

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. 112 MM 2024

New PA Project Education Fund, NAACP Pennsylvania State Conference,
Common Cause Pennsylvania, League of Women Voters of Pennsylvania, Black
Political Empowerment Project, POWER Interfaith, Make The Road Pennsylvania,
OnePA Activists United, Casa San Jose, and Pittsburgh United,
Petitioners,

v.

Al Schmidt, in his official capacity as Secretary of the Commonwealth,
and All 67 County Boards of Elections
(See back of cover for list of County Board Respondents),
Respondents,

Republican National Committee and Republican Party of Pennsylvania,
Intervenors/Respondents.

**INTERVENORS-RESPONDENTS' EMERGENCY APPLICATION
TO ENFORCE THE COURT'S OCTOBER 5 ORDER**

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Adams County Board of Elections; Allegheny County Board of Elections;
Armstrong County Board of Elections; Beaver County Board of Elections;
Bedford County Board of Elections; Berks County Board of Elections;
Blair County Board of Elections; Bradford County Board of Elections;
Bucks County Board of Elections; Butler County Board of Elections;
Cambria County Board of Elections; Cameron County Board of Elections;
Carbon County Board of Elections; Centre County Board of Elections;
Chester County Board of Elections; Clarion County Board of Elections;
Clearfield County Board of Elections; Clinton County Board of Elections; Columbia
County Board of Elections; Crawford County Board of Elections; Cumberland
County Board of Elections; Dauphin County Board of Elections; Delaware County
Board of Elections; Elk County Board of Elections;
Erie County Board of Elections; Fayette County Board of Elections;
Forest County Board of Elections; Franklin County Board of Elections;
Fulton County Board of Elections; Greene County Board of Elections;
Huntingdon County Board of Elections; Indiana County Board of Elections;
Jefferson County Board of Elections; Juniata County Board of Elections;
Lackawanna County Board of Elections; Lancaster County Board of Elections;
Lawrence County Board of Elections; Lebanon County Board of Elections;
Lehigh County Board of Elections; Luzerne County Board of Elections;
Lycoming County Board of Elections; McKean County Board of Elections;
Mercer County Board of Elections; Mifflin County Board of Elections;
Monroe County Board of Elections; Montgomery County Board of Elections;
Montour County Board of Elections; Northampton County Board of Elections;
Northumberland County Board of Elections; Perry County Board of Elections;
Philadelphia County Board of Elections; Pike County Board of Elections;
Potter County Board of Elections; Schuylkill County Board of Elections;
Snyder County Board of Elections; Somerset County Board of Elections;
Sullivan County Board of Elections; Susquehanna County Board of Elections; Tioga
County Board of Elections; Union County Board of Elections;
Venango County Board of Elections; Warren County Board of Elections;
Washington County Board of Elections; Wayne County Board of Elections;
Westmoreland County Board of Elections; Wyoming County Board of Elections;
and York County Board of Elections,

Respondents.

In direct contravention of this Court’s October 5, 2024 Order—and its numerous decisions upholding the General Assembly’s mandatory date requirement for mail ballots—several county boards have decided to change election rules a week *after* the November 5, 2024 Election Day and to count mail ballots that do not comply with the date requirement.¹ These decisions not only violate the law; they also threaten to erode public confidence in the 2024 General Election in which millions of Pennsylvanians cast their ballots. Intervenors-Respondents the Republican National Committee and Republican Party of Pennsylvania therefore respectfully ask the Court to reaffirm yet again that the date requirement is mandatory, that it remains in full force and effect for the 2024 General Election, and that county boards of elections may not count any mail ballots that fail to comply with it.²

¹ This Application uses “mail ballot” to refer to both absentee ballots and mail-in ballots. *See* 25 P.S. §§ 3146.6, 3150.16.

² The Court can also construe this filing as an application for the exercise of King’s Bench jurisdiction over all county boards of elections. This Court possesses authority to “exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King’s Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722.” 42 Pa. C.S. § 502. Here, unless this Court grants this motion or exercises King’s Bench jurisdiction, county boards will continue to issue conflicting decisions on enforceability of the date requirement for the 2024 General Election, forcing Intervenors-Respondents and their candidates to litigate the same issue in various counties. That will impose serious litigation costs on Intervenors-Respondents and their candidates, which they should not have to bear in light of this Court’s prior orders stating that the date requirement must be enforced during the 2024 General Election.

This Court’s October 5, 2024 Order could not have been clearer: The Court “will neither impose nor countenance substantial alterations to existing laws and procedures and procedures during the pendency of an ongoing election.” Oct. 5, 2024 Order 1 (per curiam). In fact, this Court adopted the *Purcell* principle, which recognizes that “[c]ourt orders affecting elections” issued close in time to Election Day “themselves result in voter confusion and consequent incentive to remain away from the polls.” *Id.* at 1 n.1 (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam)). The *Purcell* principle thus precludes changes to election rules shortly before Election Day. *See id.* And it applies “with much more force on the back end of elections.” *Trump v. Wis. Elections Comm’n*, 983 F.3d 919, 925 (7th Cir. 2020); *see League of United Latin Am. Citizens Ariz. v. Reagan*, 2018 WL 5983009, at *4 (D. Ariz. Nov. 14, 2018) (applying *Purcell* after an election). After all, changes before Election Day are made behind the veil of ignorance; neither election officials, courts, nor the public know what effect, if any, they will have on the outcome. By contrast, changes to election rules “after election day” create suspicions that election officials and courts are interfering with the election results. *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 735 (2021) (mem.) (Thomas, J., dissenting); *see also Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (“Interference with impending elections is extraordinary . . . and interference with an election after voting has begun is unprecedented.”).

The Court's Order thus precluded *any* changes in the 2024 General Election to mandatory application of the date requirement that Petitioners sought to challenge. *See* Oct. 5, 2024 Order at 2. If there were any doubt on that score, the Court has subsequently reiterated that the date requirement "shall ... be applied to the November 5, 2024 General Election." *Baxter v. Philadelphia Bd. of Elecs.*, No. 76 EM 2024, 2024 WL 4650792 at *1 (Nov. 1, 2024). As Justice Donohue explained in a concurrence, entering a stay in *Baxter* was necessary to prevent "county boards" from relying on the opinion during "canvassing . . . in the upcoming election," which would improperly "disturb[] the status quo." *Id.* at *1 (Donohue, J., concurring). Justice Dougherty also concurred and sharply criticized the continuing last-minute efforts of courts and litigants to invalidate the date requirement for the 2024 General Election, accusing them of defying this Court's clear orders. *Id.* at *2-8 (Dougherty, J., concurring) (recounting full history of such efforts).

These orders follow a long and unbroken line of this Court's precedents upholding the General Assembly's mandatory date requirement. *See Black Political Empowerment Project v. Schmidt*, 322 A.3d 221, 222 (Pa. 2024) (per curiam) (vacating order striking down date requirement under state constitution); *Ball v. Chapman*, 289 A.3d 1, 14-16 & n.77 (Pa. 2022) (rejecting host of challenges to date requirement); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) (rejecting state constitutional challenge to sign-and-date mandate, of which date

requirement is a part); *In re: Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 General Election*, 241 A.3d 1058, 1085-89 (Pa. 2020) (Wecht, J., concurring in part) (deciding vote making clear date requirement is mandatory and enforceable for all elections after 2020); *see also Pa. State Conf. of NAACP Branches v. Sec’y Commonwealth of Pa.*, 97 F.4th 120 (3d Cir. 2024) (rejecting challenge to date requirement under federal Materiality Provision), *reh’g denied*, 2024 WL 3085152 (Apr. 30, 2024). As Justice Brobson explained in a concurrence accompanying this Court’s October 5 order, the well-established law in Pennsylvania is that undated and misdated mail ballots cannot be counted. *See New Pa. Project Education Fund v. Schmidt*, No. 112 MM 2024, 2024 WL 4410884, at *1-2 (Pa. Oct. 5, 2024). (Brobson, J., concurring) (explaining this point).

Nonetheless, in defiance of the Court’s clear pronouncements, this week several county boards of elections have issued decisions to count in the 2024 General Election mail ballots that fail to comply with the date requirement. For example, on November 12, 2024, the Bucks County Board of Elections orally announced its decision to count 405 mail ballots that did not comply with the date requirement. *See Bucks County Meeting Portal, Board of Elections – November 12, 2024*, at 1:16:00-1:22:00, <https://bucksopa.portal.civicclerk.com/event/505/media>. It did so even though its legal advisors confirmed that undated and misdated ballots cannot be counted under current law and recommended rejecting them. *See id.* The Centre

County Board of Elections issued a similar decision to count noncompliant mail ballots that same day. And the Philadelphia Board of Elections—which was the named respondent in *Baxter*—followed suit on November 13, 2024. *See* Philadelphia Board Meeting (Nov. 13, 2024), <https://youtu.be/-AP-NFjtA1Q>.

These decisions simply cannot stand: These county boards are purporting to “impose” precisely the “substantial alteration[]” to mandatory application of the date requirement in the 2024 General Election that this Court has foreclosed. *See* Oct. 5, 2024 Order at 1; *Baxter*, 2024 WL 4650792 at *1. And they are doing so days *after* Election Day when the results of the 2024 General Election are clear. In so doing, these county boards are engaging in the worst kind of *Purcell* violation and threatening to undermine public “[c]onfidence in the integrity” of the Commonwealth’s “electoral processes [that] is essential to the functioning of our participatory democracy.” *Purcell*, 549 U.S. at 4.

Indeed, county boards are continuing to count ballots across the Commonwealth, including in the U.S. Senate race in which Republican Dave McCormick currently leads his Democratic opponent, Bob Casey, by an insurmountable margin of nearly 30,000 votes. *See* <https://www.electionreturns.pa.gov/>. Allowing any county boards to disregard the date requirement repeatedly upheld by this Court—particularly when the results of races across the Commonwealth have already been decided—thus opens the door to

electoral chaos and lasting harm to the Commonwealth and its voters. *See, e.g.*, Oct. 5, 2024 Order 1; *Purcell*, 549 U.S. at 4.

Moreover, allowing county boards to disregard the date requirement would violate the U.S. Constitution and the Pennsylvania Constitution. Under the Equal Protection Clause of the U.S. Constitution, a “State may not, by . . . arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). Accordingly, counties within a State cannot use “varying standards to determine what [i]s a legal vote” in statewide elections. *Id.* at 107. Likewise, the Pennsylvania Constitution decrees that “[a]ll laws regulating the holding of elections . . . shall be uniform throughout the State,” Pa. Const. art. VII, § 6, and the Free and Equal Elections Clause requires voting laws to “treat[] all voters alike” in “the same circumstances,” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914).

Other county boards have correctly decided to enforce the date requirement and *not* to count noncompliant ballots in the 2024 General Election. Thus, allowing some county boards *to count* such ballots would unconstitutionally create “varying standards to determine what [i]s a legal vote,” *Bush*, 531 U.S. at 104-05, and interject *disuniformity* into the administration of the General Election across the Commonwealth, *see* Pa. Const. art. VII, § 6; *Winston*, 91 A. at 523.

Finally, allowing county boards to count noncompliant mail ballots would trigger Act 77's non-severability clause and thereby invalidate universal mail voting in Pennsylvania. As "a general matter, nonseverability provisions are constitutionally proper." *Stilp v. Commonwealth*, 905 A.2d 918, 978 (Pa. 2006). Act 77's non-severability 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. The date requirement is part of the universal mail voting established in section 8, so invalidating "its application to any person or circumstance" voids the entire Act. *Id.*; see *McLinko v. Dep't of State*, 279 A.3d 539, 609-610 (Pa. 2022) (Brobson, J., dissenting); *McLinko v. Dep't of State*, 270 A.3d 1243, 1277-78 (Pa. Commw. Ct. 2022) (Wojcik, J., concurring in part and dissenting in part); *BPEP*, 2024 WL 4002321, at *62-64 (McCullough, J., dissenting).

That is precisely what county boards are purporting to do here. By declining to enforce the mandatory date requirement, the boards are unilaterally invalidating "its application to [the] circumstance" of the 2024 General Election—and invalidating universal mail voting in the Commonwealth in the process. Act 77 § 11.

The Court should put an end to all of this by reaffirming that the date requirement is mandatory, that it remains in full force and effect for the 2024 General

Election, and that county boards of elections may not count any mail ballots that fail to comply with it. Because county boards are continuing to count ballots in the 2024 General Election, time is of the essence. Intervenors-Respondents therefore request that the Court today enter a temporary administrative order reaffirming that the date requirement applies to the 2024 General Election, issue an expedited briefing schedule, and issue a final order granting the relief requested within 48 hours.

For the foregoing reasons, the Court should grant this Emergency Application To Enforce The Court's October 5 Order.

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Dated: November 13, 2024

Respectfully submitted,

/s/ Kathleen A. Gallagher

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Response contains 1,686 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

/s/ Kathleen A. Gallagher

Counsel for Intervenors-Respondents

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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Kathleen A. Gallagher
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