

IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. 102 EM 2018

DAVID BALL, *et al.*,
Petitioners,

V.

**LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the
Commonwealth, *et al.*,**
Respondents.

**RESPONDENT PHILADELPHIA COUNTY BOARD OF ELECTIONS
ANSWER TO PETITIONERS' APPLICATION FOR EXTRAORDINARY
RELIEF
UNDER 42 PA. C.S. § 726**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 1

INTRODUCTION 1

COUNTER-STATEMENT OF THE STANDARD FOR THE EXERCISE
OF JURISDICTION UNDER 42 Pa. C.S. § 726 7

ORDER OR DETERMINATION IN QUESTION 8

COUNTER-STATEMENT OF THE CASE 9

 A. Counterstatement of Facts 9

 B. Procedural History 11

ARGUMENT 17

I. REASONS WHY THIS COURT SHOULD NOT EXERCISE
EXTRAORDINARY JURISDICTION 17

 A. The RNC Has Failed to Raise an Issue of Immediate Public
 Importance 17

 B. The RNC Lacks Standing to Challenge Philadelphia’s Practices
 With Regard to Ballots Without a Handwritten Date. 19

II. IF THIS COURT EXERCISES JURISDICTION, IT SHOULD DENY
THE RNC’S APPLICATION FOR RELIEF BECAUSE THEY HAVE
NOT MET THE HIGH BAR FOR A MANDATORY PRELIMINARY
INJUNCTION 22

 A. The RNC Cannot Succeed on the Merits of its Application. 23

 1. The Election Code Does Not Demand Disenfranchisement
 of a Qualified Elector who Cast a Timely Absentee or
 Mail-in Ballot that Inadvertently lacks a Handwritten Date
 on the Outer Mailing Envelope 23

 2. Throwing Out Ballots Without a Correct Handwritten
 Date Violates the Materiality Provision of the Civil Rights
 Act (52 U.S.C. § 10101(a)(2)(B)) 33

 3. Even If the RNC Could Show a Likelihood Of Success
 Under Pennsylvania and Federal Law, Its Requested
 Relief Cannot Reasonably Be Implemented 36

B. The RNC Has Not Even Tried to Meet the Other Injunction
Factors. 36

CONCLUSION.....39

CERTIFICATE OF COMPLIANCE.....42

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TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bd. of Revision of Taxes, City of Philadelphia v. City of Philadelphia</i> , 4 A.3d 610 (Pa. 2010)	3
<i>Bognet v. Sec’y Commonwealth of Pennsylvania</i> , 980 F.3d 336 (3d Cir. 2020)...	15, 16, 18
<i>Chapman v. Berks Cnty. Bd. of Elections</i> , 2022 WL 4100998 (Pa. Cmwlth. Ct. Aug. 19, 2022).....	Passim
<i>Com. v. Bethea</i> , 828 A.2d 1066 (Pa. 2003)	20
<i>Dave McCormick for U.S. Senate v. Chapman</i> , 275 A.3d 966 (Pa. 2022).....	2, 14
<i>Donald J. Trump for President, Inc. v. Boockvar</i> , 493 F. Supp. 3d 331 (W.D. Pa. 2020).....	17
<i>Donald J. Trump for President, Inc. v. Degraffenreid</i> , 141 S. Ct. 1451 (2021)	9
<i>Donald J. Trump for President, Inc. v. Sec’y of Pennsylvania</i> , 830 F. App’x 377 (3d Cir. 2020)	35
<i>Friends of Danny DeVito v. Wolf</i> , 227 A.3d 872 (Pa. 2020).....	13
<i>Illinois v. City of Milwaukee</i> , 406 U.S. 91 (1972)	13
<i>In re Bruno</i> , 101 A.3d 635 (Pa. 2014)	15
<i>In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election</i> , 241 A.3d 1058 (Pa. 2020).....	8, 9, 20, 29
<i>In re Luzerne Cnty. Return Bd.</i> , 290 A.2d 108 (Pa. 1972)	21
<i>In re Major</i> , 248 A.3d 445 (Pa. 2021)	17
<i>Kauffman v. Osser</i> , 271 A.2d 236 (Pa. 1970)	15, 16
<i>Markham v. Wolf</i> , 136 A.3d 134 (Pa. 2016)	15

<i>Mazzie v. Com.</i> , 432 A.2d 985 (Pa. 1981)	18, 19
<i>McCormick for U.S. Senate v. Chapman</i> , 2022 WL 2900112 (Pa. Cmwlth. June 2, 2022).....	Passim
<i>Migliori v. Cohen</i> , 36 F.4th 153 (3d Cir. 2022).....	9, 29, 31, 32
<i>Pa. Democratic Party v. Boockvar</i> , 238 A.3d 345 (Pa. 2020)	17, 21
<i>Rapaport v. Interstate Gen. Media, LLC</i> , 99 A.3d 528 (Pa. 2014)	3
<i>Ritter v. Migliori</i> , 142 S. Ct. 1824 (2022).....	32
<i>RNC v. Chapman</i> , 447 MD 2022 at 43 (Pa. Cmwlth. Sept. 29, 2022)	33
<i>Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.</i> , 828 A.2d 995 (Pa. 2003).....	18, 33
<i>United States v. Munsingwear, Inc.</i> , 340 U.S. 36 (1950)	29
<i>Washington Cnty. Comm'rs v. Pennsylvania Labor Relations Bd.</i> , 417 A.2d 164 (Pa. 1980)	3, 13
Statutes	
1 Pa. C.S. § 1921(a)	21
1 Pa. C.S. § 1932.....	24
25 P.S. 3157(a).....	17
25 P.S. § 2811	5
25 P.S. § 3031.13(e).....	23
25 P.S. § 3050	5
25 P.S. § 3050(a.4).....	27
25 P.S. § 3063	23
25 P.S. § 3146.1	5

25 P.S. § 3146.2	5
25 P.S. § 3146.2a	5
25 P.S. § 3146.2b	5, 25
25 P.S. § 3146.4	6, 26
25 P.S. § 3146.5	5
25 P.S. § 3146.6	6
25 P.S. § 3146.6(a).....	Passim
25 P.S. § 3146.8	14
25 P.S. § 3146.8(d).....	28, 23
25 P.S. § 3146.8(g)(3).....	21, 31, 22, 25
25 P.S. § 3146.8(g)(4)(ii).....	23
25 P.S. § 3150.11(a).....	5
25 P.S. § 3150.12	5
25 P.S. § 3150.12a	5
25 P.S. § 3150.12b	5
25 P.S. § 3150.14(a).....	6
25 P.S. § 3150.15	5
25 P.S. § 3150.16	6
25 P.S. § 3150.16(a).....	6
25 P.S. § 3553	26
25 Pa. C.S. § 1222(a)	6
25 Pa. C.S. § 1222(c)(13).....	6

25 Pa. C.S. § 1222(c)(19)-(20)..... 6
25 Pa. C.S. § 1301(a) 5, 25
42 Pa. C.S. § 726..... 3, 13, 36
52 U.S.C. § 10101 (a)(2)(B) 29, 30, 31
52 U.S.C. § 10101 (2)(B)..... 12
52 U.S.C. § 10101 (e) 30
Pa. Const. art. VII § 4..... 25

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INTRODUCTION

The Republican National Committee, National Republican Congressional Committee, Republican Party of Pennsylvania, and a group of voters from eight counties ask this Court to exercise its extraordinary King's Bench Jurisdiction to upend Election Board processes just weeks before an election. They do this with manufactured urgency even though they obviously lack standing and these issues are of the type that are regularly challenged under processes provided by the Election Code. From any perspective, the basis for the RNC's request is wanting and this Court should decline jurisdiction.

Petitioners' standing rests on allegations of voter dilution. But those allegations, even if true, would affect all qualified voters equally. This Court has squarely rejected such generalized grievances that rely necessarily on speculative assumptions. In addition, the complained of conduct—the counting of absentee and mail-in ballots lacking a handwritten date—has not even occurred. Paired with the RNC's lack of standing, their petition appears to be a request for a broad statement of law in the form of an advisory opinion. And Petitioners' efforts to create a sense of urgency because Election Day is only three weeks away should not impact this Court's analysis. To the extent there were exigency, it is solely of the Petitioners' making. Particularly so as the RNC intervened in one of the cases it now seeks to overturn and *chose to withdraw* its appeal to this Court.

Properly apprehended, the issues raised in this petition are not unique and do not require resolution through this Court's extraordinary jurisdiction. The Election Code provides for challenges of all sorts. Cases have already been brought under such provisions related to this very issue. As this Court has already determined in *Dave McCormick for U.S. Senate v. Chapman*, 275 A.3d 966, 968 (Pa. 2022), the issues raised are simply not appropriate for such extraordinary jurisdiction. The same is just as true today.

Finally, even if this Court were to grant Kings Bench Jurisdiction, the Election Code must be liberally construed to effectuate the franchise. The Election Code does not demand disenfranchisement of a qualified elector who cast a timely absentee or mail-in ballot that inadvertently lacks a handwritten date on the outer mailing envelope. The Court should deny Petitioners' request for jurisdiction, or in the alternative, deny the Petition for failure to establish the requisite factors for injunctive relief.

**COUNTER-STATEMENT OF THE STANDARD FOR THE
EXERCISE OF JURISDICTION UNDER 42 Pa. C.S. § 726**

42 Pa. C.S. §726 authorizes this Court, in its discretion, to exercise plenary jurisdiction “in any matter . . . involving an issue of immediate public importance” pending before an inferior tribunal at any stage, for the purposes of “enter[ing] a final order or otherwise caus[ing] right and justice to be done.” *Id.*¹

However, as its title denotes, section 726 jurisdiction is to be invoked only in “extraordinary” cases. It is well-settled that the Court exercises its discretion “sparingly” and only in circumstances involving an issue of immediate public importance. *See Washington Cnty. Comm’rs v. Pennsylvania Labor Relations Bd.*, 417 A.2d 164, 167 (Pa. 1980). Moreover, “[t]he presence of an issue of immediate public importance is not alone sufficient to justify extraordinary relief” -- the record must also clearly demonstrate a petitioner’s rights. *Id.* A petitioner bears a “heavy burden” in establishing that the circumstances of his or her case warrants this Court’s use of plenary jurisdiction. *Id.*; *see also Rapaport v. Interstate Gen. Media, LLC*, 99 A.3d 528, 528-29 (Pa. 2014). The City respectfully submits that Petitioners’ application has not met this heavy burden.

¹ Employed to similar effect, but distinct from statutory extraordinary jurisdiction under § 726, King’s Bench jurisdiction allows the Court to exercise power of “general superintendency” over inferior courts even when a matter is not pending before a lower court. *See Bd. of Revision of Taxes, City of Philadelphia v. City of Philadelphia*, 4 A.3d 610, 620 (Pa. 2010).

ORDER OR DETERMINATION IN QUESTION

There is no particular order or determination in question in this matter. Petitioners have merely decided, after mail-in and absentee voting has already started, to challenge long-standing practice and existing case law.

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COUNTER-STATEMENT OF THE CASE

Petitioners the Republican National Committee, National Republican Congressional Committee, Republican Party of Pennsylvania, and a group of voters from eight counties (together, “the RNC”) seek to prevent county boards from counting ballots from qualified electors that lack handwritten dates on their outer envelopes.

A. Counterstatement of Facts

In Pennsylvania, an individual is qualified to vote if, as of Election Day, they are 18 years old, have been a citizen for at least one month, have lived in Pennsylvania and in their election district for at least thirty days, and are not incarcerated as a felon. 25 Pa. Cons. Stat. § 1301(a); 25 P.S. § 2811. Pennsylvania allows qualified electors to vote in-person or by absentee or mail-in ballot. *See* 25 P.S. §§ 3050, 3146.1, 3150.11(a). Qualified electors must apply to their county board of elections to vote by absentee or mail-in ballot. 25 P.S. §§ 3146.2, 3146.2a, 3150.12, 3150.12a. Upon receipt of an application for an absentee or mail-in ballot, the county board then verifies that the voter is a qualified elector based on proof of identification and voter registration information. 25 P.S. §§ 3146.2b, 3150.12b.

Once approved, the county board delivers a ballot packet to the qualified elector. 25 P.S. §§ 3146.5, 3150.15. To vote, qualified electors fill out their absentee or mail-in ballot, enclose their ballot in a “secrecy envelope,” and place

that envelope in an exterior mailing envelope printed with a declaration, which the voter must sign and date. 25 P.S. §§ 3146.6(a), 3150.16(a). The ballot, secrecy envelope, and exterior mailing envelope are all included in the ballot package provided to voters. 25 P.S. §§ 3146.4, 3150.14(a). The mailing envelope includes a unique barcode. *Chapman v. Berks Cnty. Bd. of Elections*, 2022 WL 4100998, at *20 (Pa. Cmwlth. Ct. Aug. 19, 2022) (unpublished) (hereinafter “*Berks Cnty.*”). Qualified electors must then return the absentee or mail-in ballot package by 8:00 p.m. on Election Day. 25 P.S. §§ 3146.6, 3150.16.

When the Philadelphia County Board of Elections (“the Board”) receives the completed absentee or mail-in ballot envelope, it stamps each envelope with the date and time of receipt. The Board also scans the unique barcode on the mailing envelope to record in the Statewide Uniform Registry of Electors (SURE)² system that Philadelphia has received an absentee or mail-in ballot envelope from that voter. Ballot envelopes are then kept secure pending the pre-canvass. Prior to the pre-canvass, Board does not identify ballot envelopes with a missing or “incorrect” handwritten date, much less separate out such ballot envelopes. Instead, the Board votes on how to handle these ballots during its post-election public meeting.

² The SURE system is established by statute for purposes including the “timely printing” of “district registers” (poll books) and the recording of which voters have received and voted by absentee and mail-in ballot. 25 Pa. C.S. § 1222(a), (c)(13), (c)(19)-(20).

Since the adoption of no-excuse mail-in voting, several thousand qualified electors have cast timely ballots without a handwritten date on the exterior envelope. *E.g.*, Transcript of Meeting of the Commissioners at 10:7-16:24 (May 25, 2022) (2,125 timely ballots from qualified electors only missing a handwritten date);³ Transcript of Meeting of the Commissioners at 7:14-8:8 (Nov. 9, 2020) (1,259 timely ballots from qualified electors only missing a handwritten date).⁴

For the 2022 General Election, the Board recently began mailing absentee and mail-in ballots to qualified electors and has already begun to receive completed ballot envelopes.

B. Procedural History

The Republican National Committee, the National Republican Congressional Committee, the Republican Party of Pennsylvania, and eight Pennsylvania voters from outside Philadelphia filed their Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction on October 16, 2022, against the Acting Secretary of the Commonwealth and every county board of elections in the Commonwealth, including Philadelphia. The Application brought three counts challenging certain county board of election procedures relating to the Election

³ https://vote.phila.gov/files/announcements/MeetingTranscripts/052522_Meeting_Transcript.pdf.

⁴ https://vote.phila.gov/files/announcements/MeetingTranscripts/11920_Meeting_Transcript.pdf.

Code’s date requirements for absentee and mail-in ballots. Count 1 sought a declaratory judgment that county boards of elections may not count any “undated or incorrectly dated” absentee or mail-in ballot. Count 2 sought a declaratory judgment holding invalid the Acting Secretary’s guidance that counties should count these ballots. Count 3 sought an injunction—without using that language or addressing all of the required criteria—requiring county boards of elections to segregate ballots without a correct handwritten date in the 2022 general election. The RNC did not file this case before the Commonwealth Court or any Courts of Common Pleas.

Multiple Pennsylvania cases have addressed the date issue on mail-in and absentee ballots at length. *See, e.g., In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020). In that matter, the Trump Campaign challenged the Allegheny County Board of Elections’ decision to count several thousand challenged absentee and mail-in ballots from voters whose ballots were missing some combination of handwritten names, street addresses, or dates on the ballot-return outer envelope. Justice Donohue, writing for the majority, held that a voter’s failure to handwrite their name or address on the back of the outer envelope was not a material violation of the statutory directive to “fill out” the form, but Justice Wecht, writing in concurrence, wrote that the “date and sign requirement” should be treated as mandatory in future elections. *Id.* at 1079. Notably, Justice Wecht did not clarify whether a ballot with an incorrect or illegible date should be

invalidated or only one with a completely missing date. *See id.* The United States Supreme Court denied certiorari on the case. *See Donald J. Trump for President, Inc. v. Degraffenreid*, 141 S. Ct. 1451 (2021).

The date issue was also addressed in *Migliori v. Cohen*, in which Judge McKee wrote for the Third Circuit, agreeing with this Court that a missing date on an outer envelope should not render a voter's ballot invalid in the Lehigh County judicial election. The Third Circuit found that the date on the outer envelope was not material to a voter's qualifications to vote and so an error or omission in the date should not impede the counting of that ballot. The United States Supreme Court vacated that holding as moot on October 11, 2022. *See Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), *cert. granted and judgment vacated*, *Ritter v. Migliori*, No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022) (Mem.).

The Commonwealth Court addressed the issue of missing dates on the exterior envelope in *McCormick for U.S. Senate v. Chapman*, 2022 WL 2900112, at *1 (Pa. Cmwlth. Ct. June 2, 2022) (unpublished) and again in *Berks Cnty.*, 2022 WL 4100998, at *1. *McCormick* involved a Republican senatorial candidate filing against a county board that refused to count absentee and mail-in ballots for the Republican Nomination for the Office of United States Senator in the May 17, 2022 General Primary Election. Notably, the RNC was a party in *McCormick* and argued there that ballots without a handwritten date on their exterior envelopes

should not be counted, and then withdrew their appeal to this Court of the Commonwealth Court's decision. *See McCormick*, 2022 WL 2900112, at *7; Praeceptum for Discontinuance of Appeal, June 9, 2022.⁵

President Judge Cohn Jubelirer wrote that it was undisputed that the election was free and fair, that the ballots were received before the deadline, and that outer envelopes with birth dates or clearly erroneous dates were being accepted. *McCormick*, 2022 WL 2900112, at *8. It was obvious to the Commonwealth Court that all ballots were timely completed regardless of the date on the outer envelope. *Id.* at *13. The Commonwealth Court granted a preliminary injunction to the aggrieved voters in that matter, whose ballots had been in danger of not being counted.

In *Chapman*, President Judge Cohn Jubelirer reiterated that “the lack of a handwritten date on the declaration on the return envelope of a timely received absentee or mail-ballot does not support excluding those ballots from the Boards’ certified results under both Pennsylvania law and Section 10101(a)(2)(B) of the Civil Rights Act.” *Berks Cnty.*, 2022 WL 4100998, at *30.

The RNC here claims that voters are entitled to know whether their votes will be counted if they fail to date or properly date their outer envelopes, but they do not

⁵ <https://www.democracydocket.com/wp-content/uploads/2022/05/2022-06-09-PRAECIPE-FOR-DISCONTINUANCE-OF-APPEAL-1.pdf>.

argue that anyone will intentionally fail to date the outer envelope merely to see if their ballot will be counted. Notably, in *RNC v. Chapman*, filed September 7, 2022, the RNC argued against notice and cure provisions, so the RNC is in effect saying that qualified electors who attempt to vote by absentee or mail-in ballot but whose outer envelopes have date errors should not be notified that their ballots will not be counted, and even if they did know, should not have the opportunity to fix them. *See RNC v. Chapman*, 447 MD 2022 at 11-12 (Pa. Cmwlt. Sept. 29, 2022).

The RNC claims that this is an urgent situation because *Migliori* has just been vacated, RNC App. at 1, 10-11, but the RNC never explains why the case could not have been brought earlier, since *Migliori* was not binding precedent over this Court and the state law claims could have been brought years ago. *Id.*

The RNC also claims that the votes of people who correctly filled out the “date” line on the outer envelope are being improperly diluted by the otherwise-valid votes of eligible voters in Pennsylvania who have somehow missed or improperly filled out that line on the outer envelope. RNC App. at 13, 25. Their voter dilution theory cites no caselaw supporting vote dilution by other valid Pennsylvania electors as a justiciable claim. *Id.*

The RNC also claims that the federal statute requiring states avoid denying electors the right to vote over errors or omissions not material to their qualifications, 52 U.S.C. § 10101(2)(B), does not apply to the outer envelope date requirement.

That is, they argue that a failure to accurately write a date on the outer envelope, even when the ballot is received before the deadline, is an error worthy of voter disqualification.

Notably, the RNC does not make any arguments under the Uniformity Clause. Although their reasoning is uncertain, the Commonwealth Court in *McCormick* noted that the Acting Secretary has already issued statewide guidance calling for county boards of elections to treat ballots without a handwritten date uniformly—by counting them. *See McCormick*, 2022 WL 2900112, at *2.

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ARGUMENT

I. REASONS WHY THIS COURT SHOULD NOT EXERCISE EXTRAORDINARY JURISDICTION

A. The RNC Has Failed to Raise an Issue of Immediate Public Importance.

In discussing its extraordinary jurisdiction under 42 Pa. C.S.A. § 726, this Court has stated that it “will not invoke extraordinary jurisdiction unless the record clearly demonstrates a petitioner’s rights,” and may still refuse to do so even where there is “a clear showing that a petitioner is aggrieved.” *Washington Cnty. Comm’rs v. PLRB*, 417 A.2d 164, 167 (Pa. 1980) (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972)). The Court should reject the instant Petition because the RNC has failed to demonstrate *any* showing, much less meet its “heavy burden”, *id.*, that it has been aggrieved. As detailed in Section I.B. below, the RNC’s voter dilution theory of harm has already been squarely rejected by this Court as well as the Third Circuit Court of Appeals.

While the RNC’s failure to clearly demonstrate standing should alone preclude King’s Bench jurisdiction, the RNC should also be well aware that it has not raised an “issue of immediate public importance.”⁶ *Id.* The Board, and other county boards of elections, have been counting ballots without a handwritten date

⁶ It is important to note that, unlike *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 884–85 (Pa. 2020), *cert. denied*, 141 S. Ct. 239 (2020), this timing was not the result of a novel rapidly-spreading pandemic but rather a concerted choice.

for more than two years and the Election Code contains provisions for challenging determinations during the canvass. 25 P.S. § 3146.8. In other words, whether or not the RNC has raised an issue of public importance, it is not immediate because the Election Code provides the framework through which any actually aggrieved party can seek redress in court.

Indeed, in this past primary, such a challenge was brought on this very topic. That case, *McCormick*, 2022 WL 2900112, at *2, raised the precise issue the RNC asks this Court to summarily decide here. And importantly, the RNC intervened in that case and is well aware that a King's Bench Petition was filed and already rejected by this Court. See *McCormick for U.S. Senate v. Chapman*, 275 A.3d 966, 968 (Pa. 2022). Moreover, after this Court's clear indication that it would not entertain such issues on King's Bench Jurisdiction, the RNC chose to discontinue its appeal of the decision in *McCormick* to the Supreme Court. See Praecipe for Discontinuance of Appeal, June 9, 2022, available at <https://www.democracymocket.com/wp-content/uploads/2022/05/2022-06-09-PRAECIPE-FOR-DISCONTINUANCE-OF-APPEAL-1.pdf>. To the extent there remains an issue the RNC believes should be addressed, that is of its own making. And as the history and prior cases show, the concern is certainly not immediate as that term is used in relation to this Court's exercise of extraordinary jurisdiction.

And this Court has recognized that this extraordinary remedy that should be

“exercised with extreme caution” because of possible abuse. *See In re Bruno*, 101 A.3d 635, 670 (Pa. 2014). Given that the RNC has already forgone the opportunity to appeal the issues raised here in the ordinary process of the law more than four months ago, what the RNC is actually seeking is a precedent that such a remedy be available anytime a voter or political party believes a ballot – even one that has yet to be cast – may be counted in deviation of the election code. Cases such as this in the days and weeks before an election create confusion among qualified electors and may impair the exercise of the franchise. Extraordinary jurisdiction here would only invite more gamesmanship at the expense of the credibility of Pennsylvania’s election system and should not be countenanced by this court.

B. The RNC Lacks Standing to Challenge Philadelphia’s Practices With Regard to Ballots Without a Handwritten Date.

As a threshold matter, the RNC bears the burden of establishing that it has standing to bring this action. *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). To have standing, the RNC must have a substantial, direct, and immediate interest in the matter. *Id.* As this Court held in *Kauffman v. Osser*, 271 A.2d 236, 239 (Pa. 1970), a voter cannot establish standing on the basis that counting an allegedly invalid ballot dilutes the voter’s vote because such voter dilution theories of harm implicate an “interest common to that of all other qualified electors.” *Id.* at 240; *see also Bognet v. Sec’y Commonwealth of Pennsylvania*, 980 F.3d 336 (3d Cir.

2020), *cert. granted, judgment vacated sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021) (vote dilution theories of harm are neither sufficiently concrete nor particularized to establish federal standing).

Indeed, *Kauffman* directly prohibits the RNC’s alleged theory of voter dilution harm. In *Kauffman*, voters in Philadelphia brought an action seeking to enjoin and restrain the Board from counting absentee ballots voted by qualified electors on vacation during election day because such votes contravened the constitution and were therefore invalid. *Kauffman*, 271 A.2d at 238. There, voters alleged that their harm was that their votes would be diluted by the purportedly unlawful absentee votes. *Id.* at 239. This Court held that such a vote dilution theory could not establish *any* prerequisite of standing because the harm is not particularized—it “is nowise peculiar to them but rather it is an interest common to that of all other qualified electors”—and because it is too remote and speculative—appellants harm was based on an unfounded and speculative assumption that the allegedly invalid ballots would be for candidates other than those appellants would vote for. *Id.* at 239-40.

The RNC’s claimed interest here is that “the votes validly cast by Voter Petitioners have been and will be canceled out and diluted by the counting of undated or incorrectly dated ballots.” RNC App. at 6. This is precisely the same harm rejected in *Kauffman*. See also *Bognet*, 980 F.3d at 357 (“Voter Plaintiffs’

‘dilution’ claim is a ‘paradigmatic generalized grievance that cannot support standing.’”) (citation omitted). It should be rejected here. Nor can the RNC establish standing on the basis that “Committee Petitioners make expenditures” on voter education because they have failed to demonstrate any immediate harm to voters. *See Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 380-81 (W.D. Pa. 2020) (“Because Plaintiffs’ harm is not ‘certainly impending,’ . . . spending money in response to that speculative harm cannot establish a concrete injury.”).

The Court’s firm rejection of the RNC’s vote dilution theory is not only the correct decision as to standing jurisprudence, but also is critical to the proper functioning of, and confidence in, the Commonwealth’s election system. “[T]he overarching principle guiding interpretation of the Election Code is that it should be liberally construed so as to not deprive electors of the right to elect a candidate of their choice.” *Berks Cnty.*, 2022 WL 4100998, at *13 (citing *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020); accord *In re Major*, 248 A.3d 445, 450 (Pa. 2021), *reargument denied* (Apr. 12, 2021)). And the Election Code provides for ways in which actually aggrieved parties may challenge Board decisions in courts of common pleas. *See e.g.* 25 P.S. 3157(a) (“Any person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election . . . may appeal therefrom . . .

. . . to the court of common pleas of the proper county.”). The Election Code does not provide opportunities for political parties, without a cognizable harm, to bring state-wide challenges immediately prior to elections “whenever an elections board counts any ballot that deviates in some way from the requirements of a state’s legislatively enacted election code.” *Bognet*, 980 F.3d at 360.

Because the RNC has failed to meet its threshold burden to establish a cognizable interest, the Petition should be denied.

II. IF THIS COURT EXERCISES JURISDICTION, IT SHOULD DENY THE RNC’S APPLICATION FOR RELIEF BECAUSE THEY HAVE NOT MET THE HIGH BAR FOR A MANDATORY PRELIMINARY INJUNCTION.

The RNC asks this Court to enter a preliminary injunction: an order “directing county boards of elections to segregate any undated or incorrectly dated absentee or mail-in ballots received in connection with the 2022 general election.” RNC App. at 13. But the RNC has not even attempted to carry its burden to show that it meets *all six factors* necessary for a preliminary injunction. *See Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003) (citations omitted) (emphasis added).

Importantly, the RNC does not seek a *prohibitory* injunction (i.e., one that “enjoin[s] the doing of an act that will change the status quo”). Rather, the RNC seeks a *mandatory* injunction that the Board take affirmative action to segregate ballots missing a handwritten date on the exterior envelope. *Mazzie v. Com.*, 432

A.2d 985, 988 (Pa. 1981). Mandatory injunctions are subject to greater scrutiny and “should be issued more sparingly than injunctions that are merely prohibitory.”

Id. To that end, the RNC must establish “a clear right to relief” before a mandatory injunction can enter. *Id.*

The RNC has failed to show likelihood of success on the merits of its claims, much less the clear right to relief necessary to receive a mandatory preliminary injunction.⁷ And because the RNC has not even attempted to argue the other five factors necessary for a preliminary injunction, the Court should deny its application for relief.

A. The RNC Cannot Succeed on the Merits of its Application.

1. The Election Code Does Not Demand Disenfranchisement of a Qualified Elector who Cast a Timely Absentee or Mail-in Ballot that Inadvertently lacks a Handwritten Date on the Outer Mailing Envelope.

As the Commonwealth Court recently explained in a thorough and comprehensive analysis following a factual hearing, the General Assembly’s intent was that “timely received absentee and mail-in ballots of qualified Pennsylvania electors are not invalid only because they lack a handwritten date on the return envelope declaration.” *Berks Cnty.*, 2022 WL 4100998, at *13-25. To hold

⁷ For this same reason, the RNC is not entitled to a declaratory judgment “that absentee and mail-in ballots that are undated or incorrectly dated cannot be included in the pre-canvass or canvass under the Election Code.” RNC App. at 26.

otherwise would be to disenfranchise a qualified voter who cast a timely ballot merely because they failed to handwrite a date that plays absolutely no role in determining whether the elector is qualified or the ballot timely. The Court should reach the same conclusion here.⁸

The plain language of the Election Code states that a qualified elector, after receiving their official absentee or mail-in ballot,

shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed “Official Election Ballot.” This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope.

25 P.S. §§ 3146.6(a) (absentee ballots); 3150.16(a) (mail-in ballots). When pre-canvassing and canvassing absentee and mail-in ballots, the Board must, among other things, determine whether “the declaration is *sufficient* and the information contained in [certain lists] verifies his right to vote.” 25 P.S. § 3146.8(g)(3)

⁸ The RNC repeatedly invokes the partially concurring/partially dissenting opinions in *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1084 (Pa. 2020), for the proposition that this Court has already concluded that the Board must not count ballots without a handwritten date on the exterior envelope. *E.g.*, RNC App. at 1, 13-14, 16, 17, 23. But in Pennsylvania, it is the *result* of a plurality opinion that “carries precedential weight.” *Com. v. Bethea*, 828 A.2d 1066, 1073 (Pa. 2003). And in *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, four Justices of this Court voted to *count* ballots that lacked a handwritten date. *Id.* at 1079 (opinion announcing judgment); 1089 (Wecht, J., concurring in part and dissenting in part). It is this result—not the various opinions—that carries precedential weight.

(emphasis added). If the Board so determines, then the absentee or mail-in ballot is canvassed and the vote counted. *Id.*

Under the Statutory Construction Act, interpreting the Election Code requires the Court to “ascertain and effectuate the intention of the General Assembly.” 1 Pa. C.S. § 1921(a). The Court should look to the plain language when the words are “clear and free from all ambiguity”; but when the words are not explicit, the Court may ascertain the “intention of the General Assembly” by considering other factors. *Id.* § 1921(b)-(c). In election matters, an additional consideration must guide the Court’s construction: the Election Code “should be liberally construed so as not to deprive electors of their right to elect a candidate of their choice.” *Berks Cnty.*, 2022 WL 4100998, at *13; *accord Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 361 (Pa. 2020) (stating that election laws “ordinarily will be construed liberally in favor of the right to vote.” (internal quotation marks omitted)). Indeed, the Court’s goal must be to “to enfranchise and not to disenfranchise [the electorate].” *Id.* at 361 (quoting *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972)).

As the Commonwealth Court rightly noted, the correct question when interpreting sections 3146.6(a) and 3150.16(a) is *not* whether the General Assembly clearly intended a voter to handwrite the date on the exterior mailing envelope, but “whether the General Assembly clearly intended that if the date is

omitted, the ballot is invalid and will not be counted.” *Berks Cnty.*, 2022 WL 4100998, at *14. The answer to this question is no.

First, when the Board pre-canvasses and canvasses absentee and mail-in ballot envelopes, the Election Code only requires the Board to determine if the declaration is *sufficient*. 25 P.S. § 3146.8(g)(3). The Election Code does not define what constitutes a “sufficient” declaration, but the plain meaning going back centuries is of “a quantity, extent, or scope adequate to a certain purpose or object.” *Sufficient*, Oxford English Dict. (2d ed. 1989) (tracing meaning back to 1380). In the context of the Election Code, a “sufficient” declaration is one that allows the Board to verify the voter’s identity and right to vote. § 3146.8(g)(3) (requiring the Board to verify the voter’s “proof of identification” and “his right to vote” as prerequisites to canvassing and counting the ballot). Notably, the Election Code does not require the Board to check that the voter has complied with all of the requirements of sections 3146.6(a) and 3150.16(a). Indeed, the General Assembly could have easily included language requiring the declaration to be “complete,” or cross-referenced the requirements of sections 3146.6(a) and 3150.16(a). But it did not do so, and the Court must give effect to the legislature’s choice of language.

Second, the Election Code does not state a consequence for failing to include a handwritten date on the envelope, reinforcing the conclusion the declaration need

not be perfectly complete in order for the Board to count a timely received ballot from a qualified elector that lacks a handwritten date. The Election Code elsewhere includes explicit provisions dictating when an absentee or mail-in ballot must be set aside and declared void. For example, if the secrecy envelope contains “any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference,” then the ballot “contained therein shall be set aside and declared void.” 25 P.S. § 3146.8(g)(4)(ii). Similarly, if a qualified elector returned an absentee or mail-in ballot but died prior to Election Day, the ballot “shall be rejected by the canvassers.” *Id.* § 3146.8(d); *see also, e.g.*, 25 P.S. § 3063 (providing for what ballots may not be counted); 25 P.S. § 3031.13(e) (providing that if “as a result of an otherwise properly cast write-in vote, the voter has registered more votes for an office than he is entitled to vote for that office, the entire vote cast for that office shall be void and shall not be counted”).

Third, the word “date” is ambiguous. The Election Code requires a voter to “fill out, date and sign the declaration,” 25 P.S. §§ 3146.6(a), 3150.16(a)—but it does not specify *which* date the voter should handwrite on the envelope. Is it the date the voter filled out the ballot? What if the voter filled out the ballot over multiple days? Is it the date the voter signed the declaration? What if the voter signed the declaration on a different day than they completed the ballot? What if

the voter filled out the declaration first, before filling out the ballot? Is it the date the voter returned the ballot? What if the voter mailed or returned the ballot several days after preparing the declaration?

This ambiguity is fatal to the RNC's claim that the Election Code requires voiding timely received absentee and mail-in ballots that are "incorrectly dated." RNC App. at 26. The Board has no way of knowing what the handwritten date on the exterior mailing envelope represents to the voter and no way of verifying that the voter actually marked their ballot or signed their declaration on that date.

Finally, the ambiguity with the word "date" also reveals that a handwritten date on the exterior envelope of an absentee or mail-in ballot serves no purpose relative to the other requirements of the Election Code addressing qualification, timeliness, secrecy, or the prevention of fraud. *See* 1 Pa. C.S. § 1932 (stating that statutes are "in pari materia when they relate to the same persons or things or to the same class of persons or things" and "shall be construed together, if possible, as one statute"). Because the precise date intended by the General Assembly is not clear and a ballot with an "incorrect" handwritten date cannot be detected, the absence of that handwritten date cannot hold any greater legal significance and certainly cannot justify disenfranchising a timely ballot cast by a qualified elector.

Qualification. Only qualified electors are permitted to cast absentee and mail-in ballots. *E.g.*, 25 P.S. §§ 3146.2b(a); 3150.12b(a), 3146.8(g)(3). But the

handwritten date is not relevant to determine a voter's qualification. Instead, voter qualification is determined by the Board when approving the application for an absentee or mail-in ballot, 25 P.S. §§ 3146.2b(a); 3150.12b(a), and is measured as of Election Day, not any day prior, Pa. Const. art. VII § 1; 25 Pa. C.S. § 1301(a). The Election Code does not require the Board to re-verify a voter's qualifications during the pre-canvass or canvass; instead, the Board must check certain lists to verify the voter's "right to vote." 25 P.S. § 3146.8(g)(3).

Timeliness. To be counted by the Board, all absentee and mail-in ballots must be received "on or before eight o'clock P.M." on Election Day. 25 P.S. §§ 3146.6(a), 3150.16(a). But the handwritten date is not relevant to determine the timeliness of the ballot; instead, a ballot is timely if in the possession of the Board as of 8 p.m. on Election Code. To avoid any doubt, the Board date-and-time stamps all absentee and mail-in ballots upon receipt and sets aside any ballots received after 8 p.m. on Election Day. This date-and-time stamp, not an ambiguous handwritten date on the mailing envelope, is the best evidence that a ballot was timely cast.

Secrecy. Under Pennsylvania law, "secrecy in voting" must be "preserved." See Pa. Const. art. VII § 4. But the handwritten date is to be written on the exterior mailing envelope of an absentee or mail-in ballot, which already contains the

voter's name and address. The absence of a handwritten date does nothing to undermine the secrecy of the ballot contained inside the internal secrecy envelope.

Prevention of fraud. The declaration on the exterior envelope of an absentee or mail-in ballot contains “a statement of the elector[']s qualifications” and “a statement that such elector has not already voted in such primary or election.” 25 P.S. § 3146.4; *accord id.* 3150.14(b). A voter, by signing the declaration, affirms under penalty of criminal liability that they do not “know[] any matter declared therein to be false,” have not “vote[d] any ballot other than one properly issued to the person, or vote[d] or attempt[ed] to vote more than once in any election for which an absentee ballot or mail-in ballot shall have been issued to the person ,” and have not violated other provisions of the Election Code. 25 P.S. § 3553. It is the signature of the voter, not the date, that carries the penalty of criminal liability. *Id.* (“If any person shall *sign* an application for absentee ballot, mail-in ballot or declaration of elector” (emphasis added)).

Nor does the handwritten date on the envelope prevent hypothetical instances of fraud, allegations of which are absent from the RNC's application and vanishingly rare in real life. Every absentee or mail-in ballot mailing envelope contains a unique barcode, which the Board scans into the SURE system upon receiving the voted ballot. A voter who is shown to have returned an absentee or

mail-in ballot is not permitted to cast a second ballot in person on Election Day.⁹ This scan in the SURE system, not the handwritten date on the ballot envelope, is the best evidence against double voting. The Board further date-and-time stamps all received absentee and mail-in ballot envelopes and does not count ballots received after 8 p.m. on Election Day. This procedure, not the handwritten date on the ballot envelope, is the best mechanism to avoid hypothetical back-dating.

To be clear, the RNC has provided no evidence of fraud in their Application. A timely received absentee or mail-in ballot from a qualified elector that lacks a handwritten date on the exterior envelope is not fraudulent. The RNC cites a single instance of voter fraud in support of the utility of the handwritten date, RNC App. at 15—but that case, ironically, contained no evidence that the handwritten date was missing or incorrect. The handwritten date also played no role in invalidating the ballot. RNC App. at Ex. F. Instead, the affidavit of probable cause reveals that the deceased voter had already been marked deceased and removed from the voter rolls on April 25, 2022—three days before the ballot was received by the Lancaster County Board of Elections. RNC App. at Ex. F. Pursuant to the Election Code,

⁹ Such voters are permitted to cast provisional ballots, but they must sign an affidavit with their name and place the provisional ballots in provisional ballot envelopes that contains the voter's signature. 25 P.S. § 3050(a.4). Provisional ballots are kept sealed and separated and not counted until the Board examines each one to determine if the "individual voting that ballot was entitled to vote at the election district in the election." *Id.* The Board does not count the provisional ballot if the voter cast a valid absentee or mail-in ballot.

which requires rejecting votes by persons who die prior to Election Day, 25 P.S. § 3146.8(d), the fraudulent ballot was already going to be voided. The RNC's citation of a single instance of voter fraud, much less one where the handwritten date was not relevant to determining whether the vote would be counted, cannot justify the disenfranchisement of qualified electors across the Commonwealth who return timely ballots.

In short, the requirement that a qualified elector include a handwritten date on the exterior envelope of an absentee or mail-in ballot serves no meaningful purpose in the administration of free and fair elections in Pennsylvania and there is no indication that the General Assembly intended to disenfranchise qualified electors who returned a timely ballot without that date. Indeed, the requirement to include a handwritten date is more akin to the requirements that the voter vote their absentee or mail-in ballot in a certain order: first mark the ballot, then "fold the ballot," then enclose and seal the ballot in the secrecy envelope, then place the secrecy envelope in the mailing envelope, and only then "fill out, date and sign the declaration printed on such envelope." 25 P.S. §§ 3146.6(a), 3150.16(a). But the Board has no means of enforcing this sequence, which serves no meaningful purpose, and there is no indication in the Election Code that the General Assembly intended to disenfranchise a qualified voter who returns a timely absentee or mail-in ballot but filled out the declaration before marking the ballot. Likewise, the

requirement to include a handwritten date on the exterior envelope serves no meaningful purpose and there is no indication in the Election Code that the General Assembly intended to disenfranchise a qualified voter who returns a timely absentee or mail-in ballot without the date.

2. Throwing Out Ballots Without a Correct Handwritten Date Violates the Materiality Provision of the Civil Rights Act (52 U.S.C. § 10101(a)(2)(B)).

As four Justices noted in 2020, throwing out timely absentee and mail-in ballots cast by qualified electors simply because the outer mailing envelope lacked a handwritten date might violate 52 U.S.C. § 10101(a)(2)(B), the Materiality Provision of the Civil Rights Act. *See In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d at 1074 n.5 (opinion announcing judgment); *id.* at 1089 n.54 (Wecht, J., concurring in part and dissenting in part). The Third Circuit recently concluded that the handwritten date requirement is “immaterial to a voter's qualifications and eligibility under § 10101(a)(2)(B).” *Migliori v. Cohen*, 36 F.4th 153, 157 (3d Cir. 2022), *cert. granted, judgment vacated sub nom. Ritter v. Migliori*, 2022 WL 6571686 (U.S. Oct. 11, 2022). The U.S. Supreme Court’s vacatur for mootness did not address the substance of the Third Circuit’s decision, leaving its persuasive value untouched. *See generally United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) (noting that reversing or vacating a decision that became moot on its way to the U.S. Supreme Court is the “established practice” of the Court). This Court should similarly conclude that

invalidating timely cast absentee and mail-in ballots by qualified electors only because the mailing envelope lacks a handwritten date violates the Materiality Provision of the Civil Rights Act.

The Materiality Provision provides that “[n]o person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission *on any record or paper relating to any application, registration, or other act requisite to voting*, if such error or omission is not material in determining *whether such individual is qualified under State law to vote in such election.*” 52 U.S.C. § 10101(a)(2)(B) (emphasis added). “Vote,” as used in the Materiality Provision, means “all action necessary to make a vote effective, including, but not limited to, registration or other action required by State law prerequisite to voting, *casting a ballot, and having such ballot counted* and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election.” *Id.* § 10101(e) (emphasis added). Failure to comply with a requirement of the Pennsylvania Election Code cannot be a basis denying a person the right to have their “ballot counted” if the error is “on any record or paper relating to any application, registration, or other act requisite to voting” and “not material in determining whether such individual is qualified under State law to vote in such election.” *Id.* §§ 10101(a)(2)(B), (e).

Here, the RNC argues that the Board must not count timely received ballots cast by qualified electors which lack a handwritten date on the exterior mailing envelope. The RNC's argument would deny individuals the right to vote as defined by the Civil Rights Act. § 10101(e). The accompanying outside mailing envelope for absentee and mail-in ballots is a "paper relating to any . . . other act requisite to voting." § 10101(a)(2)(B). The Election Code requires a voter to place the voted (paper) ballot into the (paper) secrecy envelope and place that secrecy envelope into the exterior (paper) mailing envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). The Board cannot count absentee or mail-in ballots not in the exterior mailing envelope, *id.* § 3146.8(g)(3), making the exterior envelope a prerequisite to voting.

The handwritten date requirement cannot be the sole basis for rejecting an absentee or mail-in ballot unless the handwritten date "goes to determining age, citizenship, residency, or current[] imprisonment for a felony." *Migliori*, 36 F.4th at 163. As the Third Circuit thoroughly explained, there is no "persuasive reason for how this requirement helped determine any of these qualifications." *Id.* at 163-64. Moreover, as explained above and in *Chapman*, the handwritten date on the exterior mailing envelope plays no role in determining a voter's qualification during the pre-canvass or canvass; instead, voter qualification is assessed when the Board approves the application for an absentee or mail-in ballot. *See Berks Cnty.*, 2022 WL 4100998 at *19. Because the handwritten date on the exterior mailing

envelope plays no role in determining a person's qualification to vote in Pennsylvania, any error in or omission of that date cannot form the sole basis for rejecting a ballot.¹⁰

3. Even If the RNC Could Show a Likelihood Of Success Under Pennsylvania and Federal Law, Its Requested Relief Cannot Reasonably Be Implemented.

The RNC asks this Court to disenfranchise not just qualified electors who inadvertently left the handwritten date off their timely cast ballot, but also voters who put in the "incorrect" date. But as explained above, the Election Code does not clearly explain what date it expects the voter to handwrite on the declaration. And even if this Court finds that the word "date" has a sub silentio meaning, the Board cannot determine whether that date is correct. The Board can only know when it receives and date/time stamps the ballot envelope. Without a means of assessing the correctness of a handwritten date, the Court should not order the Board to segregate "incorrectly dated" absentee and mail-in ballots.

B. The RNC Has Not Even Tried to Meet the Other Injunction Factors.

The RNC did not meet their burden to establish *any* of the necessary factors

¹⁰ The RNC cites Justice Alito's dissent from the denial of application for stay in *Migliori*, RNC App. at 19-22, as its primary source of authority for why the Materiality Provision does not prohibit the relief it seeks. It should go without saying that this Court should not find any persuasive value in a three-Justice dissent from the denial of an application for stay in a case in which the Supreme Court subsequently took no position on the merits, especially when Justice Alito acknowledged that "further briefing and argument might convince [him] that [his] current view is unfounded." *Ritter v. Migliori*, 142 S. Ct. 1824 (2022) (Alito, J., dissenting).

for preliminary relief. Following *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003), they meet none of them.

First, there is no immediate and irreparable harm, and their claims of immediate and irreparable harm are factually speculative and legally unsupported. *See* discussion *supra* Part I.B.

Second, an injunction would impose greater injury on disenfranchised voters than the RNC. Preliminary relief here would deprive qualified voters who returned timely ballots of the opportunity to have their votes counted, disenfranchising them. It would also require the Board, currently in the midst of administering the 2022 General Election, to divert critical resources from mailing and processing tens of thousands of ballots to modify—potentially only temporarily—their practices. *RNC v. Chapman*, 447 MD 2022 at 43 (Pa. Cmwlth. Sept. 29, 2022). An injunction would also “cause confusion and uncertainty [by] altering election administration in many counties” which had previously communicated their existing procedures to the public. *Id.* at 44-45.

Third, an injunction would disrupt the status quo and impose greater harm on the Board and the public interest by disrupting the 2022 General Election and disenfranchising voters. The RNC’s argument that they merely seek to restore the last uncontested status quo by eliminating procedures that have already been the subject of multiple court cases is nonsensical. In the context of the current election,

voters have made plans to vote based on procedures they understand are available in their counties.

Fourth, the RNC is not “clearly correct” on the merits such that this Court should act speedily to act on their requests. *See supra* Part II.A. As intervening cases demonstrate, the RNC’s theory that the Election Code and this Court’s prior opinion clearly prohibit the Board from counting ballots that lack a handwritten date on the exterior envelope is not correct. As the Commonwealth Court noted in *McCormick*, all parties acknowledged that mis-dated ballots were routinely accepted, and no party had moved to exclude them. *McCormick*, 2022 WL 2900112, at *6. Additionally, as stated *supra* in Section II.A.2., the RNC has not resolved the issue of the materiality clause prohibiting irrelevant impediments to an elector’s right to vote.

Fifth and sixth, the RNC’s requested injunction is not reasonably tailored, and it is against the public interests. The RNC requests a mandatory injunction forcing Respondents to segregate ballots without a correct handwritten date, but it does not address any standards by which respondents are supposed to determine that ballots are incorrectly dated, much less how a county board of a election implements this in the weeks before Election Day. Such an unreasonable request would only confuse voters.

The flurry of lawsuits during and after the 2020 General Election undermined

voter confidence. And they did so without a scintilla of evidentiary support that Pennsylvania's elections were tainted by fraud. *E.g., Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania*, 830 F. App'x 377, 381 (3d Cir. 2020) (“[C]alling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.”). And just as there were no actual facts showing fraud in the myriad of cases filed in Pennsylvania and across the country in 2020, there is no suggestion of wrongdoing in this case. Entertaining the RNC's request would similarly undermine voter confidence in the election.

The RNC does not allege that qualified voters are doing anything other than trying to vote. Nor does the RNC allege that county boards of elections are doing anything other than counting timely ballots received from qualified electors. Despite this, the RNC argues that the best efforts of the Board will somehow harm public trust and confidence in the integrity of Pennsylvania's elections. RNC App. at 4. The proposition that public confidence is damaged when voters vote is remarkable and should not be indulged by this Court. It is the disenfranchisement of voters out of fear rather than efforts to ensure the franchise that would raise questions about the integrity of Pennsylvania's elections.

CONCLUSION

For all the foregoing reasons, Respondent the Philadelphia County Board of Elections respectfully asks that this Court deny Petitioners' application for

extraordinary jurisdiction under 42 Pa. C.S. § 726.

Respectfully submitted,
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Dated: October 19, 2022 *Board of Elections*

CERTIFICATE OF SERVICE

I, Zachary G. Strassburger, hereby certify that I caused to be served a true and correct copy of the foregoing **Answer in Opposition to Application for Extraordinary Relief** upon counsel of record and the unrepresented counties by electronic filing and by first class mail, postage prepaid.

/s/ Zachary G. Strassburger

Zachary G. Strassburger
City of Philadelphia Law Department

Dated: October 19, 2022

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Pennsylvania Rule of Appellate Procedure 1116 because this Answer to Petition for Extraordinary Jurisdiction contains **8306** words, excluding the Supplementary Matter exempted by Pa. R. App. P. 2135(b).

/s/ Zachary Strassburger

Zachary Strassburger
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Dated: October 19, 2022

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that requires filing confidential information and documents differently than non-confidential information and documents.

/s/ Zachary G. Strassburger
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October 19, 2022

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