

**IN THE COURT OF COMMON PLEAS OF MONROE COUNTY,  
PENNSYLVANIA**

**David McCormick**  
2401 Pennsylvania Ave.  
Philadelphia, PA 19130

**Republican National Committee**  
310 First Street, SE  
Washington, D.C. 20003

**Republican Party of Pennsylvania**  
3501 N. Front Street, Suite 200  
Harrisburg, PA 17110

Petitioners,

v.

**MONROE COUNTY BOARD OF ELECTIONS**  
Administrative Building, One Quaker Plaza,  
Room 105, Stroudsburg, PA 18360

Respondent.

**CIVIL DIVISION**

No. \_\_\_\_\_

**ELECTION APPEAL**

**ORDER**

**AND NOW**, this \_\_\_\_ day of \_\_\_\_\_, 2024, upon consideration of  
Petitioners' Petition for Review in the Nature of a Statutory Appeal, and any response thereto, it  
is **ORDERED** as follows:

1. Petitioners request to reverse the decision of the Respondent be and is hereby **GRANTED**.
2. Respondent is hereby **PROHIBITED** from
  - a. Including the 42 mail-in ballots towards the electoral vote that either contained an incorrect date or were missing the date entirely; and
  - b. Including the 24 provisional ballots towards the electoral vote which lacked the required voter signatures.
3. An executed copy of the within Order shall be served upon all counsel within \_\_\_\_ days from the date hereof.

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

Micah Brown  
McKenzie O'Donnell  
Norris McLaughlin PA  
515 W. Hamilton Street, Suite 502  
Allentown, PA 18101  
(610) 391-1800  
*Counsel for Petitioners*

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**CIVIL DIVISION**

No. \_\_\_\_\_

**ELECTION APPEAL**

**PETITION FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL**

Petitioners David McCormick, the Republican National Committee, and the Republican Party of Pennsylvania, by and through their undersigned counsel, appeal pursuant to 25 P.S. § 3157 from the decisions of the Monroe County Board of Elections (“Board”) on November 14, 2024, to count in the November 5, 2024 General Election 42 mail ballots that were undated or incorrectly dated<sup>1</sup>, as well as an additional 24 provisional ballots missing the statutorily required voter signatures. Petitioners aver as follows:

### **INTRODUCTION**

1. This appeal concerns the decisions of the Board following the November 5, 2024, General Election to count undated and misdated mail ballots, as well as the decision to count provisional ballots missing mandatory voter signatures.

2. The Board erred as a matter of law in these decisions because such ballots are invalid under Pennsylvania law and cannot be counted.

3. *First*, the Board erred in deciding to count undated or misdated mail ballots. The Election Code unambiguously requires individuals voting by mail to “fill out, date and sign the declaration” on the ballot return envelope. *See* 25 P.S. §§ 3146.6(a), (b)(3), 3150.16(a), (b)(3). After years of repeatedly holding that the date requirement is mandatory, the Pennsylvania Supreme Court earlier this month reaffirmed that the requirement “shall ... be applied to the November 5, 2024 General Election.” *Baxter v. Philadelphia Bd. of Elections*, \_\_A.3d\_\_, 2024 WL 4650792, at \*1 (Pa. Nov. 1, 2024) (staying lower court order against date requirement). The Board’s baffling decision *not* to enforce the date requirement and to count noncompliant ballots thus directly contravenes binding Pennsylvania law. *See id.*; *New Pa. Project Education Fund v. Schmidt*, No. 112 MM 2024, 2024 WL 4410884, at \*1 (Pa. Oct. 5, 2024) (per curiam) (“*New*

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<sup>1</sup> The Election Code’s date requirement implicated in this appeal governs county boards’ processing both of absentee ballots and mail-in ballots. *See* 25 P.S. §§ 3146.6(a), (b)(3), 3150.16(a), (b)(3). For ease of reference, this Petition refers to both types of ballots as “mail ballots.”

*Pa.*”) (declining to exercise King’s Bench jurisdiction over state constitutional challenge to date requirement); *Black Political Empowerment Project v. Schmidt*, 322 A.3d 221, 222 (Pa. 2024) (per curiam) (“*BPEP Order*”) (vacating order striking down date requirement under state constitution); *Ball v. Chapman*, 289 A.3d 1, 14-16 & n.77 (Pa. 2022) (rejecting host of challenges to date requirement); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) (rejecting state constitutional challenge to sign-and-date mandate, of which date requirement is a part); *In re: Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 General Election*, 241 A.3d 1058, 1085-89 (Pa. 2020) (Wecht, J., concurring in part) (deciding vote making clear date requirement is mandatory and enforceable for all elections after 2020).

4. Even more on point, on October 5, 2024, the Pennsylvania Supreme Court rejected a challenge to the date requirement and held it would “neither impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election.” *New Pa.*, 2024 WL 4410884, at \*1. In particular, the Pennsylvania Supreme Court adopted the *Purcell* principle from federal law, which prohibits changes to electoral rules close to an election—and especially *after* Election Day. *See id.* (quoting *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016)). The Commonwealth Court subsequently disregarded that instruction and struck down the date requirement, which led to the Pennsylvania Supreme Court entering a stay and reaffirming that the date requirement is enforceable for the 2024 General Election. *See Baxter*, 2024 WL 4650792, at \*1.

5. In what can only be understood as a confused or defiant action, the Board decided to count 42 mail ballots that do not comply with the date requirement. The Pennsylvania Supreme Court has clearly prohibited this action. And to the extent the Board suggested that the date requirement violates the Materiality Provision of the federal Civil Rights Act, that too is wrong as a matter of law. The U.S. Court of Appeals for the Third Circuit has rejected that claim. *Pa.*



*State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120 (3d Cir. 2024), *reh'g denied*, 2024 WL 3085152 (Apr. 30, 2024).

6. Further, the Board's decision not to enforce the date requirement triggers the absolute non-severability provision in Act 77, which established universal mail-in voting. Because the date requirement is one of the provisions protected by Act 77's non-severability provision, refusing to enforce it jeopardizes universal mail-in voting.

7. The Court therefore should reverse the Board's decision to count mail ballots that fail to comply with the date requirement.

8. *Second*, the Board erred in deciding to count 24 provisional ballots that were missing a mandatory signature of the voter. The Election Code states that "[a] provisional ballot shall not be counted if . . . the signature required under" the prescribed voter affidavit "is not signed by the individual." 25 P.S. § 3050(a.4)(5)(ii). The Pennsylvania Supreme Court has made clear that provisional ballots with missing voter signatures cannot be counted. *See In re: Canvass of Provisional Ballots in 2024 Primary Election*, 322 A.3d 900, 904-09 (Pa. 2024). And the Secretary of the Commonwealth recently instructed county boards that "the Election Code does provide that if the voter's signature is missing from either the affidavit or the provision ballot envelope the ballot cannot be counted." Email on behalf of Deputy Secretary Jonathan Marks to County Election Officials (Nov. 7, 2024) (attached as **Exhibit A**).

9. The Board's decisions to count ballots the Election Code prohibits also likely violate the U.S. Constitution's Equal Protection Clause as well as the Pennsylvania Constitution. Under the Equal Protection Clause of the U.S. Constitution, a "State may not, by . . . arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). And counties cannot use "varying standards to determine what [i]s a legal vote." *Id.* at 107. Likewise, the Pennsylvania Constitution decrees that "[a]ll laws regulating the

holding of elections . . . shall be uniform throughout the State,” Pa. Const. art. VII, § 6; *accord* Pa. Const. art. I, § 5; 25 P.S. § 2642(g). The Board’s decision to ignore its lawyers’ advice and violate the Election Code—even as other counties follow it—threatens violations of both the U.S. and Pennsylvania Constitutions because ballots will be treated differently depending on the county in which they were cast. This Court can avoid those violations by reversing.

10. Petitioners are aggrieved by the Board’s decisions and hereby appeal from them pursuant to 25 P.S. § 3157(a).

### **JURISDICTION**

11. The Court has jurisdiction over this statutory appeal pursuant to 25 P.S. § 3157(a).

### **PARTIES**

12. Petitioner David McCormick is the Republican candidate for Senate.

13. Petitioner Republican National Committee (RNC) is a national committee of the Republican Party as defined by 52 U.S.C. § 30101(14). The RNC manages the Republican Party’s business at the national level, including development and promotion of the Party’s national platform and fundraising and election strategies; supports Republican candidates for public office at all levels across the country, including those on the ballot in Pennsylvania; and assists state parties throughout the country, including the Republican Party of Pennsylvania, to educate, mobilize, assist, and turn out voters.

14. Petitioner Republican Party of Pennsylvania (RPP) is a major political party, 25 P.S. § 2831(a), and the “State committee” for the Republican Party in Pennsylvania, 25 P.S. § 2834, as well as a federally registered “State Committee” of the Republican Party as defined by 52 U.S.C. § 30101(15). The RPP on behalf of itself and its members nominates, promotes, and assists Republican candidates seeking election or appointment to federal, state, and local office in Pennsylvania.

15. Respondent the Monroe County Board of Elections is responsible for overseeing the conduct of all elections in Monroe County.

### **GROUND FOR APPEAL**

#### **A. The Board Ignored the Election Code's Mandatory Date Requirement.**

16. In 2019, as part of an important bipartisan compromise, the General Assembly amended the Election Code to permit all Pennsylvanians to vote by mail without any excuse. 2019 Pa. Leg. Serv. Act 2019-77 ("Act 77"). As part of the compromise, which was protected with an absolute non-severability clause, *see* Act 77, § 11, the bill also included certain mandatory rules that Pennsylvanians voting by mail must follow to have their ballots counted.

17. For example, mail voters must enclose their ballots and secrecy envelopes within mailing envelopes bearing a declaration that voters must sign and date. *See* 25 P.S. §§ 3146.6(a).

18. The Pennsylvania Supreme Court has repeatedly held that the date requirement is mandatory; an elector's failure to comply renders the ballot ineligible to be counted. *See, e.g., Ball*, 289 A.3d at 14-16; *Pa. Democratic Party*, 238 A.3d at 372-74, 380 (rejecting challenge under Free and Equal Elections Clause to mandatory rules for mailing envelopes, including date requirement). That is why the Pennsylvania Supreme Court ordered all 67 county boards of elections not to count mail ballots that do not comply with the date requirement during the 2022 General Election. *See Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022).

19. Nevertheless, various litigants have continued to file lawsuits seeking invalidation of the date requirement. All of these efforts have failed, and the Pennsylvania Supreme Court has *twice* held that the date requirement must be enforced for the 2024 General Election. *See New Pa.*, 2024 WL 4410884; *Baxter*, 2024 WL 4650792, at \*1.

20. For example, litigants have previously argued that the date requirement violates the federal Materiality Provision in the Civil Rights Act of 1964. But the U.S. Court of Appeals

for the Third Circuit decisively rejected those challenges and upheld the date requirement under the Materiality Provision. *See Pa. State Conf. of NAACP Branches*, 97 F.4th at 129-39 (Ambro, J.). That court correctly held that the Materiality Provision only applies to voter-registration rules. *Id.* at 129-35. And because the date requirement does not apply during voter registration, it is clearly lawful under the Materiality Provision. *See id.*

21. Litigants have also continued to assert state-law arguments against the date requirement. In June 2024, the Commonwealth Court invalidated the date requirement under the Free and Equal Elections Clause, but the Pennsylvania Supreme Court vacated that opinion and order on multiple procedural grounds. *See BPEP Order at \*1, vacating Black Political Empowerment Project v. Schmidt*, No. 283 M.D. 2024, 2024 WL 4002321, at \*1 (Pa. Commw. Ct. Aug. 30, 2024).

22. Subsequently, litigants filed a King's Bench petition asking the Pennsylvania Supreme Court to invalidate the date requirement. The Pennsylvania Supreme Court rejected that petition on October 5, 2024, holding that it would “neither impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election.” *New Pa.*, 2024 WL 4410884, at \*1.

23. Nevertheless, litigants did not give up on their efforts to invalidate the date requirement for the 2024 General Election. In a lawsuit related to the Philadelphia Board of Elections' compliance with the date requirement in a 2024 special election, the Commonwealth Court again struck down the date requirement. *See Baxter v. Philadelphia Bd. of Elections*, 2024 WL 4614689 (Pa. Commw. Ct. Oct. 30, 2024). The Pennsylvania Supreme Court promptly stayed that ruling and said it “shall not be applied to the November 5, 2024 General Election.” *Baxter*, 2024 WL 4650792, at \*1. In a concurrence, Justice Donohue explained that the stay was necessary so that “county boards” would not rely on the opinion during “canvassing . . . in the

upcoming election,” which would “disturb[] the status quo.” *Id.* at \*1 (Donohue, J., concurring). Justice Dougherty also concurred and sharply criticized the continuing efforts of courts and litigants to invalidate the date requirement for the 2024 General Election, accusing them of defying the Pennsylvania Supreme Court’s clear orders. *Id.* at \*2-8 (Dougherty, J., concurring) (recounting full history of such efforts).

24. Despite the Pennsylvania Supreme Court’s clear order that the date requirement is enforceable for the 2024 General Election, the Board decided to count 42 undated and incorrectly dated mail ballots.

25. Petitioners objected to this decision before the Board.

26. This decision was clearly contrary to Pennsylvania law, and must be undone.

**B. The Board Ignored the Election Code and Voted to Count Provisional Ballots that Were Missing Voter Signatures.**

27. The Election Code also imposes mandatory requirements for those who cast provisional ballots. Those who cast provisional ballots must place the provisional ballot within a secrecy envelope, which is in turn placed within a provisional ballot envelope. 25 P.S. § 3050(a.4). The elector also “shall be required to sign an affidavit” with prescribed language. *Id.* § 3050(a.4)(2). The elector also “shall place his signature on the front of the provisional ballot envelope.” *Id.* § 3050(a.4)(3). In other words, individuals casting provisional ballots must provide *two* signatures: one for the affidavit and one on the provisional ballot envelope.

28. The Election Code expressly states that “[a] provisional ballot shall not be counted if . . . the signature required under clause (3) [the envelope signature] or the affidavit under clause (2) is not signed by the individual.” *Id.* § 3050(a.4)(5)(ii). In other words, election officials must reject a provisional ballot unless both required signatures are present—a point the Pennsylvania Supreme Court has already made clear. *See In re: Canvass of Provisional Ballots in 2024 Primary Election*, 322 A.3d at 907.

29. Nevertheless, the Board voted to count 24 provisional ballots that were missing one or both of the required voter signatures.

30. Petitioners objected to this decision before the Board.

31. Petitioners also note that the Board's decisions to count ballots prohibited by the Election Code will likely result in violations of the U.S. Constitution's Equal Protection Clause and the Pennsylvania Constitution.

32. Under the Equal Protection Clause of the U.S. Constitution, a "State may not, by . . . arbitrary and disparate treatment, value one person's vote over that of another." *Bush* 531 U.S. at 104-05. Accordingly, at least where a "statewide" rule governs, such as in a statewide election, there must be "adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them." *Id.* at 110. And counties cannot "use[] varying standards to determine what [i]s a legal vote." *Id.* at 107.

33. Yet that is precisely what will happen if this Court permits the Board not to enforce mandatory Election Code provisions, such as those requiring election official signatures. Other county boards will follow the law, which means that the Board's actions would result in "varying standards to determine what [i]s a legal vote" from "county to county" and be improper. *See id.* at 106-07.

34. The Board's refusal to follow the Election Code also violates the Pennsylvania Constitution, which decrees that "[a]ll laws regulating the holding of elections . . . shall be uniform throughout the State," Pa. Const. art. VII, § 6, and the Election Code, which requires that elections be "uniformly conducted" throughout the Commonwealth. 25 Pa. Stat. § 2642(g). Once again, other counties will follow the law, which means the Board's decisions will result in unlawful unequal treatment of Pennsylvania voters.

35. Accordingly, the Board erred in voting to count mail ballots lacking a correct date,

as well as by voting to count provisional ballots missing the two statutorily required voter signatures.

WHEREFORE, Petitioners respectfully request that this Honorable Court enter an order reversing the decision of the Monroe County Board of Elections, ordering the Monroe County Board of Elections not to count the 42 mail ballots with an incorrect or missing date, and further ordering the Board not to count 24 provisional ballots which lacked the two statutorily required voter signatures, and provide such other and further relief as provided by the Pennsylvania Election Code or as this Court deems just and appropriate.

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Respectfully submitted,

Dated: November 16, 2024

/s/ McKenzie O'Donnell

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*Counsel for Petitioners*

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**CERTIFICATE OF COMPLIANCE**

I 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.

Dated: November 16, 2024

/s/ McKenzie O'Donnell

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*Counsel for Petitioners*

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## VERIFICATION

I, David McCormick, verify that that the facts contained in the foregoing are true and correct based upon my knowledge, information, and belief. However, while the facts are true and correct based upon my knowledge, information, and belief, the words contained in the foregoing are those of counsel and not mine. I understand that statements herein are made subject to the penalties set forth in 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.

A handwritten signature in dark ink, appearing to read "David McCormick", is written over a horizontal line.

David McCormick

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**VERIFICATION OF REPUBLICAN NATIONAL COMMITTEE**

I, Ashley Walukevich, Pennsylvania State Director at the Republican National Committee, am authorized to make this verification on behalf of the Republican National Committee. I hereby verify that the factual statements set forth in the foregoing Petition For Review In The Nature Of A Statutory Appeal are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.



Ashley Walukevich  
Pennsylvania State Director  
Republican National Committee

Date: 11/13/2024

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**VERIFICATION OF REPUBLICAN PARTY OF PENNSYLVANIA**

I, Angela Alleman, Executive Director at the Republican Party of Pennsylvania, am authorized to make this verification on behalf of the Republican Party of Pennsylvania. I hereby verify that the factual statements set forth in the foregoing Petition For Review In The Nature Of A Statutory Appeal are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.



---

Angela Alleman  
Executive Director  
Republican Party of Pennsylvania

Date: 11/13/24

# EXHIBIT A

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**From:** ST, Elections <RA-Elections@pa.gov>  
**Sent:** Thursday, November 7, 2024 6:38:07 PM  
**Subject:** (EXTERNAL) [External] DOS Email: Provisional Ballot Questions



**Caution:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe. When in doubt, contact your IT Department

Sent on behalf of Deputy Secretary Jonathan Marks

Dear County Election Officials,

The Department has received inquiries from counties as to whether a provisional ballot should be counted if the voter affidavit is not signed by the Judge of Elections and/or the Minority Inspector. It is the Department's position that a missing signature of the Judge of Elections and/or the Minority Inspector should not invalidate a provisional ballot if there are no other disqualifying errors. The lack of a signature from the Judge of Elections or the Minority Inspector is not specified in the Election Code as a basis for refusing to count a provisional ballot. See 25 P.S. § 3050(a.4)(5)(ii). While the affidavit to be signed by the voter contains a space for both officials to sign, and the Department's guidance accordingly includes both officials' signing the affidavit as part of the provisional ballot process, nothing in the Election Code authorizes counties to reject provisional ballots because either or both failed to sign the affidavit. By contrast, the Election Code does provide that if the voter's signature is missing from either the affidavit or the provisional ballot envelope the ballot cannot be counted.

Additionally, we write to remind you about an important post-election deadline, and an issue the Department has observed that requires your attention. We believe some counties' sorting machines may not have properly tagged returned ballots as "PEND-NO ID", and counties should apply that status to ensure that voters can have their voices heard. If you properly approved a mail ballot application where the ID didn't verify, and the application was marked as Approved-ID Not verified, the voter should have received the ballot with notification that ID was needed. If the voter returned that ballot before the deadline, but did not include the required ID, their ballot status reason *must* be manually updated to have a ballot status reason of "PEND-NO ID". If these ballots went through a mail scanner, the scanner would not have updated the ballot status reason. We have observed several counties who have marked applications as Approved with ID Not Verified, but who have no mail ballots as PEND NO ID. As a reminder, voters may expect their ballot to be counted if they provide qualifying ID on or before Tuesday, November 12. This is a right granted to them by statute, and discussed on Page 6 of our [Guidance on Civilian Absentee and Mail-in Ballot Procedures](#).

It is critical that you mark all timely returned ballots, where the voter's ID did not verify on the application, as "PEND-NO ID", so that voters are aware of the steps they must take to ensure their ballot is counted.

As always, we urge you to consult with your Solicitor if you have further questions. Thank you for all your efforts ensuring a free and fair election.

**<image001.png>** Division of Election Administration | Bureau of Elections  
 PA Department of State  
 210 North Office Building, Harrisburg, PA 17120  
 Office: 717-787-5280  
[dos](#) [pa.gov](#) [Vote](#) [pa.gov](#) | Facebook | Twitter



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**ELECTION APPEAL**

**REQUEST FOR EXPEDITED DISPOSITION PURSUANT TO MONROE COUNTY  
LOCAL RULE 208.3(a)(5)**

Petitioners, by and through their attorneys, Norris McLaughlin, P.A., respectfully request expedited disposition of the attached petition as the matter is one of an immediate nature. Pursuant to Pennsylvania Statute 25 Pa.C.S. §3157, after receiving an appeal regarding the decision of a county board's decision the court shall affix a hearing within three days. Further, the last day when county boards of elections may certify the results of the election to the Secretary of the Commonwealth is November 25, 2024. Thus, it is imperative for the Court to expeditiously consider the Petitioners' petition. As such, Petitioners request the attached petition to be expedited.

/s McKenzie O'Donnell

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*Counsel for Petitioners*

A copy of this request has been provided to the following by the Petitioners:

Deborah Huffman  
Solicitor, Monroe County Board of Elections  
Administrative Building  
One Quaker Plaza, Room 105  
Stroudsburg, PA 18360  
[dlh@weitzmannlaw.com](mailto:dlh@weitzmannlaw.com)

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**ELECTION APPEAL**

**REQUEST FOR ARGUMENT PURSUANT TO Pa.R.C.P. 211**

Petitioners in the above-captioned matter request argument on their Petition for Review in the Nature of a Statutory Appeal.

The issues to be argued are: 1) whether the Monroe County Board of Elections (the "Board") erred in deciding to count 42 undated or incorrectly dated mail-in ballots, and 2) whether the board erred in deciding to count 24 unsigned provisional ballots.

Petitioners believe that these issues raise complicated questions of fact and law, and that argument will aid the Court in reaching its determination.

Respectfully submitted,

Dated: November 16, 2024

/s/ McKenzie O'Donnell

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**ELECTION APPEAL**

**PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR REVIEW**  
**IN THE NATURE OF A STATUTORY APPEAL**

In support of their Petition for review in the nature of a statutory review, Petitioners David McCormick, the Republican National Committee, and the Republican Party of Pennsylvania, by and through their undersigned counsel, submit the within brief.

### **FACTUAL BACKGROUND**

This appeal concerns the decisions of the Board following the November 5, 2024, General Election to count undated and misdated mail ballots, as well as the decision to count provisional ballots missing mandatory voter signatures. On Thursday, November 7, 2024, the Board convened a hearing and made several determinations regarding disputed provisional and mail ballots. The Board voted to count 42 mail-in ballots which were incorrectly dated or undated. Additionally, the Board voted to count 24 provisional ballots which lacked one or both of the required elector signatures. Representatives for the Petitioners attended the Board's hearing and objected to these decisions as they are contrary to well-established Pennsylvania law, but the Board nonetheless voted to count these improper ballots.

### **PRELIMINARY STATEMENT**

At the November 7, 2024 hearing, The Board erred as a matter of law in its decisions because such ballots are invalid under Pennsylvania law and cannot be counted.

*First*, the Board erred in deciding to count undated or misdated mail ballots. The Election Code unambiguously requires individuals voting by mail to “fill out, date and sign the declaration” on the ballot return envelope. *See* 25 P.S. §§ 3146.6(a), (b)(3), 3150.16(a), (b)(3). After years of repeatedly holding that the date requirement is mandatory, the Pennsylvania Supreme Court earlier this month reaffirmed that the requirement “shall ... be applied to the November 5, 2024 General Election.” *Baxter v. Philadelphia Bd. of Elections*, \_\_A.3d\_\_, 2024 WL 4650792, at \*1 (Pa. Nov. 1, 2024) (staying lower court order against date requirement). The Board's baffling decision *not* to enforce the date requirement and to count noncompliant ballots thus directly contravenes binding

Pennsylvania law. *See id.*; *New Pa. Project Education Fund v. Schmidt*, No. 112 MM 2024, 2024 WL 4410884, at \*1 (Pa. Oct. 5, 2024) (per curiam) (“*New Pa.*”) (declining to exercise King’s Bench jurisdiction over state constitutional challenge to date requirement); *Black Political Empowerment Project v. Schmidt*, 322 A.3d 221, 222 (Pa. 2024) (per curiam) (“*BPEP Order*”) (vacating order striking down date requirement under state constitution); *Ball v. Chapman*, 289 A.3d 1, 14-16 & n.77 (Pa. 2022) (rejecting host of challenges to date requirement); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) (rejecting state constitutional challenge to sign-and-date mandate, of which date requirement is a part); *In re: Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 General Election*, 241 A.3d 1058, 1085-89 (Pa. 2020) (Wecht, J., concurring in part) (deciding vote making clear date requirement is mandatory and enforceable for all elections after 2020).

Even more on point, on October 5, 2024, the Pennsylvania Supreme Court rejected a challenge to the date requirement and held it would “neither impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election.” *New Pa.*, 2024 WL 4410884, at \*1. In particular, the Pennsylvania Supreme Court adopted the *Purcell* principle from federal law, which prohibits changes to electoral rules close to an election—and especially *after* Election Day. *See id.* (quoting *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016)). The Commonwealth Court subsequently disregarded that instruction and struck down the date requirement, which led to the Pennsylvania Supreme Court entering a stay and reaffirming that the date requirement is enforceable for the 2024 General Election. *See Baxter*, 2024 WL 4650792, at \*1.

In what can only be understood as a confused or defiant action, the Board decided to count 42 mail-in ballots that do not comply with the date requirement. The Pennsylvania Supreme Court has clearly prohibited this action. And to the extent the Board suggested that the date requirement

violates the Materiality Provision of the federal Civil Rights Act, that too is wrong as a matter of law. The U.S. Court of Appeals for the Third Circuit has rejected that claim. *Pa. State Conf. of NAACP Branches v. Sec’y Commonwealth of Pa.*, 97 F.4th 120 (3d Cir. 2024), *reh’g denied*, 2024 WL 3085152 (Apr. 30, 2024).

Further, the Board’s decision not to enforce the date requirement triggers the absolute non-severability provision in Act 77, which established universal mail-in voting. Because the date requirement is one of the provisions protected by Act 77’s non-severability provision, refusing to enforce it jeopardizes universal mail-in voting. The Court therefore should reverse the Board’s decision to count mail ballots that fail to comply with the date requirement.

*Second*, the Board erred in deciding to count 24 provisional ballots that were missing a mandatory signature of the voter. The Election Code states that “[a] provisional ballot shall not be counted if . . . the signature required under” the prescribed voter affidavit “is not signed by the individual.” 25 P.S. § 3050(a.4)(5)(ii). The Pennsylvania Supreme Court has made clear that provisional ballots with missing voter signatures cannot be counted. *See In re: Canvass of Provisional Ballots in 2024 Primary Election*, 322 A.3d 900, 904-09 (Pa. 2024). And the Secretary of the Commonwealth recently instructed county boards that “the Election Code does provide that if the voter’s signature is missing from either the affidavit or the provision ballot envelope the ballot cannot be counted.” Email on behalf of Deputy Secretary Jonathan Marks to County Election Officials (Nov. 7, 2024) (attached as **Exhibit A** to the petition).

The Board’s decisions to count ballots the Election Code prohibits also likely violate the U.S. Constitution’s Equal Protection Clause as well as the Pennsylvania Constitution. Under the Equal Protection Clause of the U.S. Constitution, a “State may not, by . . . arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). And counties cannot use “varying standards to determine what [i]s a legal vote.” *Id.* at 107.

Likewise, the Pennsylvania Constitution decrees that “[a]ll laws regulating the holding of elections . . . shall be uniform throughout the State,” Pa. Const. art. VII, § 6; *accord* Pa. Const. art. I, § 5; 25 P.S. § 2642(g). The Board’s decision to ignore its lawyers’ advice and violate the Election Code—even as other counties follow it—threatens violations of both the U.S. and Pennsylvania Constitutions because ballots will be treated differently depending on the county in which they were cast. This Court can avoid those violations by reversing.

Petitioners are aggrieved by the Board’s decisions and hereby appeal from them pursuant to 25 P.S. § 3157(a).

### **QUESTIONS PRESENTED**

1. **WHETHER THE BOARD ERRED IN DECIDING TO COUNT 42 UNDATED AND/OR INCORRECTLY DATED MAIL-IN BALLOTS?**

Suggested Answer: YES

2. **WHETHER THE BOARD ERRED IN DECIDING TO COUNT 24 UNSIGNED PROVISIONAL BALLOTS?**

Suggested Answer: YES

### **ARGUMENT**

#### **A. The Board Ignored the Election Code’s Mandatory Date Requirement.**

In 2019, as part of an important bipartisan compromise, the General Assembly amended the Election Code to permit all Pennsylvanians to vote by mail without any excuse. 2019 Pa. Leg. Serv. Act 2019-77 (“Act 77”). As part of the compromise, which was protected with an absolute non-severability clause, *see* Act 77, § 11, the bill also included certain mandatory rules that Pennsylvanians voting by mail must follow to have their ballots counted. For example, mail voters must enclose their ballots and secrecy envelopes within mailing envelopes bearing a declaration that voters must sign and date. *See* 25 P.S. §§ 3146.6(a).

The Pennsylvania Supreme Court has repeatedly held that the date requirement is mandatory; an elector’s failure to comply renders the ballot ineligible to be counted. *See, e.g.,*

*Ball*, 289 A.3d at 14-16; *Pa. Democratic Party*, 238 A.3d at 372-74, 380 (rejecting challenge under Free and Equal Elections Clause to mandatory rules for mailing envelopes, including date requirement). That is why the Pennsylvania Supreme Court ordered all 67 county boards of elections not to count mail ballots that do not comply with the date requirement during the 2022 General Election. *See Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022).

Nevertheless, various litigants have continued to file lawsuits seeking invalidation of the date requirement. All of these efforts have failed, and the Pennsylvania Supreme Court has *twice* held that the date requirement must be enforced for the 2024 General Election. *See New Pa.*, 2024 WL 4410884; *Baxter*, 2024 WL 4650792, at \*1. For example, litigants have previously argued that the date requirement violates the federal Materiality Provision in the Civil Rights Act of 1964. But the U.S. Court of Appeals for the Third Circuit decisively rejected those challenges and upheld the date requirement under the Materiality Provision. *See Pa. State Conf. of NAACP Branches*, 97 F.4th at 129-39 (Ambro, J.). That court correctly held that the Materiality Provision only applies to voter-registration rules. *Id.* at 129-35. And because the date requirement does not apply during voter registration, it is clearly lawful under the Materiality Provision. *See id.*

Litigants have also continued to assert state-law arguments against the date requirement. In June 2024, the Commonwealth Court invalidated the date requirement under the Free and Equal Elections Clause, but the Pennsylvania Supreme Court vacated that opinion and order on multiple procedural grounds. *See BPEP Order* at \*1, *vacating Black Political Empowerment Project v. Schmidt*, No. 283 M.D. 2024, 2024 WL 4002321, at \*1 (Pa. Commw. Ct. Aug. 30, 2024). Subsequently, litigants filed a King's Bench petition asking the Pennsylvania Supreme Court to invalidate the date requirement. The Pennsylvania Supreme Court rejected that petition on October 5, 2024, holding that it would "neither impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election." *New Pa.*, 2024 WL



4410884, at \*1.

Nevertheless, litigants did not give up on their efforts to invalidate the date requirement for the 2024 General Election. In a lawsuit related to the Philadelphia Board of Elections' compliance with the date requirement in a 2024 special election, the Commonwealth Court again struck down the date requirement. *See Baxter v. Philadelphia Bd. of Elections*, 2024 WL 4614689 (Pa. Commw. Ct. Oct. 30, 2024). The Pennsylvania Supreme Court promptly stayed that ruling and said it "shall not be applied to the November 5, 2024 General Election." *Baxter*, 2024 WL 4650792, at \*1. In a concurrence, Justice Donohue explained that the stay was necessary so that "county boards" would not rely on the opinion during "canvassing . . . in the upcoming election," which would "disturb[] the status quo." *Id.* at \*1 (Donohue, J., concurring). Justice Dougherty also concurred and sharply criticized the continuing efforts of courts and litigants to invalidate the date requirement for the 2024 General Election, accusing them of defying the Pennsylvania Supreme Court's clear orders. *Id.* at \*2-8 (Dougherty, J., concurring) (recounting full history of such efforts).

Despite the Pennsylvania Supreme Court's clear order that the date requirement is enforceable for the 2024 General Election, the Board decided to count 42 undated and incorrectly dated mail ballots. Petitioners objected to this decision before the Board. This decision was clearly contrary to Pennsylvania law, and must be undone. This Court should reverse this decision of the Board.

**B. The Board Ignored the Election Code and Voted to Count Provisional Ballots that Were Missing Voter Signatures.**

The Election Code also imposes mandatory requirements for those who cast provisional ballots. Those who cast provisional ballots must place the provisional ballot within a secrecy envelope, which is in turn placed within a provisional ballot envelope. 25 P.S. § 3050(a.4). The elector also "shall be required to sign an affidavit" with prescribed language. *Id.* § 3050(a.4)(2).

The elector also “shall place his signature on the front of the provisional ballot envelope.” *Id.* § 3050(a.4)(3). In other words, individuals casting provisional ballots must provide *two* signatures: one for the affidavit and one on the provisional ballot envelope. The Election Code expressly states that “[a] provisional ballot shall not be counted if . . . the signature required under clause (3) [the envelope signature] or the affidavit under clause (2) is not signed by the individual.” *Id.* § 3050(a.4)(5)(ii). In other words, election officials must reject a provisional ballot unless both required signatures are present—a point the Pennsylvania Supreme Court has already made clear. *See In re: Canvass of Provisional Ballots in 2024 Primary Election*, 322 A.3d at 907. Nevertheless, the Board voted to count 24 provisional ballots that were missing one or both of the required voter signatures, notwithstanding that Petitioners objected to this decision before the Board.

Additionally, the Board’s decisions to count ballots prohibited by the Election Code will likely result in violations of the U.S. Constitution’s Equal Protection Clause and the Pennsylvania Constitution. Under the Equal Protection Clause of the U.S. Constitution, a “State may not, by . . . arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush* 531 U.S. at 104-05. Accordingly, at least where a “statewide” rule governs, such as in a statewide election, there must be “adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them.” *Id.* at 110. And counties cannot “use[] varying standards to determine what [i]s a legal vote.” *Id.* at 107. Yet that is precisely what will happen if this Court permits the Board not to enforce mandatory Election Code provisions, such as those requiring election official signatures. Other county boards will follow the law, which means that the Board’s actions would result in “varying standards to determine what [i]s a legal vote” from “county to county” and be improper. *See id.* at 106-07.

The Board’s refusal to follow the Election Code also violates the Pennsylvania

Constitution, which decrees that “[a]ll laws regulating the holding of elections . . . shall be uniform throughout the State,” Pa. Const. art. VII, § 6, and the Election Code, which requires that elections be “uniformly conducted” throughout the Commonwealth. 25 Pa. Stat. § 2642(g). Once again, other counties will follow the law, which means the Board’s decisions will result in unlawful unequal treatment of Pennsylvania voters.

Accordingly, the Board erred in voting to count mail ballots lacking a correct date, as well as by voting to count provisional ballots missing the two statutorily required voter signatures. This Court must overrule the Board’s decision to include these ballots.

### **CONCLUSION**

For the foregoing reasons, Petitioners respectfully request that this Honorable Court enter an order reversing the decision of the Monroe County Board of Elections, ordering the Monroe County Board of Elections not to count the 42 mail ballots with an incorrect or missing date, and further ordering the Board not to count 24 provisional ballots which lacked the two statutorily required voter signatures, and provide such other and further relief as provided by the Pennsylvania Election Code or as this Court deems just and appropriate.

Respectfully submitted,

Dated: November 16, 2024

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**CERTIFICATE OF COMPLIANCE**

I 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.

Dated: November 16, 2024

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