[5] and not through a vehicle grounded in equity, *cf. New PA Project*, our Supreme Court's recent warnings and the *Purcell* principle remain applicable as the Majority announces a new procedure just days before an already hotly contested presidential election, absent any "powerful reason to do so." *Crookston*, 841 F.3d at 398.

For the reasons articulated above, this Court should have considered transferring the matter to the Pennsylvania Supreme Court under Section 722(7) of the Judicial Code, or at the very least should have refrained from deciding this case on the eve of the 2024 General Election, and on the heels of *Genser*.[6]

/s/Matthew S. Wolf

MATTHEW S. WOLF, Judge

[5] Section 1407(a) of the Election Code, 25 P.S. § 3157(a).

[6] Practically speaking, *Genser* encourages voting by provisional ballot as a fail-safe mechanism. Our decision here may discourage use of that fail-safe mechanism if a voter believes his or her ballot was undated or incorrectly dated. *See* discussion *supra* at 6-7. Setting forth a new ballot-counting rule now, without further appellate review, is the precise change to election procedures the Supreme Court has cautioned litigants from seeking, and Courts from handing out. *See New PA Project* (Brobson, J., concurring statement).