

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian T. Baxter and Susan T. Kinniry

v.

The Philadelphia Board of Elections,
Republican National Committee, and
Republican Party of Pennsylvania

Appeal of: The Philadelphia Board of
Elections

Brian T. Baxter and Susan T. Kinniry

v.

The Philadelphia Board of Elections,
Republican National Committee, and
Republican Party of Pennsylvania

Appeal of: Republican National
Committee, and Republican Party of
Pennsylvania

CASES CONSOLIDATED

Trial Ct. No. 2024 No. 02481

No. 1305 C.D. 2024

No. 1309 C.D. 2024

**BRIEF OF APPELLANT PHILADELPHIA COUNTY BOARD OF
ELECTIONS**

On Appeal from the Order of the Court of Common Pleas of Philadelphia County

Ilana H. Eisenstein (No. 94907)
Brian H. Benjet (No. 205392)
Ben C. Fabens-Lassen (No. 321208)
M. David Josefovits (No. 331294)
DLA PIPER LLP (US)
One Liberty Place
1650 Market Street, Suite 5000
Philadelphia, PA 19103
215.656.3300

Alison L. Stohr (No. 316483)
Michael Pfautz (No. 325323)
Lydia Furst (No. 307450)
PHILADELPHIA LAW DEPARTMENT
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215.683.3563

Counsel for Appellant Philadelphia County Board of Elections

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STATEMENT OF JURISDICTION

This is a direct appeal from the final Order by the Honorable James C. Crumlish, III of the Court of Common Pleas of Philadelphia County on September 26, 2024 (attached as Exhibit A). The Appellees (referred to as “the Voters” throughout this brief) initiated this case in the Court of Common Pleas under 25 P.S. § 3157. This Court has jurisdiction over this appeal under 42 Pa. C.S. § 762(a)(4)(i)(C). *Dayhoff v. Weaver*, 808 A.2d 1002, 1005-06 (Pa. Comwlth. 2002).

ORDER IN QUESTION

The Board seeks review of the Order of September 26, 2024, which states:

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: 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 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.” 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.

SCOPE AND STANDARD OF REVIEW

The Court’s “scope of review in election contest cases is limited to examination of the record to determine whether the trial court committed errors of law and whether the court’s findings were supported by adequate evidence.” *Dayhoff*, 808 A.2d at 1005 n.4. The standard of review for questions of law is *de novo*. See, e.g., *In re Benkoski*, 943 A.2d 212, 215 n.2 (Pa. 2007). There are no factual disputes in this case.

STATEMENT OF QUESTIONS INVOLVED

1. Whether the Free and Equal Elections Clause of the Pennsylvania Constitution prohibits county boards of elections from rejecting mail ballots because of dating errors on the outer declaration envelopes.

Answer of the court below: *Yes*.

Suggested answer: The Board takes no position on this issue but voted 2-1 to not count mail ballots with dating errors in the Special Election in reliance on the Pennsylvania Supreme Court’s interpretation of the Election Code in *Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022). The Board, however, urges the Court to expeditiously decide the question for the reasons set forth in this brief.

2. Did the Court of Common Pleas reversibly err when it proceeded to reach the merits of this direct statutory election appeal by voters regarding the validity of their ballots following the election?

Answer of the court below: *No*.

Suggested Answer: *No*. State courts have a judicial responsibility to decide direct statutory appeals involving vote-counting decision by the Board that do not change the rules impacting the voting process or voter behavior.

STATEMENT OF THE CASE

A. Form of Action and Procedural History

This is a statutory appeal under 25 P.S. § 3157, from a decision of the Board regarding the procedure for processing mail ballots that contain dating errors on outer declaration envelopes.

Philadelphia conducted a Special Election on September 17, 2024 to fill vacancies in the 195th and 201st Legislative Districts. Voter-Appellees Brian T. Baxter and Susan T. Kinniry are two of the sixty-nine voters whose timely mail ballots were not counted in the Special Election because those ballots contained dating errors on the outer declaration envelope. On September 23, 2024, they filed a Petition for Review in the Nature of a Statutory Appeal in the Philadelphia Court of Common Pleas, under 25 P.S. § 3157, challenging the Board's September 21, 2024 decision to not count their mail ballots. (Reproduced Record ("R.R.") at 8a-46a.)

On September 25, 2024, the trial court held a hearing on the Petition for Review. At the hearing, the trial court accepted the parties' stipulation that the facts in the Petition for Review were not disputed. (R.R. at 52a-53a; 5:23-6:6). The Republican National Committee and the Republican Party of Pennsylvania (collectively, "Intervenors") sought to intervene in the action and filed a Petition for Leave to Intervene. (R.R. at 5a). Intervenors also filed a "Motion to Dismiss" the Petition for Review. *Id.*

On September 26, 2024, the trial court granted the Petition for Review. *Id.* The trial court also later granted Intervenors' motion to intervene but denied their motion to dismiss. (R.R. at 6a). This Final Disposition Order, dated September 27, 2024, was entered on the docket on September 28, 2024. *Id.*

On October 1, 2024, the Board appealed. (R.R. at 6a). Two days later, Intervenors also appealed. *Id.* Intervenors' appeal is pending at 1309 C.D. 2024 and has been consolidated with the Board's appeal. (R.R. at 7a).

B. Prior Determinations in this Case

The prior determination in this case is the September 26, 2024 Order granting the Petition for Review, reversing the Board's September 21, 2024 decision to reject Voters' mail ballots along with sixty-seven other mail ballots with dating errors, and directing the Board to count mail ballots with dating errors that were cast in the September 17, 2024 Special Election. Ex. A at 1-2.

C. Name of Judge or Official Whose Determination Is to Be Reviewed

The Honorable Judge James C. Crumliss, III of the Philadelphia County Court of Common Pleas issued the determination to be reviewed by this Court.

D. Factual Chronology in this Case

The Board does not dispute—and has stipulated to—relevant facts in the Voters’ petition for review. (R.R. at 52a-53a, Tr. 5:23-6:6).

Philadelphia conducted a Special Election on September 17, 2024. The Voters are two Philadelphia County voters who submitted mail ballots ahead of the Special Election. (R.R. at 13a-15a, Pet. ¶¶ 11, 18). They neglected to date the declaration envelope of their mail ballot. (R.R. at 14a-15a, Pet. ¶¶ 16, 21). The Board received sixty-nine mail ballots with dating errors in the Special Election. (R.R. at 22a-23a, Pet. ¶ 46, 52). Twenty-three ballot envelopes had missing dates, and forty-six envelopes had dates determined to be incorrect. *Id.* All ballots were timely received and otherwise valid, and all the electors who submitted these ballots (including Voters) were otherwise qualified to vote in the Special Election.

On September 21, 2024, the Board convened at a public meeting to make sufficiency determinations about mail ballots with dating errors pursuant to 25 P.S. § 3146.8(f)(3). (R.R. at 22a, Pet. ¶ 45). In comments made before voting on undated and incorrectly dated mail ballots, the Board acknowledged that the dating provision is meaningless and serves no purpose in the administration of elections. (R.R. at 22a-

23a, Pet. ¶¶ 47-50). But the Board voted 2-1 to not count mail ballots with dating errors in reliance on the Pennsylvania Supreme Court’s decision in *Ball v. Chapman*, 284 A.3d 1189, 1192 (Pa. 2022) and its later vacatur of this Court’s opinion in *Black Political Empowerment Project v. Schmidt* (“B-PEP”) for lack of jurisdiction. (R.R. at 22a, 24a, Pet. ¶¶ 46-54).

Two days later, Voters appealed the Board’s decision to the Court of Common Pleas. (R.R. at 8a-46a). Following a hearing, the trial court granted the Petition for Review, granted the Republican Intervenors’ motion to intervene, and denied the Intervenors’ motion to dismiss. (R.R. at 6a). The trial court entered its Final Disposition Order on the docket on September 28, 2024. *Id.*

E. Order Or Other Determination Under Review

As relevant here, the trial court’s September 26, 2024 Order reversed the Board’s September 21, 2024 decision to not count mail ballots with dating errors, held that the Board’s decision violated the Pennsylvania Constitution, and ordered the Board to “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.” Ex. A.

SUMMARY OF ARGUMENT

1. The question of whether the Pennsylvania Constitution permits the Board to reject otherwise qualified mail ballots with dating errors on the declaration

envelope remains unsettled, and this Court should take this opportunity to resolve the uncertainty. Given the legal whiplash on this issue over the last several years, the Board has no conclusive resolution on whether it must or must not count mail ballots with dating errors. This continued uncertainty will result in even more litigation, further burdening county boards as they prepare for the imminent election. It will also force the Board to continue expending unnecessary resources by individually reviewing ballots—by hand—for inconsequential dating errors.

2. The Board anticipates Intervenors will argue that this Court either cannot or should not address the merits of this issue under the so-called *Purcell* doctrine or for other prudential reasons relating to the proximity of this appeal to the General Election. But the concerns that animated the United States Supreme Court in *Purcell* are not present here. This issue is, in effect, a vote-counting decision and not a change in the rules impacting the voting process or voter behavior. It is an ideal vehicle for resolving the important constitutional question presented here.

3. The Board also anticipates Intervenors will argue that, if this Court concludes that declining to count mail ballots with dating errors violates the Pennsylvania Constitution, then this Court should invalidate Act 77 in its entirety. This Court has rejected that argument before and should do so again here. *See, e.g., Bonner v. Chapman*, 298 A.3d 153, 168-69 (Pa. Cmwlth. 2023). Resolution of this appeal would not require invalidation of any part of Act 77, much less its entirety.

And in any event, this Court has the discretion to narrowly interpret the scope of nonseverability provisions because making all of Act 77 depend on an immaterial dating provision threatens judicial independence.

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ARGUMENT

A. The Question of How Boards Should Handle Mail Ballots with Dating Errors Remains Unsettled.

This Court should decide whether the Pennsylvania Constitution permits the Board to reject otherwise qualified mail ballots with dating errors on the declaration envelope. The history of state and federal litigation over whether the Board should count or reject mail ballots with dating errors confirms that conclusive resolution of this issue is necessary. For years, the Board has been whipsawed in opposing directions, causing disruption and burdening its good-faith efforts to efficiently and fairly administer elections. Since November 2020, the jurisprudence on this question has shifted as many as eight times.

1. *Count ballots with dating errors in November 2020, but not after.* In 2020, this Court permitted county boards of elections to count mail ballots with dating errors in the November 2020 election, but required them to treat the date as a mandatory requirement “in future elections.” See *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election* (“*In re 2020*”), 241 A.3d 1058, 1076-79 (Pa. 2020), *cert. denied*, 141 S. Ct. 1451 (2021); *id.* at 1079 (Wecht, J., concurring).

2. *In May 2022, count ballots with dating errors.* In early 2022, a unanimous panel of the Third Circuit held that the Materiality Provision of the Civil Rights Act prohibited disenfranchisement based on the dating provision. *See Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir. 2022), *vacated as moot sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022). The U.S. Supreme Court then vacated that opinion for mootness. *Ritter*, 143 S. Ct. 297.

3. *In November 2022, do not count ballots with dating errors.* In November 2022, this Court in *Ball* held that the Pennsylvania Election Code required voters to correctly date their declaration envelopes and that county boards of elections had to enforce this requirement by disenfranchising voters by rejecting ballots with dating errors. 284 A.3d at 1192.

4. *In November 2023, count ballots with dating errors.* In November 2023, a federal district court held that disenfranchisement under the dating provision violated the Materiality Provision of the 1964 Civil Rights Act. *See Pa. State Conf. of NAACP v. Schmidt*, 703 F. Supp. 3d 632 (W.D. Pa. 2023) (“*NAACP I*”). The district court rendered its decision after the Board had computed and reported the results for the 2023 General Election, but before it had certified those results. After the decision, the Board had to re-compute the results to include mail ballots with dating errors, thus delaying certification to comply with the required five-day period between computation and certification under 25 P.S. § 3154(f). Due to this re-

computation, the Board was unable to comply with the statutory certification deadline of Monday, November 27, 2023, and instead certified three days later, on Thursday, November 30, 2023.¹

5. *In March 2024, do not count ballots with dating errors.* In 2024, a divided panel of the Third Circuit reversed on the issue of the Materiality Provision, and remanded for the parties to continue litigating whether disenfranchisement under the dating provision violates the United States Constitution. *See Pa. State Conf. of NAACP v. Schmidt*, 97 F.4th 120, 125 (3d Cir. 2024) (“*NAACP II*”). The Appellees in the Third Circuit recently petitioned for certiorari to the United States Supreme Court. *See* Petition for a Writ of Certiorari, *Pa. State Conf. of NAACP v. Schmidt*, No. 24-363.

6. *In August 2024, count ballots with dating errors.* In 2024, this Court held that enforcing the dating provision by disenfranchisement violates the Pennsylvania Constitution. As this Court explained, “[t]he refusal to count undated or incorrectly dated but timely ballots submitted by otherwise eligible voters because

¹ 25 P.S. § 2642(k) (requiring boards to certify elections no later than the third Monday following the election); November 30, 2023 Philadelphia Board of Elections Public Meeting Agenda & Transcript, *available at* <https://vote.phila.gov/resources-data/commissioner-meetings/commissioner-meetings/transcripts-for-2023-general-and-special-election/> (last accessed Oct. 13, 2024).

of meaningless and inconsequential paperwork errors violates the fundamental right to vote recognized in the free and equal elections clause.” *B-PEP*, 2024 WL 4002321, at *1. As a result, the Board was “**PERMANENTLY ENJOINED** from strictly enforcing the dating provisions of the Election Code.” *Id.* at *39.

7. *September 4, 2024, do not count ballots with dating errors.* In a *per curiam* opinion issued shortly thereafter, the Pennsylvania Supreme Court vacated this Court’s decision solely on jurisdictional grounds. *Black Pol. Empowerment Project v. Schmidt*, --- A.3d ----, 2024 WL 4181592, at *1 (Pa. Sept. 4, 2024). The Pennsylvania Supreme Court did not address the constitutional question on the merits.

8. *September 26, 2024, count ballots with dating errors.* And now, here, the trial court has held that disenfranchisement based on the dating provision *does* violate the Pennsylvania Constitution. It had ordered the Board to include mail ballots with dating errors in the final vote count for the Special Election.

* * * * *

The Board believes that the net effect of the current jurisprudence on this issue—including this Court’s persuasive, but subsequently vacated, decision in *B-PEP*—strongly suggests that the Board would violate voters’ constitutional rights if it were to refuse to count mail ballots with dating errors in the 2024 General Election. Even so, the constitutional question presented in this appeal is unsettled.

And less than one month from now, the Board will once again be tasked with deciding how to handle timely submitted mail ballots with dating errors submitted by qualified electors during the General Election—but this time the Board will be in a materially different situation than it was a month ago, due to the trial court’s order requiring it to count such ballots in the Special Election.

The trial court’s order places the Board in a unique position. The Board wishes to avoid handling mail ballots with dating errors in a manner that diverges from the approach taken by other county boards. Such a divergence will 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 efficiently canvass, compute, and certify election results. The Board also does not intend to handle such ballots one way in the Special Election but a different way, less than two months later, in the General Election.

For this reason—despite taking no position on the merits of the constitutional question presented—the Board has appealed the trial court’s grant of the Petition for Review and is nominally seeking reversal to avoid a scenario where: (i) the Board is an outlier from the other county boards on this issue, and (ii) the Board counts mail ballots with dating errors in the Special Election (as it must under the appealed-from order here), but then is ordered by this Court to reject the same category of ballots weeks later during the General Election. A ruling from this Court on the merits of

the constitutional issue will enable the Board to avoid inconsistency concerns, comply with the Election Code, uphold the voting rights of electors under the Pennsylvania Constitution, and avoid further litigation on this issue after the General Election.

B. There Is No Barrier to Resolving This Issue Now.

While Intervenors appear likely to argue that this Court should not or cannot resolve the merits, this Court should reject that argument. Nothing prohibits this Court from deciding, in this direct appeal over which it has jurisdiction, whether the Board was required to count mail ballots with dating errors in the September 17, 2024 Special Election.

This appeal does not seek to “disrupt” an imminent election. It addresses an earlier one that has already concluded. To be sure, federal courts may decline to grant requests for injunctions that seek to alter established election procedures near an election. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006) (per curiam) (vacating injunction that enjoined operation of Arizona voter identification procedures); *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (staying preliminary injunction). But the *Purcell* principle is limited to the context of preliminary injunctions without a developed factual record and “is probably best understood as a sensible refinement of ordinary stay principles.” *See Merrill v. Milligan*, 142 S.Ct. 879, 880 (2022) (Kavanaugh, J., concurring).

Unlike *Purcell* and *Crookston*, this case is a direct appeal from the Board's vote-counting decision following the Special Election, which took place on September 17, 2024. This case does not involve a request for a preliminary injunction, a situation where practical considerations relating to an election affect the balancing of the harms. Neither *Purcell*, *Crookston*, nor any other decision that the Board is aware of, instructs state courts to abdicate their judicial responsibility to decide direct appeals involving questions of constitutional importance in the ordinary course simply because it might affect elections. “*Purcell* is a consideration, not a prohibition.” *Kim v. Hanlon*, 99 F.4th 140, 160 (3d. Cir. 2024) (affirming injunction). It has no relevance here.

Nor are the factors that animated *Purcell*—voter confusion and election disruption—present here. *Purcell* embodies pre-election judicial restraint to avoid disrupting efforts by election administrators or imposing hardship or confusion on voters. *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 30-32 (2020) (Kavanaugh, J., concurring). In *Purcell*, changes to voter-ID laws directly affected voters who might have been deterred from voting because they lacked the requisite documentation. *See* 549 U.S. at 2. And in *Crookston*, an injunction altering longstanding laws limiting cameras in polling places to protect ballot secrecy might have confused voters and poll workers alike, who would be unsure how to comply with or enforce the law. *See* 841 F.3d at 399. When those animating factors are not

present, there is no bar to a court's exercise of its judicial duties. *See, e.g., Feldman v. Ariz. Sec'y of State's Off.*, 843 F.3d 366, 368 (9th Cir. 2016) (affirming injunction when there was no risk of voter confusion); *Kim*, 99 F.4th at 160 (same).

Here, there is no danger of voter confusion or hardship on election administrators for either prior or future elections. The Special Election has already occurred, and all mail ballots have been cast and canvassed. *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) (quoting *Purcell*, 549 U.S. at 4-5)). 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. § 3050(a.4)(4). There is no risk of voter confusion, or hardship on election administrators. As the Sixth Circuit explained when it decided a post-election challenge, “[t]o the contrary, counting the ballots of qualified voters miscast as a result of poll-worker error may enhance ‘[c]onfidence in the integrity of our electoral processes[, which] is essential to the functioning of our participatory democracy.’” *Hunter*, 635 F.3d at 244-45 (quoting *Purcell*, 549 U.S. at 4).

Nor is there any risk of voter confusion or other hardship in future elections because prohibiting the Board from rejecting mail ballots with dating errors is

“feasible” without “significant cost, confusion, or hardship.” *See Merrill*, 142 S.Ct. at 881 (Kavanaugh, J., concurring). The status quo is that Board staff segregate mail ballots with dating errors, and after the canvassing process is completed, they then present these mail ballots to county boards of elections who decide whether to reject them or count them. This Court’s decision will affect only that last stage—*i.e.*, whether county boards of elections include those ballots in the final tally. This Court’s decision will not affect the voters who will still receive the same mail ballot with instructions to date the outer declaration envelope. It simply would allow the Board to count timely ballots cast by qualified electors.

This case is different than *Purcell* for several other reasons, too. *First*, unlike those cases where *Purcell* applied, there was no delay here. *See Feldman*, 843 F.3d at 368 (holding *Purcell* inapplicable when there is no delay). The Petition for Review was filed two days after the Board’s September 21, 2024, decision not to count mail ballots with dating errors by two voters whose ballots had been rejected. (R.R. at 3a, 11a). And all Appellants timely appealed. (R.R. at 6a).

Second, *Purcell* is designed to limit the “federal intrusion on state lawmaking processes.” *Democratic Nat’l Comm.*, 141 S. Ct. 28, 28 (2020) (Roberts, C.J., concurring). It imposes no constraints on state courts. State courts may adopt a *Purcell*-like principle as a matter of state law, and in fact the Pennsylvania Supreme Court recently referenced *Purcell* in declining to exercise King’s Bench jurisdiction.

See New PA Project Educ. Fund v. Schmidt, No. 112 MM 2024, 2024 WL 4410884, at *1 (Pa. Oct. 5, 2024). But this case does not involve a request for extraordinary jurisdiction. This case is a direct appeal in state court where the Pennsylvania Supreme Court specifically stated that it would “continue to exercise [its] appellate role with respect to lower court decisions that have already come before this Court in the ordinary course” as it has recently done in other appeals like this one. *Id.* at *1 n.2. That language strongly supports the view that this Court has a statutory and jurisdictional obligation to resolve this direct appeal on the merits.

Third, this is not a case where the law at issue has been clear and settled. As explained in Section A above, the last two years have seen continual litigation over whether county boards of elections can reject mail ballots with dating errors, and the law on this issue has changed as many as eight times. A definitive answer on whether disenfranchisement based on the dating provision violates the Pennsylvania Constitution will bolster the public’s confidence in elections and create certainty in a long-running disputed issue. *See Kim*, 99 F.4th at 160 (holding *Purcell* does not apply when a ruling would “reduce, if not eliminate voter confusion”). A decision would also decrease the likelihood of a situation where an electoral contest might turn on disputed ballots. *See, e.g., Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 734 (2021) (Thomas, J., dissenting) (observing that the lack of “clear rules” in an election “brews confusion” and allows competing candidate to “declare victory

under different sets of rules”); *Democratic Nat’l Comm.*, 141 S. Ct. at 31 (Kavanaugh, J., concurring) (“[T]he rules of the road should be clear and settled.”). “Swift resolution” by this Court will thus “promote confidence in the authority and integrity of our state and local institutions.” *Bd. of Revision of Taxes v. City of Philadelphia*, 4 A.3d 610, 620 (Pa. 2010).

There is no barrier to resolving this issue now, and this Court should do so.

C. The Facts here Are Not in Dispute, and the Handwritten Date Serves No Purpose.

The facts here are straightforward and not disputed. Voters timely returned mail ballots in the September 17, 2024 Special Election. (R.R. at 13a-15a, Pet. ¶¶ 11, 18). Both Voters neglected to include a handwritten date on their outer declaration envelopes. (R.R. at 13a-15a, Pet. ¶¶ 16, 21). On September 21, 2024, the Board voted not to count sixty-nine mail ballots with dating errors, including Voters’ mail ballots. (R.R. at 22a-24a, Pet. ¶¶ 46-54).

Despite this vote, the Election Code’s instruction to handwrite a date on the outer return envelope of a mail ballot does not offer any benefit to the administration of elections. The Board does not use the handwritten date to determine a voter’s qualification or the timeliness of the ballot. Nor can the Board rely on it to prevent or detect fraud.

After the ballot template is certified by the Pennsylvania Department of State, county boards of elections print and mail absentee and mail ballots to qualified voters

who have successfully applied to receive such a ballot. (R.R. at 18a, Pet. ¶ 29). When the Board receives an absentee or mail ballot, the ballot envelope is stamped with the date and time of receipt to confirm its timeliness.² (R.R. at 18a-19a, Pet. ¶¶ 33-34). Only ballots received by 8:00 p.m. on Election Day may be counted. 25 P.S. §§ 3146.6(c), 3150.16(c). If an absentee or mail ballot is timely received by a county board of elections, the ballot could only have been marked and dated between the time it was sent to a qualified voter and 8:00 p.m. on Election Day. Every court to consider this issue has concluded that the date is meaningless to election administration. *See, e.g., NAACP II*, 97 F.4th at 129 (“[N]ot one county board used the date on the return envelope to determine whether a ballot was timely received in the November 2022 election.”); *see also NAACP I*, 703 F. Supp. 3d at 679 (“Whether a mail ballot is timely, and therefore counted, is not determined by the date indicated by the voter on the outer return envelope, but instead by the time stamp and the SURE system scan indicating the date of its receipt by the county board.”).

The dating provision is thus a meaningless paperwork-related technicality, and it has been challenging and costly for the Board (and other county boards) to enforce it. *Cf. Amici Curiae Br. Cnty. Offs.* at 15-19, *B-PEP v. Schmidt*, No. 68 MAP

² This does not include military overseas ballots, which may be counted as timely if submitted for delivery no later than 11:59 p.m. the day before the election and received by a County Board of Elections by 5:00 p.m. on the seventh day following an election. *See* 25 P.S. §§ 3509(2), 3511(a).

2024 (Pa. 2024). To process the large volume of absentee and mail ballots received each election,³ the Board relies on automated sorting machines to recognize when ballot envelopes are returned without handwritten signatures or without the internal secrecy envelope that is required by the Pennsylvania Election Code. These machines, however, cannot be configured to determine whether the date on the ballot's outer return envelope is "correct." As a result, the Board must devote more time and labor to manually inspect, identify, and set aside ballots that do not comply with the dating provision.

This unnecessary administrative burden does not contribute to the integrity or efficiency of the election process. The only effect of the date provision is to reject timely ballots of otherwise qualified voters.

D. Declining to Enforce the Dating Provision by Disenfranchisement in the Special Election Would Not Trigger Act 77's Nonseverability Provision or Invalidate Act 77.

If this Court were to affirm the trial court's ruling that enforcement of the date provision by disenfranchisement is unconstitutional, it need not also strike all of Act 77—including universal mail voting in Pennsylvania—as Intervenors recently argued to the Court in the *B-PEP* litigation and appear likely to do so again here.

³ In the 2020 General Election, for example, Philadelphia County received more than 380,000 absentee and mail-in ballots before the Election Day deadline. *See* Pa. Dep't of State, Rep. on the 2020 Gen. Election at 9, *available at* <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/reports/2020-General-Election-Report.pdf> (May 14, 2021).

At the outset, this Court’s holding in *Bonner v. Chapman* confirms that the dating provision need not be invalidated or stricken from Act 77 to grant Petitioners relief. In *Bonner*, as here, the issue was whether declining to enforce the dating provision by disenfranchisement triggered Act 77’s nonseverability provision. 298 A.3d. at 168-69. This Court determined that Act 77’s nonseverability provision was not triggered because a decision not to enforce the dating provision did not “str[ike] the Dating Provisions from the Election Code,” nor did it imply “that electors cannot or should not handwrite a date on the declaration in accordance with those provisions.” *Id.* at 168. Here, too, if the Voters prevail, Act 77’s nonseverability provision is “not triggered” because “the Dating Provisions” will “remain part of the Election Code and continue to instruct electors to date the declaration on the return mailing envelope, which, as history has shown, a majority of electors will do.” *Id.* Accordingly, *Bonner*’s holding alone refutes Intervenor’s anticipated “nonseverability” argument.

Moreover, concluding that enforcement of the dating provision through disenfranchisement violates the Pennsylvania Constitution would not trigger the nonseverability provision of Act 77. Act of Oct. 31, 2019, P.L. 552, No. 77 (“Act 77”).⁴ A decision in the Voters’ favor here would not “invalidate” the date provision, as voters

⁴ That provision (*i.e.*, Section 11 of Act 77) 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.”

in future elections would still be required to date their declaration and would violate the Election Code by failing to do so. *B-PEP*, 2024 WL 4002321, at *37-38; *see also* *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 488-89 (2018) (Thomas, J., concurring) (“Invalidating a statute is not a ‘remedy,’ like an injunction, a declaration, or damages.”). Instead, any decision would be directed at preventing county boards from rejecting ballots based on the date provision, rather than altering the obligations of voters themselves.

Additionally, even if this Court were to conclude that the nonseverability provision was triggered, such a conclusion would not justify invalidating Act 77 in its entirety. Pennsylvania statutes are presumptively severable, and this Court has ample discretion to exercise its independent judgment with respect to how to interpret and apply Act 77’s nonseverability provision. *See Stilp v. Commonwealth*, 905 A.2d 918, 970-75, 980 (Pa. 2006).

Accepting the extreme nonseverability argument that Intervenors have made recently to this Court would have dire consequences for Pennsylvania voters and the county boards of election tasked by law with administering the 2024 General Election. Universal “no-excuse” mail voting has been a resounding success since the General Assembly adopted it in 2019. It has made voting more accessible and less burdensome to hundreds of thousands of voters, with more than one and a half million voters now

relying on mail voting to exercise their constitutional right to vote.⁵ The sudden elimination of this time-tested and proven method of voting—mere days before the 2024 General Election—would be devastating to those who are unable to vote in person, yet are not permitted to vote by absentee ballot. Indeed, invalidating Act 77 would, in effect, “disenfranchise a massive number of Pennsylvanians from the right to vote in the upcoming election.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 397 n.4 (Pa. 2020) (Donohue, J., concurring in part and dissenting in part).

Eliminating Act 77 would also be confusing to voters and extremely disruptive and chaotic to the electoral process. Act 77 is a comprehensive election modernization statute in which county boards of elections, elections officials, Pennsylvania voters, and candidates for office have developed significant reliance interests. With the General Election soon approaching, eliminating Act 77—which includes voting reforms that go well beyond the introduction of universal no-excuse mail voting—would be profoundly disruptive to those efforts and would place countless voters at risk of disenfranchisement.

In sum, if disenfranchisement based on the dating provision is declared unconstitutional, this Court can and should conclude that Act 77’s nonseverability

⁵ Commonwealth of Pennsylvania, Elections Data – Daily Mail Ballot Report, <https://www.pa.gov/en/agencies/vote/elections/elections-data.html> (last accessed October 14, 2024).

provision is either inapplicable or unenforceable. In either event, this Court should not invalidate all of Act 77.

CONCLUSION

The Board is unwaveringly committed to protecting the fundamental right to vote through the fair and orderly administration of elections in Philadelphia County. That commitment to the rule of law and the Pennsylvania Constitution has compelled it to file this direct appeal. To that end, the Board welcomes a swift decision from this Court on whether the Free and Equal Elections Clause permits County Boards to reject mail ballots with dating errors on their outer declaration envelopes.

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Respectfully submitted,

/s/ Ilana H. Eisenstein

Ilana H. Eisenstein (No. 94907)
Brian H. Benjet (No. 205392)
Ben C. Fabens-Lassen (No. 321208)
M. David Josefovits (No. 331294)
DLA PIPER LLP (US)
One Liberty Place
1650 Market Street, Suite 5000
Philadelphia, PA 19103
215.656.3300
ilana.eisenstein@us.dlapiper.com
brian.benjet@us.dlapiper.com
ben.fabens-lassen@us.dlapiper.com
david.josefovits@us.dlapiper.com

Alison L. Stohr (No. 316483)
Michael Pfautz (No. 325323)
Lydia Furst (No. 307450)
PHILADELPHIA LAW DEPARTMENT
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
alison.stohr@phila.gov
michael.pfautz@phila.gov
lydia.furst@phila.gov

*Counsel for Appellant Philadelphia
County Board of Elections*