

# IN THE SUPREME COURT OF PENNSYLVANIA

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No. 136 MM 2024

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The Republican National Committee and the Republican Party of  
Pennsylvania,

*Petitioners,*

v.

All 67 County Boards of Elections (see back cover for list),

*Respondents.*

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## RESPONSE OF PROPOSED INTERVENORS DSCC AND BOB CASEY FOR SENATE, INC. TO APPLICATION FOR THE EXERCISE OF KING'S BENCH POWER OR EXTRAORDINARY JURISDICTION

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*Respondents.*

## TABLE OF CONTENTS

TABLE OF CITATIONS .....	ii
INTRODUCTION .....	1
ARGUMENT .....	3
I.    The RNC’s application should be denied. ....	3
II.   Granting the RNC’s request to reject timely-received ballots cast by qualified voters would force county boards to violate the Pennsylvania Constitution.....	5
A.  The county boards’ decisions to count undated or misdated ballots are consistent with the Pennsylvania Constitution. ....	5
B.  This case does not require the Court to sever any part of the Commonwealth’s mail voting laws. ....	13
C.  The county boards’ actions do not offend Equal Protection. ..	15
III.  The equities weigh overwhelmingly against the RNC’s requested relief here, which seeks to disrupt the ongoing work of county election officials. ....	19
CONCLUSION .....	22
CERTIFICATE OF COMPLIANCE WITH WORD LIMIT .....	24
CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 127 .....	24
CERTIFICATE OF SERVICE.....	24

## INTRODUCTION

The Republican National Committee and Republican Party of Pennsylvania (collectively “RNC” or “Applicants”) ask this Court to exercise its extraordinary King’s Bench authority to toss out the mail ballots<sup>1</sup> of hundreds of Pennsylvania voters who, no one disputes, are qualified to vote and cast their ballots in a timely manner. The Court should decline to entertain this request for a host of reasons.

To start, this is not a proper instance to grant King’s Bench review. The Legislature has prescribed procedures for appealing the decisions of county boards of elections. See 25 P.S. § 3157(a). The RNC knows this—it has filed parallel challenges to the same board decisions at issue here in various Courts of Common Pleas, cluttering the court system with duplicative requests for relief. Rather than short-circuit the Legislature’s preferred mode of review, the RNC should be required to pursue its claim through the ordinary channels set by the Legislature, which still permit appellate review by this Court if needed.

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<sup>1</sup> Proposed Intervenor use the terms “mail ballots” and “mail voting” here to encompass both forms of voting offered in Pennsylvania that are subject to the dating envelope requirement: absentee ballots, see 25 P.S. § 3146.6; and mail-in ballots, see 25 P.S. § 3150.16.

Even if the Court grants review, it should not disturb the decisions of the boards to count timely ballots cast by qualified voters simply because those voters failed to properly date the declaration on their mail ballot return envelopes. As the Commonwealth Court has now *repeatedly* found, enforcing this date requirement to disenfranchise voters violates the Pennsylvania Constitution. The boards did nothing more than act in a manner consistent with those well-reasoned decisions. The RNC, for its part, offers *no argument at all* as to how the date requirement is constitutional; indeed, it cannot even offer a plausible rationale for the requirement, never mind one weighty enough to survive strict scrutiny and justify disenfranchising voters. It instead pretends that various orders of this court barred the county boards from conducting their canvassing duties in a constitutional manner. But none of those decisions purported to either resolve the merits issue presented here or to bind the canvassing actions of county officials.

The RNC's remaining arguments likewise fail to warrant the dramatic and harmful relief sought. The RNC raises the specter that leaving the board decisions in place will require striking down the entirety of Pennsylvania's mail ballot law. But declining review here will have no such consequence, and the RNC's argument badly misunderstands this Court's severability

jurisprudence. Equally infirm is its suggestion that the boards here have violated the Fourteenth Amendment's Equal Protection Clause by canvassing votes in a manner consistent with the Pennsylvania Constitution. Even if the RNC was right on that score—and it is not—the proper relief would be to enfranchise *additional* voters, not to force county boards to disenfranchise Pennsylvanians, as the RNC demands. Finally, the RNC's appeal to the so-called *Purcell* principle turns that doctrine on its head. *Purcell* cautions against late-in-time *judicial* amendment of election rules that could harm *voters* on the eve of an election. But Pennsylvanians have already cast their ballots and it is the *RNC* who is asking this Court to disrupt the ongoing work of election officials.

In sum, the RNC offers little reason for this Court to exercise its discretion to hear this case. The Court should not strain to reach an important constitutional issue, on an expedited basis, simply to toss out hundreds of ballots county boards have voted to count. The application should be denied.

## **ARGUMENT**

### **I. The RNC's application should be denied.**

The RNC's application for this Court to exercise its extraordinary King's Bench power is an improper end-run around the systematic and orderly process provided by statute for contesting county boards' decisions to count

disputed ballots. Specifically, if the RNC is “aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election . . . [then the RNC] may appeal therefrom within two days after such order or decision shall have been made.” 25 P.S. § 3157(a). The RNC is clearly aware that this is the proper procedure because it has already appealed to the Court of Common Pleas the decisions by Bucks and Philadelphia County to count misdated and undated ballots.<sup>2</sup> The RNC offers no explanation for why that standard process is insufficient. By cluttering the judicial process with this King’s Bench application (and with an emergency application in a closed case where it was not a party),<sup>3</sup> the RNC has introduced serial redundancies that depart sharply from the Legislature’s prescription. And it is all for no discernable purpose: Final review by this Court—if necessary—will remain available at an appropriate time and on an appropriate record. *See, e.g., Genser v. Butler Cnty. Bd. of Elections*, Nos. 26 WAP 2024, 27 WAP 2024, 2024 WL 4553285, at \*4–6 (Pa. Oct. 23, 2024); *Baxter*, 2024 WL 4614689, at \*1–2. There is simply no

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<sup>2</sup> See Pet. for Review in the Nature of a Statutory Appeal, *McCormick v. Bucks Cnty. Bd. of Elections*, No. 2024-07228 (Ct. Common Pleas, Bucks Cnty. Nov. 14, 2024); Notice of Appeal via Pet. for Review of Decision by the Phila. Cnty. Bd. of Elections, *In re Canvass of Absentee and Mail-in Ballots of Nov. 5, 2024 Election*, No. 241101877 (Ct. Common Pleas, Phila. Cnty. Nov. 14, 2024)

<sup>3</sup> See Proposed Intervenors-Resps.’ Emergency Appl. to Enforce the Court’s Oct. 5 Order, *New PA Project v. Schmidt*, No. 112 MM 2024 (Pa. Nov. 13, 2024)

need to entertain the RNC's improvised approach when the Legislature has already prescribed the proper mode for appealing board decisions, and where the RNC is currently a full participant in that statutory appeal process, 25 P.S. § 3157.

**II. Granting the RNC's request to reject timely-received ballots cast by qualified voters would force county boards to violate the Pennsylvania Constitution.**

If this Court does reach the merits of the question at hand, it should decline to disturb the canvassing decisions of the county boards, which are consistent with—and, in fact, compelled by—the Pennsylvania Constitution. As several boards and the Commonwealth Court have correctly reasoned, tossing out timely ballots cast by qualified Pennsylvania voters due to missing or incorrect dates on the return envelope violates the Free and Equal Elections clause of the Pennsylvania Constitution. The RNC's contrary equal protection and severability arguments do not change this required outcome.

**A. The county boards' decisions to count undated or misdated ballots are consistent with the Pennsylvania Constitution.**

Pennsylvania's Free and Equal Elections Clause guarantees that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5. The Clause mandates that elections be “conducted in a manner which guarantees, to the greatest degree possible, a voter’s right to



equal participation in the electoral process for the selection of his or her representatives in government.” *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018). In other words, “elections are free and equal within the meaning of the Constitution . . . when each voter under the law has the right to cast his ballot and have it honestly counted; [and] when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). Indeed, this Court has long instructed that “[t]he power to throw out a ballot for minor irregularities . . . must be exercised very sparingly and . . . an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons.” *Appeal of Norwood*, 116 A.2d 552, 555 (Pa. 1955) (quotation omitted); *accord Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945). And it is the “longstanding and overriding policy in this Commonwealth to protect the elective franchise.” *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004).

Consistent with these principles, the Commonwealth Court in recent months has repeatedly determined that—under the Free and Equal Elections Clause—the dating requirement at issue (1) is subject to strict scrutiny and (2) fails such scrutiny. See *Baxter v. Phila. Bd. of Elections*, No. 1305 C.D. 2024, 2024 WL 4614689, at \*17 (Pa. Commw. Ct. Oct. 30, 2024); *Black Pol.*

*Empowerment Project v. Schmidt*, No. 283 M.D. 2024, 2024 WL 4002321, at \*32 (Pa. Commw. Ct. Aug. 30, 2024) (“*BPEP*”), *vacated on other grounds*, 322 A.3d 221 (Pa. 2024) (Mem.). Three Justices of this Court have likewise observed that “failure to comply with the date requirement would not compel the discarding of votes in light of the Free and Equal Elections Clause, and our attendant jurisprudence that ambiguities are resolved in a way that will enfranchise, rather than disenfranchise, the electors of this Commonwealth.” *Ball*, 289 A.3d at 27 n.156. The actions of the boards that have canvassed undated and misdated ballots are entirely consistent with this precedent and thus should not be set aside.

The reason the Commonwealth Court has repeatedly reached this decision is clear—as the Third Circuit recently explained, the date requirement “serves little apparent purpose.” *Pa. State Conf. of NAACP Branches v. Sec’y Commonwealth of Pa.*, 97 F.4th 120, 125 (3d Cir. 2024). Indeed, it serves no function at all: “It is not used to confirm timely receipt of the ballot or to determine when the voter completed it.” *Id.* Rather than relying on the handwritten date on the declaration to determine a ballot’s timeliness,

boards “stamp the date of *receipt* on the ballot-return envelope”<sup>4</sup> and record that date in SURE, the state’s voter database.<sup>5</sup> While county officials must compare information on the envelope such as the voter’s name and address with the official registration records to ensure that the person casting the ballot is a qualified voter, the handwritten date is examined only to determine whether it is (1) present, and (2) correct as defined by each board.<sup>6</sup> The handwritten date is *not* used to determine whether the voter is qualified, and it is the “date received” as recorded by officials using the stamp and SURE that determines a ballot’s timeliness.<sup>7</sup> The Commonwealth Court’s decisions properly recognize that this pointless requirement cannot survive strict scrutiny.

Although these cases are not currently binding—*Baxter* was stayed due to the proximity of the November 2024 elections, *Baxter*, 2024 WL 4650792, at \*1, while *BPEP* was vacated on jurisdictional grounds, *Black Pol. Empowerment Project v. Schmidt*, 322 A.3d 221, 222 (Pa. 2024)—the

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<sup>4</sup> Pennsylvania Department of Commonwealth, *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes* at 2 (April 3, 2023), <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2023-04-03-Examination-Absentee-Mail-In-Ballot-Return-Envelopes-4.0.pdf>. Last visited Nov. 13, 2024.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

careful analysis in both decisions remains persuasive. And no contrary authority prevents the county boards from reaching decisions to count on constitutional grounds the mail ballots that do not comply with the date requirement. The RNC suggests this Court's orders in *Baxter* and *New PA Project* precluded the boards' decisions, but they did no such thing. In *Baxter*, for example, this Court *declined* to disturb an earlier, non-precedential Commonwealth Court decision *permitting* county officials to count undated and misdated ballots in a September 2024 special election—precisely as the boards did here. *Baxter v. Philadelphia Board of Elections*, Nos. 76 EM 2024, 77 EM 2024, 2024 WL 4650792, at \*1 (Pa. Nov. 1, 2024) (per curiam). This Court “stayed” the decision only to the extent it might be read to bind all election officials moving forward—a request no party makes here. *Id.* The order otherwise cast no doubt on the Commonwealth Court's cogent analysis. Similarly, this Court's order *declining* King's Bench review in *New PA Project* says nothing about the merits here and certainly did not bind the county boards. *Cf. Powell v. Barrett*, 541 F.3d 1298, 1313 n.5 (11th Cir. 2008) (collecting extensive authority confirming “that the denial of certiorari does not in any way or to any extent reflect or imply any view on the merits”).

In view of the Commonwealth Court's persuasive analysis, the RNC must clear a high bar to show the boards erred by counting the disputed

ballots. To start, the RNC's demand to throw out ballots is subject to strict scrutiny because the date requirement that it seeks to enforce "restrict[s] the right to have one's vote counted . . . to only those voters who **correctly** handwrite the date on their mail ballots and effectively den[ies] the right to all other qualified electors who sought to exercise the franchise by mail in a timely manner but made minor mistakes or omissions regarding the handwritten date on their mail ballots' declarations." *Baxter*, 2024 WL 4614689, at \*17; see also *BPEP*, 2024 WL 4002321, at \*32 (similar). In other words, enforcement of the date requirement here to discard otherwise valid mail ballots "effectively amounts to a denial of the franchise itself." *BPEP*, 2024 WL 4002321, at \*32; see also *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at \*20 (Pa. Commw. Ct. Jan. 17, 2014) (subjecting election regulation to strict scrutiny because its enforcement "has the effect of disenfranchising. . . [and thus] infringes upon qualified electors' right to vote.").

To satisfy strict scrutiny, the date requirement must be "narrowly drawn to accomplish a compelling state interest." *DePaul v. Commonwealth*, 969 A.2d 536, 543 (Pa. 2009). But neither the county boards have asserted any legitimate interest in the date requirement, much less one that justifies throwing out ballots cast by qualified Pennsylvania voters. The RNC, for its

part, does not even *try* to put forward a rationale for the date requirement in its application. And, in any event, it is doubtful that a private litigant could simply backfill a state interest to suit its preference for disenfranchising Pennsylvania voters.

Indeed, any effort to manufacture a compelling state interest runs headlong into the findings of various courts that the handwritten date is a pointless barrier to voting. As the Third Circuit recently put it: “The date requirement, it turns out, serves little apparent purpose. It is not used to confirm timely receipt of the ballot or to determine when the voter completed it.” *Pa. State Conf. of NAACP Branches v. Sec’y Commonwealth of Pa.*, 97 F.4th 120, 125 (3d Cir. 2024). It is “not even remotely a form used in Pennsylvania’s voter qualification process.” *Id.* at 137; *see also id.* at 155 n.31 (Shwartz, J., dissenting) (recognizing date requirement does not serve any fraud-prevention purpose). In fact, “none of the county boards of elections use the handwritten date for any purpose, and . . . the only reason the date is included on absentee and mail-in ballot envelope declarations is because such requirement is in the Election Code.” *BPEP*, 2024 WL 4002321, at \*33.

If there was any doubt on the matter, the RNC’s own candidate for U.S. Senate, David McCormick, *agrees* that the date requirement is a pointless

barrier to voting. He previously argued that “enforcing the dating requirement serves only one purpose—to gratuitously disenfranchise qualified Pennsylvania voters who have cast otherwise valid ballots on a timely basis.” Mot. for Injunction, *McCormick v. Chapman*, No. 286 M.D. 2022<sub>1</sub> at 9 (Pa. Commw. Ct. 2022). Because the date requirement is “virtually meaningless” it “thus[] serve[s] no compelling government interest.” *Baxter*, 2024 WL 4614689, at \*17. Quite so. The RNC’s insistence that county boards be forced to invalidate mail ballots for noncompliance with the date requirement cannot survive strict scrutiny—enforcing the law in such a manner plainly violates the Pennsylvania Constitution.

Finally, even if strict scrutiny did not apply, and the date requirement were subject to a more permissive standard of review, the boards’ decisions to count noncompliant mail ballots would still be correct. Because the boards’ decisions implicate a fundamental right—the right to vote—*some* strong state interest must be offered to justify burdening such a right. See *In re Nader*, 858 A.2d 1167, 1181 (Pa. 2004) (“[W]here the fundamental right to vote is at issue, a strong state interest must be demonstrated.”), *abrogated on other grounds by In re Vodvarka*, 140 A.3d 639 (Pa. 2016); cf. *Mont. Democratic Party v. Jacobsen*, 545 P.3d 1074, ¶¶ 13–20, 28–39, 46 (requiring, under nearly identical Montana Constitution provision, that

“statute minimally burden[ing] the right to vote” must be “reasonable, and [] that its asserted interest [be] more important than the burden on the right to vote”). But no state interest whatsoever justifies the “virtually meaningless” date requirement, *Baxter*, 2024 WL 4614689, at \*17, and thus it cannot survive any level of scrutiny under the Pennsylvania Constitution.

**B. This case does not require the Court to sever any part of the Commonwealth’s mail voting laws.**

With little to say to justify the date requirement, the RNC resorts to claiming the requirement *must* be enforced, lest Act 77 be discarded as a whole. This argument fails for several reasons.

*First*, the RNC’s argument disregards the Commonwealth’s well-settled nonseverability analysis. Contrary to the RNC’s assertion, this Court’s decision in *Stilp v. Commonwealth*, did not mandate blind adherence to all nonseverability provisions; instead, it “assume[d]” “for the purpose of [that] appeal” that nonseverability clauses are constitutionally proper, before ultimately holding that the nonseverability clause at issue was *not* constitutionally proper and could not be enforced. 905 A.2d 918, 978 (Pa. 2006) (emphasis added). As relevant here, *Stilp* confirmed that “the Statutory Construction Act establishes a presumption of severability.” *Id.*

Proper application of this Court’s nonseverability analysis makes clear that holding the date requirement invalid would not imperil Act 77 as a whole.



A court's invalidation of a provision triggers a nonseverability clause only when either (1) "the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one;" or (2) "the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." *Id.*

The Commonwealth Court has twice analyzed these questions and on both occasions found that the date provisions did not implicate nonseverability. The court found that "nothing in the otherwise valid provisions of Act 77 is 'so essentially and inseparably connected with' the dating provisions, nor can we say that the remaining valid provisions of Act 77, 'standing alone, are incomplete or are incapable of being executed in accordance with the legislative intent' of that Act." *BPEP*, 2024 WL 4002321 at \*38. The court similarly found that counting the noncompliant mail ballots at issue in *Baxter* did not trigger the clause. *Baxter*, 2024 WL 4614689 at \*18. These conclusions that the remaining provisions of Act 77 fair fine without rigid enforcement of the date provision are consistent with the fact that the date is nowhere mentioned outside of the boilerplate "sign and date"

instruction. The RNC entirely avoids these courts' analysis and incorrectly implies that this Court has rejected it.

*Second*, the RNC simply misunderstands the nonseverability provision in Act 77. That provision states various provisions of the Act are nonseverable and may be held void if “any provision of this act or its application to any person or circumstance is held invalid.” Act 77, § 11. But no party here is seeking to invalidate any part of Act 77, and the Court need not reach that issue in declining to grant the request for King’s Bench review or the RNC’s requested relief. Accordingly, the RNC’s claim that a handful of county boards are “unliterally invalidating” the entirety of Act 77 by carrying out their canvassing duties in a constitutional manner is deeply confused. Appl. at 18. The RNC cites no cases in support of such a theory, resorting instead to citing a number of dissenting decisions in tension with the nonseverability analysis above.

**C. The county boards’ actions do not offend Equal Protection.**

Finally, the RNC resorts to the claim that the boards violated Equal Protection by carrying out their canvassing duties in a manner different than some other counties—a purposeful design of Pennsylvania’s decentralized electoral system. This theory is wrong on the merits and further wrong as to what remedy would be appropriate if the RNC were correct.

The states' broad authority over their own election procedures, see U.S. Const., art. I, § 4, cl. 1, includes authority to devolve election administration to county and local officials, as Pennsylvania has done for decades. See, e.g., *Bush v. Gore*, 531 U.S. 98, 116 (2000) (Rehnquist, C.J., concurring) (recognizing Florida "legislature has delegated to county canvassing boards the duties of administering elections" (citation omitted)); *Missouri Prot. & Advoc. Servs., Inc. v. Carnahan*, 499 F.3d 803, 807 (8th Cir. 2007) (recognizing "broad authority to register voters and to administer voting and elections is delegated to local 'election authorities'" in Missouri (citation omitted)); *Frederick v. Lawson*, 481 F. Supp. 3d 774, 790–91 (S.D. Ind. 2020) (confirming that "Indiana Code reflects a delegation of authority from the state to the county level with respect to the administration and enforcement of Indiana election law" (citation omitted)); *Richardson v. Flores*, 28 F.4th 649, 654-54 (5th Cir. 2022) (describing Texas's decentralized system of election administration); *Ostrewich v. Tatum*, 72 F.4th 94, 100-01 (5th Cir. 2023) (same).

The RNC, however, seems to believe that Pennsylvania counties administering their own elections consistent with Pennsylvania law run afoul of the U.S. Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000). See Appl. at 17–18. But its read of that limited, circumstance-specific

decision could not be further off base. *Bush* did not broadly declare that the “counties within a State cannot use varying standards to determine what is a legal vote in statewide elections.” *Id.* (cleaned up). In fact, its *per curiam* decision explicitly recognized that “[t]he question before the Court [was] not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections,” but instead whether a state *court* with the power to “assure uniformity” for a statewide recount could neglect to do so. *Bush*, 531 U.S. at 109. That case specifically addressed only “a lack of uniform standards for determining whether a ballot expressed the voter’s choice.” *Pennsylvania State Conf. of NAACP Branches*, 97 F.4th at 143 n.6 (Shwartz, J., dissenting).

This case does not involve a recount or a statewide order; it involves the longstanding status quo of Pennsylvania’s devolved system of election administration. Nothing in *Bush v. Gore*, including in the separate opinions of the justices, supports the RNC’s expansive reinterpretation of federal constitutional law. See *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 922–23 (M.D. Pa. 2020) (rejecting same claim and noting that “Plaintiffs’ interpretation of *Bush v. Gore* would broaden the application of that case far beyond what the Supreme Court of the United States endorsed”); see also *Donald J. Trump for President*, 830 F. App’x at 388

(affirming district court and recognizing that “*Bush v. Gore* does not federalize every jot and tittle of state election law”); *cf. Bognet v. Sec’y Commonwealth of Pennsylvania*, 980 F.3d 336, 352–55 & n.11 (3d Cir. 2020), *cert. granted, judgment vacated sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021) (rejecting similar argument in Article III standing context). Instead, “many courts . . . have recognized that counties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state.” *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 389 (W.D. Pa. 2020) (collecting cases).

Moreover, *Bush*’s “core proposition”—“that a state may not take the votes of two voters, similarly situated in all respects, and, for no good reason, count the vote of one but not the other,” *id.* at 387, is simply not implicated here. The RNC is not seeking to have votes *counted*, but rather to have votes *rejected* based on the actions of other county boards. The Equal Protection violation that it complains of would not be remedied by discarding the ballots of voters in counties that have decided against rejecting them—that would simply compound the problem. It does nothing to remedy the injury to voters in counties that have unlawfully decided to *reject* similarly situated ballots. Were the RNC seeking to remedy any actual Equal Protection problem, it

should have sued *those* counties to ensure that those ballots would be counted.

**III. The equities weigh overwhelmingly against the RNC’s requested relief here, which seeks to disrupt the ongoing work of county election officials.**

Finally, the RNC distorts the so-called *Purcell* principle by attempting to use it as a basis for reversing the actions of actual election officials. To start, this Court has never formally adopted the *Purcell* doctrine, and this fact-specific *post-election* dispute presents a poor opportunity to do so. The RNC’s insistence that this Court’s order in *New PA Project* somehow “adopt[ed]” *Purcell* into state law, Appl. at 7, is not correct—as explained, that order merely declined to exercise King’s Bench authority in one instance because of an upcoming election. See *Baxter*, 2024 WL 4614689, at \*10. *Contra* Appl. at 2.

In any event, the concerns of the *Purcell* doctrine are simply not present here. As the Third Circuit recently explained, that doctrine cautions *courts* to “avoid[]” issuing orders on “election issues that could lead to voter confusion shortly before an election.” *Kim v. Hanlon*, 99 F.4th 140, 160 (3d Cir. 2024) (citing *Purcell v. Gonzalez*, 549 U.S. 140, 160 (2006)). Not one of those concerns is present. First, the election ruling the RNC seeks to displace was made *by actual election officials tasked with canvassing*

*ballots*—not by last-minute judicial intervention. See *Purcell*, 549 U.S. at 4-5 (explaining “[c]ourt orders affecting elections” are disfavored shortly before elections); see also *DNC v. Wisc. State Legislature*, 141 S. Ct. 28, 31 (2020) (warning against “judicial alterations” to election procedures) (Kavanaugh, J., concurring). The only “judicially created confusion” that can arise here is if this Court chooses to grant relief that disrupts the ordinary canvassing process. *RNC v. DNC*, 589 U.S. 423, 425 (2020). Second, there is no risk of voter confusion from the Boards’ actions because voters *have already cast their ballots*. The Boards’ decisions cannot fathomably create “voter confusion and consequent incentive to remain away from the polls.” *Id.*; see also *Pennsylvania State Conf. of NAACP Branches*, 97 F.4th at 142 n.5 (Shwartz, J., dissenting). Third, and relatedly, the challenged actions occurred *after* the election, not “before.” *Kim*, 99 F.4th at 160. In every respect, the RNC’s motion turns *Purcell* on its head—it seeks to *disrupt* the ordinary conduct of election officials, by *judicial intervention*, to *disenfranchise* qualified voters who have already cast timely ballots. The RNC cannot point to a single case where *Purcell* has been invoked in such a manner—none exists.

Indeed, the RNC’s precedent on this point rejects the very relief it seeks here. In *Trump v. Wisconsin Elections Comm’n*, 983 F.3d 919 (7th Cir.

2020), for example, the Seventh Circuit found that *Purcell* weighed against that court “enter[ing] a judgment that would void election results” after the fact. Such late-breaking *judicial* intervention to void the actions of *election officials* was improper. *Id.* Yet that is precisely what the RNC seeks here. See also *League of United Latin Am. Citizens Arizona v. Reagan*, No. CV17-4102 PHX DGC, 2018 WL 5983009, at \*1 (D. Ariz. Nov. 14, 2018) (declining to grant post-election against county official).

The RNC’s invocation of *Purcell* is particularly inappropriate because Pennsylvania law prescribes procedures for handling these sorts of post-election disputes, notwithstanding the RNC’s attempted end run. See 25 P.S. § 3157(a). Indeed, here the ballots have already been set aside pursuant to existing procedures under the Election Code, see 25 P.S. § 3146.8(g)(5), (7); all that remains is the ordinary challenge process to run its course, including through any Section 3157 appeals. In view of this process, Pennsylvania courts have repeatedly directed county boards to count ballots that were unlawfully excluded in the weeks following an election. See, e.g., *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1079 (Pa. 2020) (concluding that “technical violations of the Election Code[] do not warrant the wholesale disenfranchisement of



thousands of Pennsylvania voters”). The circumstances the RNC is concerned with here are no different.

Moreover, equitable considerations weigh strongly against the extraordinary relief the RNC seeks. Tossing out the ballots of hundreds of Pennsylvania voters—who no party disputes are qualified to vote and did so in a timely manner—is rank disenfranchisement. See *Baxter*, 2024 WL 4614689, at \*17; *BPEP*, 2024 WL 4002321, at \*32. Such relief is likely to erode public confidence in the electoral process. See, e.g., *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1031–32 (N.D. Fla. 2018) (“This court does not understand how assuring that all eligible voters are permitted to vote undermines the integrity of the election process.” (cleaned up, quoting *Martin v. Kemp*, 341 F.Supp.3d 1326, 1340 (N.D. Ga. Oct. 24, 2018))). *Contra* Appl. at 1.

## CONCLUSION

The Court should deny the RNC’s application for the exercise of King’s Bench power. To the extent the Court decides to exercise its King’s Bench power, however, it should declare that invalidating a mail ballot for noncompliance with the date requirement violates the Free and Equal Elections Clause of the Pennsylvania Constitution.

Dated: November 15, 2024

Respectfully submitted,

/s/ Adam C. Bonin

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**CERTIFICATE OF COMPLIANCE WITH WORD LIMIT**

I hereby certify that this filing contains no more than 14,000 words, in accordance with Rules 531(b) and 2135(b) of the Pennsylvania Rules of Appellate Procedure.

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**CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 127**

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

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 15, 2024, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

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