

IN THE SUPREME COURT OF PENNSYLVANIA

77 EM 2024

REPUBLICAN NATIONAL COMMITTEE,
REPUBLICAN PARTY OF PENNSYLVANIA,
Petitioners,

v.

BRIAN T. BAXTER, SUSAN T. KINNIRY,
Respondents,

and

DEMOCRATIC NATIONAL COMMITTEE,
PENNSYLVANIA DEMOCRATIC PARTY,
Proposed Intervenor-Respondents.

PROPOSED INTERVENOR-RESPONDENTS' COMBINED APPLICATION TO
INTERVENE AND RESPONSE TO THE RNC'S AND RPP'S EMERGENCY
STAY APPLICATION

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**Pro hac vice* motion forthcoming

The Democratic National Committee (“DNC”) and the Pennsylvania Democratic Party (“PDP”) file this combined application to intervene as respondents in this litigation and response to the emergency stay application filed by intervenor-petitioners the Republican National Committee (“RNC”) and the Republican Party of Pennsylvania (“RPP”).

INTRODUCTION

This case presents a question of “substantial public importance.” 210 Pa. Code R. 1114(4). That question is whether the Pennsylvania Constitution’s Free and Equal Elections Clause, art. I, §5 (“Clause”), prohibits county boards of elections from refusing to count eligible voters’ timely received mail ballots solely because a voter did not correctly date the ballot-return envelope—a date that serves no purpose because a ballot’s timeliness is determined by when county officials scan it upon receipt. (“Mail ballots” refers herein to both mail and absentee ballots.) Although this Court previously declined to address that question based on jurisdictional and equitable concerns, no such concerns are present in this statutory appeal, which arises from the decision of a single county board not to count 69 undated or incorrectly dated mail ballots in a September 25, 2024, special election for state office (i.e., a past—not impending—election). This Court should thus resolve the question now, before election day, to ensure uniformity throughout the Commonwealth and to protect Pennsylvanians’ fundamental right to vote.

More specifically, in order to resolve this matter expeditiously and thereby provide clarity and uniformity in advance of the upcoming election, the Court should treat the RNC's and RPP's emergency stay application as a petition for allowance of appeal, grant the petition, and summarily affirm for the reasons set forth in the Commonwealth Court's decision and the briefing in this Court in *Black Political Empowerment Project v. Schmidt*, No. 68 MAP 2024 (“*BPEP*”). As explained in the decision below and in the DNC's and PDP's brief in *BPEP*, the requirement that voters date the outer envelopes of their mail-ballot packets (the “date requirement”) serves no state interest, and hence it violates the Free and Equal Elections Clause—no matter the appropriate level of judicial scrutiny—to deny qualified voters the right to vote based solely on a failure to comply with that requirement. See Op.32-39; DNC-PDP Br., *BPEP v. Schmidt*, No. 68 MAP 2024 (Pa. Sept. 4, 2024) (“DNC-PDP *BPEP* Br.”) (attached as Appendix A).

Summarily affirming expeditiously, without further briefing, will provide clarity and uniformity—through definitive, pre-canvass precedent guiding the conduct of all 67 county boards of elections. Such a decision will also ensure that the Commonwealth's courts are not flooded with new appeals in dozens of counties raising the question in the aftermath of the upcoming election, which would delay the resolution of the general election and ultimately require this Court to act.

Finally, because the DNC and PDP meet the qualifications for intervention in this case, the Court should grant their application to intervene.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW AND SUMMARILY AFFIRM

A. This Court Should Decide This Issue Now

This case presents the Court the opportunity to review the date requirement's constitutionality in the "exercise [of its] appellate role with respect to [a] lower court decision[] that ha[s]... come before [it] in the ordinary course." *New PA Project Education Fund v. Schmidt*, 2024 WL 4410884, at *1 n.2 (Pa. Oct. 5, 2024). The case presents the legal issue in the context of a factual record, and with the benefit of reasoned lower-court opinions. This case is therefore unlike *New PA Project*, on which the emergency application relies (e.g., at 1). There, this Court declined to resolve the date requirement's constitutionality as an abstract legal question, presented under its King's Bench authority. 2024 WL 4410884, at *1.

Without a definitive ruling, county boards may continue to enforce the date requirement in their upcoming general-election canvass by disqualifying voters, even though the Commonwealth Court has held that remedy is unconstitutional. That would prompt objections and lead to post-election appeals arising simultaneously in many county courts of common pleas, followed by petitions for consolidation and expedited decision under this Court's extraordinary jurisdiction—

the very result the Court sought to avoid in *New PA Project*. Such a post-election proceeding, moreover, perhaps involving only some of the 67 county boards, could face procedural complications, should it be necessary to order post-election injunctive relief against absent boards or against groups of boards that may have employed disparate practices when canvassing affected ballots. See *BPEP v. Schmidt*, 322 A.3d 221, 222 (Pa. 2024) (mem.) (per curiam) (*BPEP III*) (holding that all 67 county boards were indispensable parties for granting statewide equitable relief). By contrast, this case concerns a special election that “**only took place in one county of this Commonwealth;**” meaning the “requested relief could not have been sought against any other county board,” and so “the other 66 county boards of elections need[not] be joined as parties.” Op.23 n.25.

Put simply, a “prompt and definitive ruling on the constitutional question presented in this appeal is of paramount public importance,” because it will facilitate orderly election and post-election processes. *BPEP III*, 322 A.3d at 223 (Wecht, J., dissenting). Such clarity is critical to an accurate and timely certification of the general election.

B. The Commonwealth Court Correctly Held That Denying People’s Right To Vote For Failure To Comply With The Date Requirement Is Unconstitutional—Under Any Level Of Judicial Scrutiny—Because The Date Requirement Serves No State Interest

The Commonwealth Court correctly concluded (Op.37-39) that under this Court’s precedent, enforcement of the date requirement to disqualify otherwise-valid

ballots violates the Free and Equal Elections Clause, which provides that “[e]lections 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,” Pa. Const. art. I, §5.

As this Court has explained, the Clause provides far-reaching protection for the fundamental right to vote. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018). Indeed, the Court has held, the Clause’s “clear[] and unambiguous[]” text uses “the broadest possible terms” in safeguarding the right to vote. *Id.* The Court has also explained that “the *minimum requirements* for ‘free and fair’ elections” include that “‘each voter under the law has the right to cast his ballot and have it honestly counted’” and that “‘the regulation of the right to exercise the franchise does not deny the franchise itself[] *or* make it so difficult as to amount to a denial.’” *Id.* at 810 (emphasis added) (quoting *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914)). As explained in the DNC’s and PDP’s brief in *BPEP* (at 13-18), the Clause’s text and history, as well as case law interpreting and applying it, underscore just how expansively it protects the right to vote.

This Court analyzes claims under the Clause by weighing the alleged “violat[ion of] the fundamental right to vote” or alleged “disparate treatment of any group of voters” against the state interest supposedly advanced by the challenged regulation. *Banfield v. Cortés*, 110 A.3d 155, 178 (Pa. 2007). As elaborated in the DNC’s and PDP’s *BPEP* brief (at 31-39), the magnitude of the state interest required

to uphold a challenged regulation depends on the severity of the burden it places on citizens' exercise of the franchise, with a compelling interest required for more severe burden. The critical point, however, is that enforcement of the date requirement does not satisfy *any* conceivable level of judicial scrutiny because the requirement serves no state interest whatsoever. Op.37.

In particular, as confirmed here and in prior litigation (in which petitioners fully participated), *none* of Pennsylvania's 67 county boards of elections uses the handwritten date on the outer envelopes of mail ballots for *any* reason—other than to check compliance with the date requirement. Op.16; *see also Pennsylvania State Conference of the NAACP v. Schmidt*, 703 F.Supp.3d 632 (W.D. Pa. 2023), *reversed & remanded, Pennsylvania State Conference of NAACP Branches v. Secretary*, 97 F.4th 120 (3d Cir. 2024). No county board uses the handwritten date to determine the ballot's timeliness, a voter's eligibility, the presence of fraud, or anything else of substance. Op.38; DNC-PDP *BPEP* Br.12. In fact, the handwritten date has served no function under the Election Code since 1968, when the deadline for ballot return was set at 8 p.m. on election day. *See* Act of December 11, 1968, P.L. 1183, No. 375, sec. 8, §1308(a). It is a vestige of prior law whereby absentee ballots completed on election day were counted even if they were received after election day. *See* Act of June 3, 1937, P.L. 1333, No. 320, §1317.

It is indefensible as a matter of first principles—and conflicts with decades of this Court’s precedent protecting the franchise—to assert that the government is free to take away what this Court has called one of our most “precious” liberties even though doing so advances no cognizable government interest. *In re Nomination Papers of Nader*, 858 A.2d 1167, 1180 (Pa. 2004). The *only* reason an election official in Pennsylvania would examine the handwritten date on a ballot-return envelope is to determine whether to disqualify the ballot based on a “minor irregularit[y],” *In re Petitions to Open Ballot Boxes*, 188 A.2d at 256. Such purposeless disqualification is not “rationally related to the Commonwealth’s interest in ensuring honest and fair elections,” *Banfield*, 110 A.3d at 177. Much less does it serve a “compelling” state interest, *Id.* at 176 n.15; *accord Appeal of Norwood*, 116 A.2d 552, 555 (Pa. 1955); *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945). Denying the right to vote based solely on a failure to comply with the date requirement is thus unconstitutional under any level of judicial scrutiny. Indeed, in *Ball v. Chapman*, three members of this (then-six-member) Court stated in dicta that enforcement of the date requirement would violate the Clause. 289 A.3d 1, 27 n.156 (Pa. 2023) (Wecht, J., joined by Todd, C.J., and Donohue, J.).

That conclusion does not mean, however—as petitioners’ application repeatedly claims (e.g., at 11)—that the Commonwealth Court “invalidat[ed] the date requirement.” The court instead interpreted the Free and Fair Elections Clause

as prohibiting disqualification of otherwise-valid mail ballots received in undated or misdated ballot-return envelopes, and enjoined respondents from the implied remedy of *enforcing* the date requirement by disqualifying ballots solely for an omitted or erroneous date. That does not constitute striking or invalidating the date-requirement itself, which “remain[s] part of the Election Code and continue[s] to instruct electors to date the declaration on the return mailing envelope, which, as history has shown, a majority of electors will do,” *Bonner v. Chapman*, 298 A.3d 153, 168 (Pa. Commw. Ct. 2023). In fact, the very same provision of the Election Code that contains the date requirement also contains other requirements, including specific ink colors and pen types, that are directory, but the failure to follow them does not result in the disqualification of the ballot. *See* 25 P.S. §3150.16(a). That is precisely how the date requirement should be treated, as well.

Nor is there merit to the RNC’s and RPP’s argument (Appl.10-19) that the Commonwealth Court’s decision violates “the *Purcell* principle.” The concern highlighted in *Purcell*—that certain orders regarding impending elections may “result in voter confusion and consequent incentive to remain away from the polls,” *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam)—is not implicated here. The issue presented does not concern *voter* behavior at all; the question is whether *county boards* must count ballots where an otherwise eligible voter misdated, or failed to date, the declaration envelope, given that the provision of a date (or no date

at all) serves no state purpose whatsoever. Because this case does not concern what voters should or should not do before sending in their mail ballots, but rather what county boards must do after mail ballots are received, it will not lead to voter confusion or keep voters from casting ballots.

In short, because the date requirement serves no state interest, voters cannot be disenfranchised solely for failing to comply with it—again, no matter what level of scrutiny applies.

II. THE DNC'S AND PDP'S APPLICATION TO INTERVENE SHOULD BE GRANTED

The DNC and PDP are entitled to intervene because this case will affect their legally enforceable interests, and they could have joined as original parties with standing to litigate. *See* Pa.R.C.P. 2327(3)-(4). No ground for denying intervention exists: The DNC's and PDP's interests are not adequately represented by the existing parties, their intervention is timely and would not unduly delay this litigation, and their claims are “in subordination to and in recognition of the propriety of the action,” Pa.R.C.P. 2329. Accordingly, intervention is mandatory, not discretionary. *See id.* Even if any ground to deny intervention were present, discretionary intervention would be warranted because the DNC and PDP have an important and unrepresented perspective on this significant matter. *See Larock v. Sugarloaf Township Zoning Hearing Board*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999). The DNC and PDP sought the consent of the parties prior to filing this

application; the individual respondents and the Philadelphia County Board of Elections consented to intervention; the intervenor-petitioners did not respond prior to this expedited filing.

A. The DNC And PDP Each Have Legally Enforceable, Particularized Interests In This Matter, Conferring Standing And Confirming That They Could Have Brought This Action Themselves

This litigation will significantly affect the DNC's and PDP's legally enforceable interests in ensuring that their members can vote to elect Democratic representatives without risk of needless ballot disqualification under the date requirement. Because these interests are "substantial, direct, and immediate," *Markham v. Wolf*, 136 A.3d 134, 139 (Pa. 2016), they also confer standing on the DNC and PDP, such that each organization could have been an original party here.

The DNC and PDP dedicate significant resources toward educating Pennsylvania Democratic voters on how to vote by mail, which diverts DNC and PDP resources from affirmative election efforts. Declaration of Mitch Kates ¶¶20-27 ("Kates Decl."). The DNC and PDP have a significant interest in not continuing to need to divert resources to address the date requirement at the expense of other priorities. *Id.* ¶31.

The DNC and PDP also each have a substantial interest in protecting their members' right to have their votes counted. These members include individuals qualified to vote in every county in Pennsylvania whose ballots are discarded by

enforcement of the date requirement. Kates Decl. ¶30. The DNC's and PDP's memberships also include candidates for offices in every county in Pennsylvania; the disqualification of eligible mail ballots under the date requirement threatens those candidates' electoral prospects, thereby impeding the DNC's and PDP's organizational mission. In recognition of the DNC's and PDP's substantial interests in litigation affecting the electoral rights of Democratic voters and candidates, courts routinely grant intervention to the DNC and the PDP in similar circumstances. *See, e.g., BPEP v. Schmidt*, 2024 WL 4002321, at *3 (Pa. Commw. Ct. Aug. 30, 2024) (en banc), *vacated*, 322 A.3d 221 (Pa. 2024); Order Granting Motion To Proceed As Intervenor, *Pennsylvania State Conference of NAACP Branches v. Northampton County Board of Elections*, No. 23-03166 (3d Cir. Jan. 3, 2024).

B. There Are No Valid Grounds To Deny Intervention

None of Rule 2329's three grounds for denying intervention applies.

First, no party in this litigation shares the DNC's and PDP's interests. The individual voter-respondents seek to have their own ballots counted, but they do not share the interests of the DNC and PDP, which are partisan organizations that mount political campaigns and educate and mobilize Democratic voters. Nor, of course, do the Republican petitioners adequately represent the DNC's and PDP's interests, as they seek to disenfranchise mail voters—including the DNC's and PDP's constituents—who mistakenly violate the purposeless date requirement.

Second, this intervention motion is timely, and granting the DNC and PDP intervention will not delay the timely advancement of the action, prejudice the adjudication of any rights, or otherwise harm the parties. Pa.R.C.P. 2329(3). The RNC's and RPP's emergency stay application filed earlier today crystalized the DNC and PDP's interest in this matter. And the DNC and PDP will not delay the resolution of this litigation, as they seek clarity on the rules for the November 2024 election. Thus, while the DNC and PDP believe that the Court can and should resolve this case based on the briefing in *BPEP* and the decision below, they are prepared to brief this matter on the merits on any schedule the Court adopts.

Third, this intervention motion is "in subordination to and in recognition of the propriety of the action." Pa.R.C.P. 2329. While the meaning of this language is unclear, and there is relatively little interpretive case law, none of it supports refusing this application on this basis. The DNC and PDP do not contest that the Court would have personal jurisdiction over them if they are granted intervention. *Cf. Bannard v. New York State Natural Gas Corp.*, 172 A.2d 306, 313 (Pa. 1961). And the DNC and PDP agree to take the facts and procedural history of this case as they find it, rather than question the propriety of the proceedings to date. *Cf. Tremont Township School District v. West Anthracite Coal Co.*, 113 A.2d 234, 237 (Pa. 1955).

C. Alternatively, Permissive Intervention Is Warranted

Even if there were a Rule 2329 basis to deny intervention, “the court [has] the discretion” to permit intervention “where the petitioner falls within one of the classes enumerated in Rule 2327.” *Larock*, 740 A.2d at 313. The DNC and PDP fall into two such classes—a judgment in this case will affect their legally enforceable interests, and they could have joined as original parties to this action —so this Court can and should grant intervention on a discretionary basis given its important perspective on this significant issue of public concern.

CONCLUSION

The application of the DNC and PDP to intervene should be granted, and the Commonwealth Court’s judgment should be affirmed.

November 1, 2024

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**Application for admission pro hac vice
forthcoming*

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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/ Clifford B. Levine
CLIFFORD B. LEVINE

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served on all counsel of record on November 1, 2024 by this Court's electronic filing system.

/s/ Clifford B. Levine
CLIFFORD B. LEVINE

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No. 77 EM 2024

**[PROPOSED] ORDER GRANTING THE APPLICATION TO INTERVENE
OF THE DEMOCRATIC NATIONAL COMMITTEE AND
PENNSYLVANIA DEMOCRATIC PARTY**

AND NOW, this ___ day of _____, 2024, and upon consideration of the application to intervene filed by the Democratic National Committee (“DNC”) and Pennsylvania Democratic Party (“PDP”), it is hereby ORDERED that the application is GRANTED. The Court DIRECTS the Prothonotary to enter the DNC and PDP on the docket in this matter as intervenor-respondents, and to DOCKET their application and related materials.

BY THE COURT:
