
United States Court of Appeals
for the
Third Circuit

Appeal No. 23-3166

PENNSYLVANIA STATE CONFERENCE OF THE NAACP, et al.,
Plaintiffs-Appellees,

v.

SECRETARY OF THE COMMONWEALTH, et al.,
Defendants-Appellants,
REPUBLICAN NATIONAL COMMITTEE, et al.,
Intervenors-Appellants,
DEMOCRATIC NATIONAL COMMITTEE, et al.,
Intervenors-Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA IN CASE NO. 1:22-CV-00339,
HONORABLE SUSAN PARADISE BAXTER

**BRIEF OF *AMICUS CURIAE* BIPARTISAN POLICY CENTER
IN SUPPORT OF APPELLEES' PETITIONS FOR
REHEARING *EN BANC***

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel certifies that *amicus curiae* Bipartisan Policy Center is not a subsidiary of any other corporation and no publicly held corporation owns 10 percent or more of the Bipartisan Policy Center's stock.

Dated: April 17, 2024

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INTEREST OF *AMICUS CURIAE*

The Bipartisan Policy Center (“BPC”) is a nonprofit organization based in Washington, D.C. that helps policymakers work across party lines to craft bipartisan policies. The *amicus* respectfully submits that it has a unique perspective that will aid the Court in considering whether to rehear this case *en banc*.¹

BPC was founded more than 15 years ago by former Senate Majority Leaders Howard Baker (R-TN), Tom Daschle (D-SD), Bob Dole (R-KS), and George Mitchell (D-ME) to provide a vehicle for bipartisan collaboration. The organization is devoted to connecting policymakers, business and labor leaders, academics and advocates; providing them with objective information and data; and facilitating policy discussions and negotiations to achieve bipartisan solutions. Through this approach, BPC has built trust and strong relationships with policymakers across the political spectrum. BPC works closely with lawmakers from both political parties to address the country’s most pressing policy issues, including fair elections and ballot access.

¹ BPC submits this brief solely as *amicus curiae*. The undersigned certifies that no counsel for a party authored this brief in whole or in part; no party or party’s counsel contributed money to fund preparing or submitting this brief; and no person other than the *amicus curiae* or its counsel contributed money intended to fund preparing or submitting this brief.

BPC's Elections Project develops and advances bipartisan policy solutions to create secure, accessible, and trustworthy elections. In 2019, BPC's Elections Project established its Task Force on Elections as an extension of the 2013 BPC Commission on Political Reform. The Task Force on Elections set out to explore aspects of the voting process from voter registration through certification and auditing of results, with the goal of generating bipartisan policy recommendations that improve the voting experience.

BPC respectfully submits this *amicus curiae* brief in support of Plaintiffs-Appellees and Defendants-Appellees' petitions for rehearing *en banc*, to express its views that a qualified, registered voter's failure to date a mail-in ballot, by itself, does not justify disqualifying that voter's ballot, and that this important issue deserves the full court's attention.

SUMMARY OF ARGUMENT

Given the other significant safeguards Pennsylvania has in place to ensure its elections are accessible, secure, and trustworthy, like its use of barcodes and signature requirements, there is no reason why a Pennsylvania voter's mail-in ballot should not be counted if the voter makes a harmless, clerical error in dating their declaration on the outside of the ballot return envelope. As BPC has previously observed, allowing votes to not be counted under this law is "poor policy and bad for democracy" for a number of reasons.

First, the enforcement of the mail-in ballot dating rule places an undue burden on Pennsylvanians' ability to cast their vote, which has already resulted in the disqualification of *thousands* of ballots because of an inconsequential paperwork error. This rule's application risks excluding thousands more in the 2024 elections and beyond.

Second, the inconsistent enforcement of the mail-in ballot dating rule by different county boards risks undermining voters' trust in Pennsylvania's elections, especially without assured opportunities for voters to rectify dating errors on ballots.

Third, the mail-in ballot dating rule does not enhance election security. For example, the date on the ballot does not serve to verify the timeliness of the ballot or the identity or eligibility of the voter.

As the panel’s decision will allow Pennsylvania to implement this “bad for democracy” policy, this case involves a question of exceptional importance that should be reheard by this Court *en banc*.

ARGUMENT

I. Pennsylvania’s Mail-In Ballot Dating Rule Disqualifies Eligible Voters, Undermines Public Trust in Pennsylvania’s Election Process, and Serves No Purpose in Protecting Election Security

Pennsylvania requires that a voter casting a ballot by mail date the declaration that is printed on the return envelope before mailing in the completed ballot. 25 P.S. § 3150.16(a). This requirement may seem innocuous on paper, but in practice, it has proven to be a harmful policy that has had—and will continue to have—deleterious effects on the administration of Pennsylvania elections.

To request a mail-in ballot, “a registered voter must apply to his county election board and provide, among other things, his name, address, date of birth, proof of identification, and length of residency in the voting district.” Maj. Op. at 17–18. Once a voter is deemed eligible and provided a mail-in ballot, they receive “a package containing the ballot, a secrecy envelope, and a pre-addressed return envelope.” *Id.* at 18. This return envelope is tailored to “each voter and features a declaration as well as a unique barcode that allows the county board to track each ballot.” *Id.*

As the Majority observed in this case, “the date on the declaration plays no role in determining the ballot’s timeliness.” *Id.* Instead, timeliness is “established both by a receipt stamp placed on the envelope by the county board and separately through scanning of the unique barcode on the envelope.” *Id.* “[A] ballot is timely if received before 8:00 p.m. on Election Day [N]ot one county board used the date on the return envelope to determine whether a ballot was timely received in the November 2022 election.” *Id.* at 22. Nor does the date on the envelope play any role in determining the eligibility of the voter. *See id.* at 17–18 (noting that “an individual is qualified to vote if that person” is at least 18, a U.S. citizen for at least a month before the election day, has resided in PA and the election district for at least thirty days, and “has not been imprisoned for a felony conviction with the last five years”).

Nevertheless, in the November 2020 and November 2022 elections, failures to strictly comply with the envelope-dating rule resulted in the disqualification of the ballots of *thousands* of voters who “omitted the date,” or wrote “shortened or obviously incorrect dates.” *Id.* at 19. This result runs counter to BPC’s core belief that “[a]ll qualified individuals [should be] able to register and cast their ballot in a free, fair, and private manner without undue burden or

barrier.”² Disqualifying mail-in ballots because of a clerical error discounts the electoral preference of eligible voters and reduces voter access; undermines Pennsylvanians’ trust in the election process; and does nothing to protect the security of elections.³

The harmful effects of this rule were exacerbated during the 2020 and 2022 elections as a result of its inconsistent application because “county boards took different approaches to enforcing the date requirement,” with some (but not all) counties requiring strict compliance with the rule and some (but not all) counties offering noncompliant voters an opportunity to cure their ballots. *Id.* at 19. Put simply, a voter’s access to the ballot should not vary based on the county in which that voter resides.

² Rachel Orey, et al., *Policy to Carry Us Beyond the Next Election*, Bipartisan Policy Center (Apr. 2023), https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2023/04/BPC_Elections-Policy-to-Carry-Us-Beyond-the-Next-Election.pdf.

³ Additionally, in *Migliori v. Cohen*, 36 F.4th 153, 156–57 (3d Cir. 2022), the Court reached the exact opposite conclusion that the panel here reached, holding that the mail-in ballot dating requirement violates the materiality provision of the Civil Rights Act, and prohibiting election officials from casting aside otherwise validly cast votes based on a harmless error. While the panel’s decision here and *Migliori* do not create an intra-circuit conflict because *Migliori* was vacated, *see Ritter v. Migliori*, 143 S. Ct. 297 (2022), to avoid any further confusion on this issue which may erode trust in elections, the *en banc* court should decide this issue once and for all

The problem of the mail-in ballot dating rule is not a partisan issue. Indeed, this rule has been the subject of criticism by several nonpartisan organizations and agencies dedicated to promoting good government and secure, accessible, and trustworthy elections. BPC, for its part, has raised concern about this issue on several occasions and remains concerned by its harmful effects and inconsistent implementation. For example, in June 2022, the director of BPC's Elections Project released a statement following Pennsylvania's 2022 primary election expressing BPC's position that while "[a]bsentee ballot verification serves to ensure that 1) the voter is eligible and 2) the ballot was cast by the deadline[,] . . . [w]hether or not a voter remembers to include a date with their signature achieves neither of these things."⁴ BPC believes that "[e]xploiting inconsequential errors or omissions to invalidate otherwise eligible ballots received by the deadline is poor policy and bad for democracy."⁵

BPC's position also is consistent with that of Pennsylvania's Joint State Government Commission, the "primary and central non-partisan, bicameral research and policy development agency for the General Assembly of

⁴ *BPC Elections Director Statement on Delayed Counting of Undated Ballots in Pennsylvania* (June 2, 2022), <https://bipartisanpolicy.org/press-release/bpc-elections-director-statement-on-delayed-counting-of-undated-ballots-in-pennsylvania/>.

⁵ *Id.*

Pennsylvania.”⁶ In January 2023, the Joint State Government Commission released its *Mail-In Ballots* report, which recommended that “the requirement to date the mail-in or absentee ballot be clarified to indicate . . . that failure to provide a date should not disqualify the ballot if all other requirements, including the signature of the voter, have been fulfilled.”⁷ The Joint State Government Commission reaffirmed this position in its most recent annual report.⁸

For all these reasons, this case “involves a question of exceptional importance” regarding Pennsylvania voters’ access to the ballot and the fair administration of elections in Pennsylvania. Fed. R. App. P. 35(a)(2).

Pennsylvania voters deserve to feel confident in the election process and the systems they will use to vote this coming November. Accordingly, *en banc* review is warranted.

⁶ *Mail-In Ballots: An Interim Report of the Election Law Advisory Board*, Joint State Government Commission (Jan. 2023), <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2023-01-11%20ELAB%20Mail-In%20Ballot%201.10.23.pdf> (“*Mail-In Ballots* Report”).

⁷ *Id.* at 31–32.

⁸ See *Election Law in Pennsylvania: Third Annual Report of the Election Law Advisory Board*, Joint State Government Commission 3 (Aug. 2023), [http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2023-08-23%20WEB%20ELAB%202023%20FIN%20\(8.22.23\).pdf](http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2023-08-23%20WEB%20ELAB%202023%20FIN%20(8.22.23).pdf) (the Commission “continues to support the proposals set forth” in the *Mail-In Ballots* Report).

A. The Mail-In Ballot Dating Rule Causes Eligible Voters' Ballots to Be Invalidated Thereby Reducing Access to Voting

Pennsylvania's mail voting system is the product of bipartisan cooperation aimed at improving the administration of elections and expanding access to the ballot for all Pennsylvanians. In 2019, Pennsylvania enacted its "no excuse" absentee ballot option through a bill that was passed by a Republican House and a Republican Senate, and was signed into law by a Democratic governor. According to the Secretary of the Commonwealth, because of this reform and others, Pennsylvania's election laws have changed "for the better" and elections are "more accessible, more safe, and more secure than ever."⁹ Indeed, an extraordinary number of Pennsylvanians have relied on mail-in voting to cast their ballots since the system went into effect. For example, in the November 2020 general election more than 2.6 million mail and absentee ballots were cast and

⁹ *Ballot Box Briefing: Episode 6*, Bipartisan Policy Center (February 27, 2024), <https://bipartisanpolicy.org/podcast-episode/ep-6-pennsylvania-secretary-of-the-commonwealth-al-schmidt/b>. BPC has conducted extensive research on mail voting across all 50 states and has reported that "[m]ail voting is a safe, secure, and reliable voting method used by voters of all political parties." Elections Project Staff, *Mail Voting is Safe and Secure*, Bipartisan Policy Center (Mar. 13, 2024), <https://bipartisanpolicy.org/report/mail-voting-is-safe-secure/>.

counted.¹⁰ And local news outlets have reported that 1.4 million Pennsylvanians requested to vote by mail in the November 2022 election.¹¹

Rigid enforcement of the mail-in ballot dating rule turns a system designed to increase access to the ballot into one that potentially disenfranchises voters who neglect to clear an immaterial procedural hurdle. Whatever the intended purpose of requiring mail-in voters to date the voter declaration on the return envelope for their ballot, the date requirement in practice has served mainly to disenfranchise eligible voters by disqualifying otherwise valid ballots. As the Joint State Government Commission reported, “[o]mitting the date or using an obviously incorrect date results in the disenfranchisement of the voter for what seems to be *harmless error*.” *Mail-In Ballots Report* at 31 (emphasis added). After all, “[i]t can be assumed that the voter filled out the ballot sometime between the date he or she received it and the date it was returned.” *Id.*

The unjustified disqualification of valid ballots is a threat to the ballot access of *thousands* of voters who will rely on Pennsylvania’s mail-in voting system this coming November and beyond, to say nothing of the harm this rule has

¹⁰ *Pennsylvania Election Stats*, Pennsylvania Department of State, <https://www.dos.pa.gov/VotingElections/BEST/Pages/BEST-Election-Stats.aspx> (last visited Apr. 12, 2024).

¹¹ Kate Huangpu, *1.4 million Pennsylvanians asked to vote by mail. Here’s what that means for Election Week 2022 counting.*, Spotlight PA (Nov. 3, 2022), <https://www.spotlightpa.org/news/2022/11/pa-election-2022-mail-ballot-requests-data-counting-delays/>.

already caused. The parties in this action do not dispute that “[i]n the 2022 general election, county boards refused to count at least 10,500 timely-received mail ballots based on missing or purportedly ‘incorrect’ handwritten dates on the outer return envelope. The affected voters are registered Democrats, Republicans, and Independents, ranging from ages 18 to 101. They hail from across the Commonwealth.” Plaintiffs-Appellees’ Opposition Br. at 10, ECF No. 151 (citations omitted). If the mail-in ballot dating rule is allowed to stand, more eligible voters will have their ballots disqualified for what amounts to “harmless error.”

B. Disqualifying Mail-In Ballots for a Harmless, Clerical Mistake Without a Guaranteed Opportunity to Cure Undermines Voters’ Trust in the Election Process

Trust in the outcome of elections is of paramount importance to a functioning democracy. Unfortunately, about a third of Americans believe that votes will be inaccurately counted across the country in the upcoming presidential election.¹² To encourage trust in elections, in January 2020, BPC released its *Logical Election Policy* report, in which the BPC Task Force on Elections recommends, among other things, that “[s]tates should allow sufficient time for

¹² Jeff Allen, Katie Harbath, Rachel Orey, & Thania Sanchez, *Who Voters Trust for Election Information in 2024*, Bipartisan Policy Center (Feb. 26, 2024), <https://bipartisanpolicy.org/explainer/who-voters-trust-election-information-2024/>.

voters to cure eligibility deficiencies in vote-by-mail ballots, even if this period extends beyond Election Day.”¹³

The mail-in-ballot dating rule has the potential to undermine the public’s trust in elections, as the Panel’s decision leaves in place a law that is inconsistently applied. For example, individual counties decide whether and to what extent to permit ballot curing. As a result, the ability for a Pennsylvania citizen to correct the date and have their vote count varies solely based on what county they happen to live in.¹⁴ Such discretionary decision-making in election policy may cause voters to rightfully question the fairness of the process. The availability, process, and timeline to cure ballots should be substantially the same for all Pennsylvania voters.¹⁵

C. The Mail-In Ballot Dating Rule Does Not Protect Election Security or Integrity

BPC considers election security to be a high priority for election administration and has long advocated for robust verification measures that make mail-in ballots secure. For instance, BPC supports practices, such as signature

¹³ *Logical Election Policy*, Bipartisan Policy Center 43 (Jan. 2020), <https://bipartisanpolicy.org/explainer/who-voters-trust-election-information-2024/>.

¹⁴ Joe Webster & Kim Wyman, *There’s Still Time to Strengthen Pennsylvania’s Election Process*, Bipartisan Policy Center (Dec. 6, 2023), <https://bipartisanpolicy.org/blog/theres-still-time-to-strengthen-pennsylvanias-election-process/>.

¹⁵ *Id.*

verification, frequent registration list updates, ballot tracking, voter data matching, and Election Day deadlines, to ensure that ballots cast by mail are legally valid.¹⁶ At the same time, BPC has cautioned against the use of excessive verification measures, such as witness or notary signatures, that impede voters' access to the electoral process, without contributing meaningfully to election security or integrity.

The mail-in-ballot dating rule is such a measure. The information conveyed by the date on a mail-in ballot does not bear on a voter's proper identification or eligibility to vote, as the date—accurate or not—does not verify that the ballot was cast by the voter who submitted it, and has nothing to do with a voter's (1) age, (2) citizenship, (3) residency, or (4) history of imprisonment. *See* Pa. Const. art. VII, § 1; 25 P.S. § 2811, 25 Pa.C.S. § 1301(a).

Pennsylvania's other verification requirements help to ensure that a mail-in ballot is secure, irrespective of the date written by the voter on the return envelope. For example, voters who are deemed eligible to vote by mail receive “a package containing the ballot, a secrecy envelope, and a pre-addressed return envelope” that is “specific to each voter and features a declaration as well as a unique barcode that allows the county board to track each ballot.” *Maj. Op.* at 18.

¹⁶ *See Prioritizing Achievable Federal Election Reform*, Bipartisan Policy Center 8–16 (Jan. 2022), <https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2022/02/AchievableFederalElectionReformV2.pdf>.

The date that the voter writes on the envelope when signing their declaration adds nothing to these security features.

Nor does the date written by the voter on the envelope provide any information about whether the ballot is timely. Instead, the ballot's timeliness is determined by the date it is received, as established by county board stamping the envelope and scanning the unique barcode. The date the voter writes when signing the declaration on the outside of the envelope plays no role in this process.

In short, the mail-in ballot dating rule does nothing to verify the identity of the voter or their eligibility to vote, or whether their ballot was timely received. Pennsylvania has other safeguards that perform these important functions. Voters should not be disenfranchised for a harmless error that does nothing to enhance the security of elections.

CONCLUSION

For the foregoing reasons, BPC respectfully urges the Court to grant rehearing *en banc*.

Dated: April 17, 2024

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Under 3d Cir. L.A.R. 28.3(d), I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: April 17, 2024

/s/ Yahnnes Cleary

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Dated: April 17, 2024

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the United States Court of Appeals for the Third Circuit by using the CM/ECF system on April 17, 2024.

I certify that all participants in the case are registered CM/ECF users and thus will be served by the CM/ECF system, which constitutes service pursuant to Fed. R. App. 25(c)(2).

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