

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian T. Baxter and Susan T. Kinniry

v.

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

Appeal of: Philadelphia County Board
of Elections

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

CASES CONSOLIDATED

Trial Ct. Case ID No. 240902481

No. 1305 C.D. 2024

No. 1309 C.D. 2024

AMICUS BRIEF IN SUPPORT OF APPELLEES

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October 14, 2024

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INTEREST OF AMICI CURIAE

The Secretary of the Commonwealth and the Department of State file this amicus brief in support of affirming the decision of the Philadelphia County Court of Common Pleas in this matter.¹ The Department’s “obvious interest in election administration” is “highly salient” here. Memorandum Opinion, *In re: Contest of November 7, 2023*, 1482 CD 2023, Slip Op. at 5 n.5 (Pa. Cmwlth. Dec. 29, 2023).

The Secretary is required to prescribe the form of the declaration that appears on mail-ballot envelopes, and all counties are required to use the declaration he prescribes. *See* 25 P.S. § 3146.4; *id.* § 3150.14(b). The central issue in this case concerns what voters must do to have “sufficiently” completed that declaration. *See id.* § 3146.6(a); *id.* § 3150.16(a); *see also id.* § 3146.8(g)(3).

Similarly, the Secretary has broad authority to prescribe the form of the return envelope that carries the declaration as well as the form of the enclosed instructions. *See id.* § 3146.4; *id.* § 3150.14(b) & (c). The Secretary has used this authority to redesign mail ballot materials to reduce

¹ This brief was not authored or paid for, in whole or in part, by any person or entity other than *amici* and their counsel.

the frequency of inadvertent voter errors, including dating errors. Despite these efforts, thousands of voters in each election continue to omit the declaration date or write an “incorrect” date.

Furthermore, the Secretary has the duty “[t]o receive from county boards of elections the returns of primaries and elections, to canvass and compute the votes cast for candidates and upon questions as required by the provisions of this act; to proclaim the results of such primaries and elections, and to issue certificates of election to the successful candidates at such elections.” *Id.* § 2621(f); *see also Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *1 (Pa. Cmwlth. Aug. 19, 2022).

Finally, the Department is required to administer the Statewide Uniform Registry of Electors, or SURE system. 25 Pa.C.S. § 1222. In this role, the Department issues directives to county boards of elections regarding their use of the SURE system for recording information about Pennsylvania voters.

DISCUSSION

As this Court has recognized, the handwritten declaration date on mail ballot return envelopes serves no purpose in the administration of Pennsylvania's elections. See *Black Pol. Empowerment Project v. Schmidt*, 283 MD 2024, 2024 WL 4002321, at *33 (Pa. Cmwlth. Aug. 30, 2024) (*BPEP I*), vacated on other grounds, 68 MAP 2024, 2024 WL 4181592 (Pa. Sept. 4, 2024) (*BPEP II*). It has not served a purpose since 1968. See Br. for Secy. of the Cmwlth. at 16-29, *BPEP II*, at 16-29 (Sept. 4, 2024) (attached hereto as Exhibit A).

Since the General Assembly amended the Election Code that year, the Code has not permitted county boards of elections to discard timely returned ballots cast by qualified, registered voters on the basis of errors with the handwritten declaration date. *Id.* Although counties have since been ordered to reject such ballots, doing so violates the Pennsylvania Constitution. *Id.* at 36-59. The Department has made these points in previous litigation and will not repeat its previous arguments here. Instead, the Department focuses this brief on a few specific points for the benefit of the Court:

1. In every election in which the relevant data has been analyzed, the rejection rate based on dating errors among older voters has been meaningfully higher than that among younger voters.²

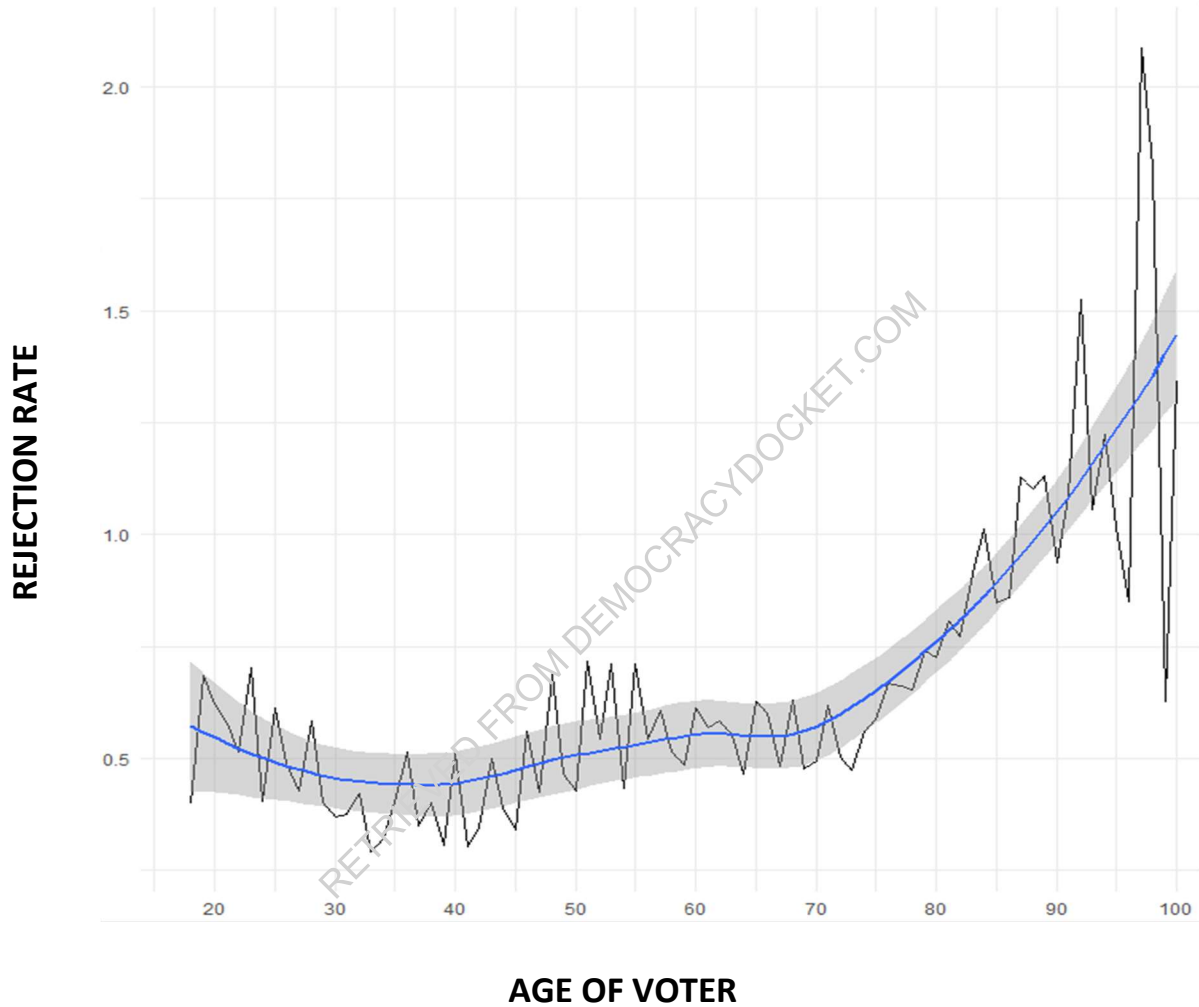
For instance, in the 2024 primary, SURE data reflects that the rejection rate based on dating errors among mail voters aged 70 and over was more than 1.5 times the rejection rate among voters aged 50 and under.³ And the rejection rate for voters 80 and over was more than double that among voters aged 50 and under. Among certain subgroups, the disparity is even more pronounced: among mail voters aged 91 to 100 (of whom 20,982 voted in this year's primary), the rejection rate was over three times that of voters aged 31 to 40.

² Prior to the 2023 municipal primary, the SURE system did not allow the Department to distinguish between ballots rejected for missing or incorrect declaration dates from ballots rejected for other reasons. Analyses of dating errors for earlier elections were conducted based on hand reviews of individuals ballot envelopes by county boards of elections.

³ As this Court is aware, see *Ctr. for Coalfield Just. v. Washington Cnty. Bd. of Elections*, 1172 CD 2024, 2024 WL 4272040, at *1 (Pa. Cmwlth. Sept. 24, 2024), *appeal pending*, 259 WAL 2024, not all counties use the ballot status codes in the SURE system that allow for the identification of ballots with declaration-date errors (or other errors, such as omitted signatures or missing secrecy envelopes). As a result, the actual frequency of dating errors is almost certainly higher than that that can be determined using data in the SURE system.

The chart below shows the rejection rate of mail ballots due to dating issues by age of the voter in 2024 primary election:

**REJECTION RATE BASED ON DATING ERRORS
VOTERS AGED 18 TO 100**



The black line reflects the actual rejection rates among voters of each age. The blue line is the same data, smoothed. The shaded gray area represents the confidence interval.

This effect is compounded by the fact that significantly more older voters vote by mail than do younger voters. For instance, while 121,154 voters aged 50 and under voted by mail in this year's primary, 357,437

voters aged 70 and over did. As a result, in this year’s primary, the total number of mail ballots of voters aged 70 and over that were rejected for declaration date issues (2,591 ballots rejected) was nearly five times that of voters aged 50 and under (541 ballots rejected).

In fact, for many older voters, voting by mail is the only feasible option. To the extent such voters must vote by mail because of a disability, such as a mobility impairment, their right to participate in elections on an equal basis is protected by federal law, including Title II of the Americans with Disability Act. *See* 42 U.S.C § 12131 *et seq.*⁴ To date, no court has addressed whether rejecting ballots based on an error or omission in a handwritten date used for no purpose raises concerns under the ADA.

In dissent in *BFEF I*, Judge McCullough asserted that the suggestion that elderly voters were disproportionately impacted by excluding ballots with dating errors was “insulting to that group of voters.” 2024

⁴ *See also* U.S. Department of Justice, *The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities* (Apr. 18, 2024), available at <https://www.ada.gov/resources/protecting-voter-rights/> (describing protections under federal law).

WL 4002321, at *61. The data demonstrates, however, that is not merely a suggestion—it is reality.

2. Over the last two elections, the Department has redesigned Pennsylvania’s mail balloting materials to try to reduce the number of voter errors that lead to rejected mail ballots. That design work has been helpful, but it has not fully solved the problem of mail ballot rejections. And for any election—but especially for high turnout elections—even small percentages of rejected ballots amount to thousands of qualified voters who are disenfranchised.

This year’s presidential election will be the first since the Supreme Court ordered counties to set aside ballots with “incorrect” handwritten dates. *See Ball v. Chapman*, 284 A.3d 1189, 1192 (Pa. 2022). Based on prior rejection rates, it is reasonable to expect that tens of thousands of timely returned mail ballots from qualified, registered voters will be rejected in November based solely on inconsequential dating errors, and older voters will be disproportionately affected.

In several recent elections, the number of ballots with declaration-date errors has been greater than the margin separating the top two candidates. *See In re 2020 Canvass of Absentee & Mail-in Ballots of Nov. 3*,

2020 Gen. Election, 241 A.3d 1058 (Pa. 2020) (“*In re 2020 Canvass*”); *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), *vacated on other grounds*, *Ritter v. Migliori*, 143 S. Ct. 297 (2022); *In re Contest of Nov. 7, 2023 Election of Towamencin Twp.*, 318 A.3d 420 (Pa. Cmwlth. 2024).

It is only a matter of time before a statewide race is decided because qualified voters returned mail ballots on time but were disenfranchised for failing to perform an act that serves no purpose under the Election Code.

3. The Department is mindful of the Supreme Court’s recent assertion that it will no longer “impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election.” *See New PA Project Educ. Fund v. Schmidt*, 112 MM 2024, 2024 WL 4410884, at *1 (Pa. Oct. 5, 2024). The Department agrees that such an approach is appropriate where late changes would disrupt election administration or confuse voters, and has previously argued as much. *See, e.g., Secretary’s Ans. to Pet. for the Exercise of King’s Bench Auth. or Extraordinary Juris., Ball*, 102 MM 2022 (Oct. 19, 2022); *see also* Response to Prelim. Inj., *West v. Dep’t of State*, 24-1349 (W.D. Pa. Oct. 1, 2024), ECF No. 20.

But not all “alterations to existing laws and procedures” are the same. Regardless of what happens in this case, litigation over how counties determine what constitutes an “incorrectly dated” ballot will almost certainly persist. While the Supreme Court has insisted that this question “falls beyond [its] purview,” 289 A.3d at 23, it will be required to address it at some point—conceivably in challenges to county canvassing decisions made in the 2024 general election.⁵ The same sort of challenge brought here under 25 P.S. § 3157 to Philadelphia’s canvassing decisions during its recent special elections is likely to recur for canvassing decisions made during the forthcoming general election.

It is better to address questions about which ballots will be counted before such a decision becomes outcome determinative. *See Zimmerman v. Schmidt*, 33 MD 2024, 2024 WL 3979110, at *5 n.13 (Pa. Cmwlth. Aug. 23, 2024), *vacated on other grounds*, 63 MAP 2024, 2024 WL 4284202 (Pa.

⁵ While declining to provide guidance as to how they should do so, the Supreme Court in *Ball* held that “county boards of elections retain authority to evaluate the ballots that they receive in future elections—including those that fall within the date ranges derived from statutes indicating when it is possible to send out mail-in and absentee ballots—for compliance with the Election Code.” 289 A.3d at 23. Justice Brobson went even further, and seemingly encouraged counties to take additional steps to determine whether ballots with “facially correct date[s]” might nonetheless be excluded. *Id.* at 36 (Brobson, J., concurring).

Sept. 25, 2024) (Cohn Jubelirer, P.J.). That is especially true for issues that, if they are not resolved pre-election, will certainly be raised post-election.

Moreover, the requirement that county boards begin setting aside ballots with declaration-date errors—and, in particular, ballots with incorrect dates—imposed a significant new burden on those boards. After the Supreme Court first ordered that ballots with “incorrect” declaration dates be set aside, one week before the 2022 general election, the result was “utter chaos.” See Bethany Rodgers, *‘Utter chaos’: Pa. counties hustle after Supreme Court order on mail-in ballots*, GoErie.com;⁶ see also Jonathan Lai, *Pennsylvania’s vote count will be slower and more ballots will be rejected after a new court ruling*, Philadelphia Inquirer (Nov. 3, 2022).⁷ And counties have faced uncertainty in every election since then regarding how to determine whether a handwritten declaration date is

⁶ Available at <https://www.goerie.com/story/news/politics/2022/11/05/pennsylvania-dealing-court-order-undated-ballots-election-day-voting/69620980007/>

⁷ Available at <https://www.inquirer.com/politics/election/pennsylvania-vote-count-slower-incorrectly-dated-ballots-20221103.html>

“incorrect,” sometimes requiring them to interpret the handwriting of individual voters.⁸

Relieving county boards of this burden when they begin canvassing on Election Day would not be disruptive—indeed, it would make their responsibilities easier. And it would not affect voters in any way, save by enfranchising certain qualified, registered voters whose timely returned votes would otherwise be thrown out.

⁸ As summarized by the U.S. District Court for the Western District of Pennsylvania, counties have faced decisions regarding how to apply the Supreme Court’s *Ball* decision in circumstances in which “the voter declaration date omitted the year; omitted the month; omitted the day; included a day that does not exist; put the date elsewhere on the envelope; or included a cross-out to correct an erroneous date.” *Pennsylvania State Conf. of NAACP v. Schmidt*, 703 F. Supp. 3d 632, 681 (W.D. Pa. 2023), *reversed*, *Pennsylvania State Conf. of NAACP Branches v. Secy. Commonwealth of Pennsylvania*, 97 F.4th 120 (3d Cir. 2024). Likewise, counties have faced decisions regarding how to treat declaration dates in which the voter used the European dating convention. *Id.* Furthermore, as discussed above, given the Supreme Court’s suggestion that counties could reject ballots with handwritten dates that fall within the relevant date range—although it did not specify *why* counties might reject such ballots—the potential for differential treatment across counties persists. *See Ball*, 289 A.3d at 23; *id.* at 36 (Brobson, J., concurring).

Where possible, the Secretary has sought to provide guidance to counties on how to address such situations. Of course, the Secretary cannot anticipate every possible question that might arise regarding whether a date is “incorrect,” and his guidance is not binding on the counties.

As a result, the Secretary strongly believes that the issue presented in this case requires resolution *before* November’s election.

* * * * *

“Voters, not lawyers, choose the President. Ballots, not briefs, decide elections.” *Donald J. Trump for President, Inc. v. Sec’y of Pennsylvania*, 830 F. App’x 377, 391 (3d Cir. 2020). And so it bears repeating here that the ballots at issue in this appeal were returned on time to the Philadelphia County Board of Elections and were cast by qualified, registered voters. No one has alleged that any of these ballots was fraudulent. Nor, in this appeal or in the lengthy history of litigation over declaration dates, has there been any evidence that any county board uses the handwritten date for any purpose.

The status quo is untenable, for all of the reasons discussed above. This case presents an opportune vehicle for resolving the question that the Supreme Court left open after *BPEP II*. And, while a great deal has been written about the issue in this case, at bottom, it is not a particularly difficult one. Even if it is assumed that the Election Code allows counties to discard ballots based on dating errors (although it has not since 1968), a Constitution that mandates “free and equal” elections plainly cannot

countenance the disenfranchisement of thousands of voters, predominantly older voters, for failing to perform an act that serves no purpose in the administration of our elections.⁹

CONCLUSION

The decision of the Court of Common Pleas should be affirmed. And, because of the importance of this issue, the Secretary respectfully requests that the Court immediately report any decision in this matter so that counties have clear guidance before they begin counting ballots in the 2024 general election.

October 14, 2024

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⁹ For this reason, and as the Department has previously explained, *see* Exh. A, it is not necessary to apply strict scrutiny to arrive at this result. Rather, under any relevant standard, rejecting ballots based on declaration envelope dating errors violates the Constitution.