

**IN THE SUPREME COURT OF PENNSYLVANIA**

|                                   |   |                 |
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| DAVID BALL, <i>et al.</i> ,       | : |                 |
|                                   | : |                 |
| Petitioners,                      | : | No. 102 MM 2022 |
|                                   | : |                 |
| v.                                | : |                 |
|                                   | : |                 |
| LEIGH M. CHAPMAN, <i>et al.</i> , | : |                 |
|                                   | : |                 |
| Respondents.                      | : |                 |
|                                   | : |                 |

**JOINT RESPONSE OF RESPONDENTS BEDFORD COUNTY, CARBON COUNTY, CENTRE COUNTY, COLUMBIA COUNTY, DAUPHIN COUNTY, FAYETTE COUNTY, HUNTINGDON COUNTY, INDIANA COUNTY, JEFFERSON COUNTY, LAWRENCE COUNTY, LEBANON COUNTY, NORTHUMBERLAND COUNTY, VENANGO COUNTY AND YORK COUNTY BOARDS OF ELECTIONS IN OPPOSITION TO PETITIONERS’ APPLICATION FOR THE EXERCISE OF KING’S BENCH POWER OR EXTRAORDINARY JURISDICTION**

Respondents Bedford County Board of Elections, Carbon County Board of Elections, Centre County Board of Elections, Columbia County Board of Elections, Dauphin County Board of Elections, Fayette County Board of Elections, Huntingdon County Board of Elections, Indiana County Board of Elections, Jefferson County Board of Elections, Lawrence County Board of Elections, Lebanon County Board of Elections, Northumberland County Board of Elections, Venango County Board of Elections and York County Board of Elections, (collectively “Respondent Counties”), by and through their undersigned counsel, Babst, Calland, Clements & Zomnir, P.C., file this Answer in Opposition to Petitioners’ Application for the Exercise of King’s Bench Jurisdiction or Extraordinary Jurisdiction.

## RESPONSE

Preliminarily, while the Republican National Committee and the other Petitioners (collectively the “RNC”) use the terms “King’s Bench power” and “extraordinary jurisdiction” interchangeably, (*see, e.g.*, Application at 11), “the two are not identical.” *In re Avellino*, 690 A.2d 1138, 1140 (Pa. 1997). While King’s Bench power can be invoked where no matter is pending before a lower court, the same is not true for an exercise of extraordinary jurisdiction. Extraordinary jurisdiction can only be invoked if—and only if—the matter is pending before a lower court. *See, e.g., Avellino*, 690 A.2d at 1140. Therefore, to the extent that the Application requests the exercise of extraordinary jurisdiction, it must be denied.

The Application fares no better with respect to the RNC’s request for King’s Bench jurisdiction. King’s Bench power must be employed “with extreme caution,” *Commonwealth v. Balph*, 3 A. 220, 230 (Pa. 1886), and justiciability concerns militate against the exercise of such jurisdiction here.<sup>1</sup> This case centers around the Acting Secretary of the Commonwealth’s guidance regarding the date requirement for an absentee or mail-in ballot in Pennsylvania. (Application at 1-5). However,

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<sup>1</sup> *See, e.g., Bayada Nurses, Inc. v. Dep’t of Labor & Indus.*, 8 A.3d 866, 874 (Pa. 2010) (“While the right to relief under the Declaratory Judgments Act is broad, there are certain limitations upon a court’s ability to make a declaration of rights. Generally, our judicial system requires a real or actual controversy before it will embrace a matter for review and disposition. Our Court has noted, however, that, while we do not have a constitutional case or controversy requirement, as found in our federal system, [s]everal discrete doctrines—including standing, ripeness, and mootness—have evolved to give body to the general notions of case or controversy and justiciability.” (alteration in original; citation and quotation marks omitted)).

and as conceded by the RNC, the Acting Secretary's guidance "[is] not binding on the county boards of elections." (*Id.* at 23).

Equally important, the RNC has not identified a single county board of elections that intends to follow the Acting Secretary's guidance and count an undated or incorrectly dated absentee or mail-in ballot. (*Id.* at 4 (alleging, without any factual support, that some unnamed county boards "may" count an undated or incorrectly dated ballot)). To the contrary, the RNC asserts that "[c]ounty boards of elections have . . . informed their voters that their ballots will not be counted if they do not comply with the date requirement." (*Id.* at 2). Because this matter involves an abstract disagreement between the RNC and Acting Secretary, it is not ripe for adjudication. *See, e.g., Phila. Entm't. & Dev. Partners, L.P. v. City of Phila.*, 937 A.2d 385, 392 (Pa. 2007) ("The basic rationale underlying the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.")

Indeed, for this same reason, RNC lacks standing to even file this action. *See, e.g., Rendell v. Pa. State Ethics Comm'n*, 983 A.2d 708, 717 (Pa. 2009) ("standing arises from the principle that judicial intervention is appropriate only when the underlying controversy is real and concrete" (citation and quotation marks omitted)). To conclude otherwise would require this Court to issue an advisory opinion about hypothetical conduct, in violation of a fundamental principle of Pennsylvania law. *See, e.g., Pittsburgh Palisades Park, LLC, v. Commonwealth*, 888 A.2d 655, 659

(Pa. 2005) (“The courts in our Commonwealth do not render decisions in the abstract or offer purely advisory opinions[.]”).

Even assuming, *arguendo*, that a case or controversy exists, the Application should still be denied. First, the timing of the Application is questionable, if not suspect. Although the RNC tries to give the appearance that it filed the Application in response to last week’s ruling in *Ritter v. Miliore*, No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022), the RNC has known since at least September 26, 2022, that the Acting Secretary advised county boards of elections to include in the canvass and pre-canvass “[a]ny ballot-return envelope that is undated or dated with an incorrect date but has been timely received.” (Application, Ex. A).

Yet, the RNC — who, among other parties, has filed countless challenges to how Pennsylvania counties administer elections since the 2020 General Election<sup>2</sup> — inexcusably waited until October 16, 2022, to file the Application, well after when most counties mailed-out ballots to lawfully registered voters who requested the same. Thus, while King’s Bench jurisdiction is designed to remedy deficiencies in the “ordinary processes of law,” *In re Bruno*, 101 A.3d 635, 671 (Pa. 2014), this

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<sup>2</sup> This includes the following inexhaustive list matters which involved the Respondent Counties herein: *Republican Party of Pennsylvania v. Kathy Boockvar, Secretary of Pennsylvania*, No. 20A54 (2020); *Donald J. Trump for President, Inc. et al. v. Boockvar et al.*, No. 2:20-cv-00966-NR (W.D. Pa. 2020); *Donald J. Trump for President, Inc. et al. v. Boockvar et al.*, 4:20-cv-02078-MWB (M.D. Pa. 2020); *Pennsylvania Voters Alliance et al. v. Centre County et al.*, 4:20-cv-01761-MWB (W.D. Pa. 2020); *Bognet, et al. v. Boockvar, et al.*, No. 3:20-cv-215-KRG (W.D. Pa. 2020); *McCormick for U.S. Senate et al. v. Leigh M. Chapment, et al.*, No. 286 MD 2022 (Pa. Cmwlth. 2022); *McCormick et al., v. Chapman et al.*, No. 46 MM 2022 (Pa. 2022); *RNC et al. v. Leigh M. Chapman., et al.*, No. 100 MAP 2022 (Pa. 2022) (currently pending before this Court on appeal from No. 447 MD 2022 (Pa. Cmwlth. 2022)).

Court has never suggested, much less held, that a party who manufacturers an alleged deficiency is entitled to that relief.

Moreover, the Application involves issues of disputed fact—specifically, which of Pennsylvania’s 67 Counties, if any, intend to count an undated or incorrectly dated absentee or mail-in ballot. (Application at 4 (“[S]ome county boards of elections may follow the plain statutory text, the Acting Secretary’s website, and their own instructions to voters and decline to count an undated or incorrectly dated absentee or mail-in ballot. . . . On the other hand, other county boards may choose to follow the Acting Secretary’s guidance and to count any undated or incorrectly dated ballot.”)). Because the Commonwealth Court often sits as a trial court as part of its original jurisdiction, the Commonwealth Court, unlike this Court, is “organized to support orderly fact-finding.” *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 904 (Pa. 2002) (Saylor, C.J., joined by Dougherty, J. and Mundy, J.). It thus stands to reason that the Commonwealth Court “can more appropriately administer the necessary judicial consideration in the first instance, subject to appellate review by this Court if necessary.” *Id.*

Further, the Application is motivated, at least in part, upon the RNC’s belief that the Commonwealth Court will continue to, in the RNC’s words, “depart[] from the General Assembly’s date requirement” even though the U.S. Supreme Court vacated the Third Circuit’s ruling in *Ritter*. (Application at 10 (“[T]he Commonwealth Court twice has departed from the General Assembly’s date

requirement and the majority’s construction in unpublished, non-precedential cases arising out of the 2022 Republican primary election or U.S. Senate.”); *accord id.* at 16). The RNC, though, offers no support for this contention.<sup>3</sup> Regardless, the purpose of King’s Bench jurisdiction is “not to permit or encourage parties to bypass an existing constitutional or statutory adjudicate process.” *Bruno*, 101 A.3d at 670.

Finally, granting the Application could set a dangerous precedent. If an issue that the RNC claims has been settled law since October of 2020 (Application at 13-14) is a sufficient basis to invoke King’s Bench power two years later, then virtually any issue — election or otherwise — will satisfy the criteria to exercise such jurisdiction. Therefore, instead of confining King’s Bench authority to reviewing “an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law,” *Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015), the exercise of King’s Bench jurisdiction will become the norm. Were that to occur, the consequences for the Pennsylvania judicial system would be dire.

For the foregoing reasons and any additional reasons offered by the other Respondents, this Court should deny the Application. *See, e.g., In re Domitrovich*, 257 A.3d 702, 715 (Pa. 2021) (“Keeping in mind that we should exercise our King’s

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<sup>3</sup> That said, it should not be lost on this Court that the RNC filed this Application shortly after the Commonwealth Court rejected a different challenge from the RNC regarding mail-in ballots. Memorandum Opinion in *Republican National Committee, et al. v. Chapman, et al.*, No. 447 MD 2022 (Sept. 29, 2022) (per Ceisler, J.).

Bench authority with extreme caution, we decline to exercise it here[.]” (citation omitted)).

WHEREFORE, Respondents Bedford County Board of Elections, Carbon County Board of Elections, Centre County Board of Elections, Columbia County Board of Elections, Dauphin County Board of Elections, Fayette County Board of Elections, Huntingdon County Board of Elections, Indiana County Board of Elections, Jefferson County Board of Elections, Lawrence County Board of Elections, Lebanon County Board of Elections, Northumberland County Board of Elections, Venango County Board of Elections and York County Board of Elections respectfully request that this Honorable Court deny Petitioners’ Application for the Exercise of King’s Bench Power or Extraordinary Jurisdiction and enter the form of Order submitted herewith.

Respectfully submitted,

BABST, CALLAND, CLEMENTS  
and ZOMNIR, P.C.

*/s/ Elizabeth A. Dupuis*

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*Counsel for Respondents Bedford County, Carbon County, Centre County, Columbia County, Dauphin County, Fayette County, Huntingdon County, Indiana County, Jefferson County, Lawrence County, Lebanon County, Northumberland County, Venango County, and York County Boards of Elections*

Dated: October 19, 2022

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**CERTIFICATE OF COMPLIANCE**

I 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.

Date: October 19, 2022

*/s/ Elizabeth A. Dupuis*

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Elizabeth A. Dupuis, Esquire

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| Petitioners,                      | : | No. 102 MM 2022 |
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| v.                                | : |                 |
|                                   | : |                 |
| LEIGH M. CHAPMAN, <i>et al.</i> , | : |                 |
|                                   | : |                 |
| Respondents.                      | : |                 |
|                                   | : |                 |

**ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2022, having considered Petitioners’ Application for the Exercise of King’s Bench Power or Extraordinary Jurisdiction and all answers submitted in opposition thereto, it is hereby ORDERED, ADJUDGED and DECREED that Petitioners’ Application for the Exercise of King’s Bench Power or Extraordinary Jurisdiction is DENIED.

PER CURIAM:

\_\_\_\_\_ J.

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