

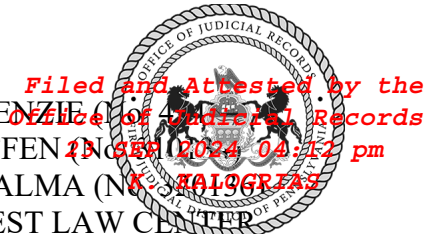
MARIAN K. SCHNEIDER (No. 50337)  
STEPHEN A. LONEY (No. 202535)  
KATE STEIKER-GINZBERG (No. 332236)  
ACLU OF PENNSYLVANIA  
P.O. Box 60173  
Philadelphia, PA 19102  
215-592-1513  
mschneider@aclupa.org  
sloney@aclupa.org  
ksteiker-ginzberg@aclupa.org

WITOLD J. WALCZAK (No. 62976)  
ACLU OF PENNSYLVANIA  
P.O. Box 23058  
Pittsburgh, PA 15222  
412-681-7864  
vwalczak@aclupa.org

MARY M. MCKENZIE  
BENJAMIN GEFFEN  
CLAUDIA DE PALMA (No. 20196745)  
PUBLIC INTEREST LAW CENTER  
1500 JFK Blvd., Suite 802  
Philadelphia, PA 19102  
(267) 546-1319  
mmckenzie@pubintl.org  
bgeffen@pubintl.org  
cdepalma@pubintl.org

JOHN A. FREEDMAN\*  
ARNOLD & PORTER KAYE  
SCHOLER LLP  
601 Massachusetts Ave., NW  
Washington, DC 20001  
(202) 942-5000  
john.freedman@arnoldporter.com

*Counsel for Petitioners*  
*\*Pro hac vice application*  
to be filed



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

**BRIAN T. BAXTER**  
2401 Pennsylvania Ave.  
Philadelphia, PA 19130

and

**SUSAN T. KINNIRY**  
859 N. Stillman St.  
Philadelphia, PA 19130

Petitioners,

v.

**PHILADELPHIA BOARD OF ELECTIONS**  
City Hall, 1400 JFK Blvd., Rm 142  
Philadelphia, PA 19107

Respondents.

**CIVIL DIVISION**

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

**ELECTION APPEAL**

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

Case ID: 240902481  
Control No.: 24094566

Petitioners Brian T. Baxter and Susan T. Kinniry, qualified registered electors of Philadelphia County, by and through their undersigned counsel, appeal pursuant to 25 P.S. § 3157 from the decision of the Philadelphia Board of Elections (“Board”) on September 21, 2024, to not count their mail-in ballots in the September 17, 2024 Special Election, and aver as follows:<sup>1</sup>

### **INTRODUCTION**

1. Voting is the cornerstone of our democracy and the fundamental right upon which all our civil liberties rest. In Pennsylvania, the right to vote and have that vote count is enshrined and protected by the Free and Equal Elections Clause in the Pennsylvania Constitution, which provides that “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.

2. This appeal concerns the decision of the Board following the September 17, 2024 Special Election for State House Districts 195 and 201 to not count mail-in ballots because of a missing handwritten date on the outside declaration envelope. The Board set aside and did not count Petitioners’ mail-in ballots because both Petitioners inadvertently forgot to handwrite a date on the declaration envelope. 67 other ballots were also not counted because the voter either omitted the date or wrote a date that was deemed “incorrect” on the declaration envelope.

3. Since 2022, if a voter fails to handwrite the date on the outer declaration envelope of their mail ballot or writes a date that is deemed “incorrect,” their mail ballot is not counted.

*See Ball v. Chapman*, 289 A.3d 1 (Pa. 2023).

---

<sup>1</sup> As Petitioners do not seek a recount or canvass under §§ 1701, 1702, or 1703 of the Election Code, and the race in their election districts is not close enough for the affected voters’ mail-in ballots to potentially impact any outcomes, there is no need for the Court or the Commissioners to suspend certification of the election results in the special election. Rather, Petitioners seek an order declaring the Commissioners’ decision unlawful under the Pennsylvania Constitution and requiring the Commissioners to amend the final vote count to include the mail-in ballots of Petitioners. That said, given the upcoming November general election, time is of the essence to achieve clarity of the law before then.

4. However, in recent prior lawsuits multiple courts have found that the voter-written date is meaningless, unnecessary to establish voter eligibility or timely ballot receipt. *See, e.g., Pa. State Conf. of NAACP v. Schmidt* (“*NAACP P*”), 703 F. Supp. 3d 632, 668 (W.D. Pa. 2023), *rev’d on other grounds*, 97 F.4th 120 (3d Cir. 2024) (“County boards of elections acknowledge that they did not use the handwritten date on the voter declaration on the Return Envelope for any purpose related to determining a voter’s age..., citizenship..., county or duration of residence..., felony status..., or timeliness of receipt...” (internal record citations omitted)); *Pa. State Conf. of NAACP Branches v. Schmidt* (“*NAACP IP*”), 97 F.4th 120, 125, 127, 129 (3d Cir. 2024)(agreeing the handwritten date plays no role in determining a ballot’s timeliness or voter qualifications or in detecting fraud); *see also, e.g., Black Political Empowerment Project, et al. v. Schmidt, et al.* (“*B-PEP*”), No. 283 M.D. 2024, 2024 WL 4002321 at \*32 (Pa. Cmwlth. Aug. 30, 2024), *vacated on other grounds*, No. 68 MAP 2024 (Pa. Sept. 13, 2024) (“As has been determined in prior litigation involving the dating provisions, the date on the outer absentee and mail-in ballot envelopes is not used to determine the timeliness of a ballot, a voter's qualifications/eligibility to vote, or fraud.”).

5. Accordingly, the refusal to count timely mail ballots submitted by otherwise eligible voters because of an inconsequential date error violates the fundamental right to vote enshrined in the Free and Equal Elections Clause. *See B-PEP*, 2024 WL 4002321, at \*32-33; *see also Ball*, 289 A.3d at 27 n.156 (Pa. 2023) (plurality opinion) (acknowledging that the “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”).

6. Enforcement of this envelope-date provision disenfranchised at least 10,000 voters in the 2022 general election and thousands more voters in the 2024 Presidential primary whose ballots were timely received by Election Day. In the September 17, 2024 Special Election—a low turnout election involving only two seats in the Pennsylvania House of Representatives—the Board disenfranchised 23 mail-in voters for failing to include the date on the outer declaration envelope and 46 mail-in voters for writing a date that was deemed to be “incorrect.”

7. Although previous cases addressed whether federal or state statutory law required enforcement of the handwritten date, the only case to assess whether enforcement of the meaningless envelope-date requirement violates the Free and Equal Elections Clause found that it did. *B-PEP*, 2024 WL 4002321, at \*32-33. But that decision was recently vacated on procedural grounds. *See B-PEP*, No. 68 MAP 2024 (Pa. Sept. 13, 2024) (without reaching the merits, vacating lower court opinion on procedural grounds, holding that the Commonwealth Court lacked subject matter jurisdiction).

8. The Board’s decision to refuse to count Petitioners’ votes violates art.1, §5 of the Pennsylvania Constitution.

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

### **JURISDICTION**

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

### **PARTIES**

11. Petitioner Brian T. Baxter is an 81-year-old qualified registered voter who lives in Philadelphia. Mr. Baxter submitted a mail-in ballot ahead of the September 17, 2024 Special

Election for State Representative in the 195<sup>th</sup> state house district. *See* Declaration of Brian T. Baxter ¶¶ 1-3, 9 (“Baxter Decl.”).<sup>2</sup>

12. Mr. Baxter has a master’s degree in public policy and has had a long professional career in politics and public sector governance. *Id.*, ¶ 5.

13. Mr. Baxter votes in every election because voting is important to him and he believes it is a citizen’s responsibility to participate in shaping the policies under which we live. *Id.*, ¶¶ 6-7.

14. Mr. Baxter votes by mail because he appreciates the ability to take his time and research the candidates while deciding for whom to vote. He has been voting by mail for two years. *Id.*, ¶ 8.

15. About one month before the September 2024 Special Election, Mr. Baxter received a mail-in ballot from the Board. *Id.*, ¶ 9. He marked it, inserted it into the secrecy envelope and the outer return envelope. He thought he had filled out everything on the declaration envelope correctly when he submitted it. *Id.*, ¶ 10.

16. However, Mr. Baxter neglected to include a date on the outer declaration envelope when completing his mail-in ballot packet.<sup>3</sup>

17. As a consequence, the Board set aside and did not count his mail ballot in the September 2024 Special Election.

18. Petitioner Susan T. Kinniry is a 38-year-old qualified registered voter in Philadelphia who submitted a mail-in ballot in the September 17, 2024 Special Election for State

---

<sup>2</sup> A true and correct copy of Brian T. Baxter’s Declaration is attached hereto as Exhibit 1.

<sup>3</sup> See Philadelphia Board of Elections, *List of Flawed Ballots, 2024 Special Election* (Sept. 15, 2024), [https://vote.phila.gov/media/2024\\_Special\\_Election\\_Deficiency\\_List.pdf](https://vote.phila.gov/media/2024_Special_Election_Deficiency_List.pdf).

Representative in the 195<sup>th</sup> state house district. *See* Declaration of Susan T. Kinniry ¶¶ 1-3, 9 (“Kinniry Decl.”).<sup>4</sup>

19. Ms. Kinniry tries to vote in every election and especially in off-cycle, low turnout elections to show that voters are paying attention to what local officials are doing. Kinniry Decl. ¶¶ 6, 15.

20. Ms. Kinniry, who is a regular mail voter, received a mail-in ballot from the Board a few weeks before the September 2024 Special Election. *Id.*, ¶¶ 8-9. She marked her ballot and inserted it into the secrecy envelope and thought she properly filled out the declaration after she inserted everything into the return envelope. *Id.*, ¶ 10.

21. Ms. Kinniry received an email from the Board on August 27, 2024, informing her that she did not date her ballot return envelope and that her vote would not be counted. *Id.*, ¶ 12.

22. As a consequence, the Board set aside and did not count her mail ballot in the Special Election.

23. Respondent the Philadelphia Board of Elections is responsible for overseeing the conduct of all elections in Philadelphia County.<sup>5</sup> Among other duties, County Boards are responsible for:

- a. Reviewing and processing applications for absentee and mail ballots.<sup>6</sup> 25 P.S. §§ 3146.2b, 3150.12b.
- b. Confirming an absentee applicant’s qualifications by verifying their proof of identification and comparing the information on the application with information

---

<sup>4</sup> A true and correct copy of Susan Kinniry’s Declaration is attached hereto as Exhibit 2.

<sup>5</sup> The Board is composed of the three Philadelphia City Commissioners (the “Commissioners”), who are a bipartisan group of elected officials who oversee elections and voter registration in Philadelphia. Pursuant to the Philadelphia Home Rule Charter, the Commissioners serve as the county board of elections for Philadelphia County as provided in the Election Code. 25 P.S. § 2641.

<sup>6</sup> The rules governing mail and absentee ballot processing are identical. For ease of reference, Petitioners will refer to both absentee and mail ballots as “mail ballots.”

contained in the voter's record. 25 P.S. §§ 3146.2b, 3150.12b; *see also id.* § 3146.8(g)(4).

- c. Sending a mail-ballot package that contains a ballot, a “secrecy envelope” marked with the words “Official Election Ballot,” and the pre-addressed outer return envelope, on which a voter declaration form is printed (the “Return Envelope”). *Id.* §§ 3146.6(a), 3150.16(a).
- d. Maintaining poll books that track which voters have requested mail ballots and which have returned them. *Id.* §§ 3146.6(b)(3), 3150.16(b)(3).
- e. Upon return of a mail ballot, stamping the Return Envelope with the date of receipt to confirm its timeliness.<sup>7</sup>
- f. Logging returned mail ballots in the Department of State’s Statewide Uniform Registry of Electors (“SURE”) system, the voter registration system. *Id.*
- g. Keeping returned mail ballots in sealed or locked containers until they are canvassed by the County Board. 25 P.S. § 3146.8(a).
- h. Pre-canvassing and canvassing mail ballots, including examining the voter declaration. *Id.* § 3146.8(g).
- i. Conducting a formal hearing to hear challenges as to all challenged absentee ballot applications and challenged absentee ballots. *Id.* § 3146.8(g)(5).

---

<sup>7</sup> See Pa. Dep’t of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes*, at 2–3 (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>.

## **DECISION OF THE BOARD AT ISSUE**

24. Pursuant to 25 P.S. § 3154(f), the Board met in a public meeting on Saturday, September 21, 2024 to review the mail ballots from the Special Election.<sup>8</sup> Following a 2-1 vote, the Board orally announced its decision to refuse to count 69 ballots—including Petitioners' ballots—with a missing or incorrect date.<sup>9</sup>

25. Petitioners appeal from that decision.

## **FACTUAL BACKGROUND**

### **A. Voting by Mail in Pennsylvania**

26. Pennsylvania has long provided absentee ballot options for voters who cannot attend a polling place on Election Day. *See* 25 P.S. §§ 3146.1–3146.9. In 2019, Pennsylvania enacted new mail-in voting provisions, extending the vote-by-mail option to *all* registered, eligible voters. Act of Oct. 31, 2019, P.L. 552, No. 77, § 8.

27. A voter seeking to vote by mail must complete an application that includes their name, address, and proof of identification and send it to their county board of elections. 25 P.S. §§ 3146.2, 3150.12. Such proof of identification must include a Pennsylvania driver's license number, or non-driver identification number, if the voter has one. If the voter does not have a PennDOT-issued identification, they must provide the last four digits of the voter's social security number. 25 P.S. § 2602(z.5)(3). As part of the application process, voters provide all the information necessary for county boards of elections to verify that they are qualified to vote in Pennsylvania, namely, that they are at least 18 years old, have been a U.S. citizen for at least one

---

<sup>8</sup> *See* Philadelphia Board of Elections, *Agenda of the Philadelphia City Commissioners Return Board Meeting* (Sept. 21, 2024), [https://vote.phila.gov/media/Agenda\\_for\\_09\\_21\\_2024.pdf](https://vote.phila.gov/media/Agenda_for_09_21_2024.pdf).

<sup>9</sup> *See* Philadelphia Board of Elections, *Livestream Meetings: Return of Board Meeting on 9-21-2024*, <https://vote.phila.gov/resources-data/commissioner-meetings/livestream-meetings/>.



month, have resided in the election district for at least 30 days, and are not currently incarcerated on a felony conviction. *See* 25 Pa.C.S. § 1301.

28. After the application is submitted, the county board of elections confirms applicants' qualifications by verifying their proof of identification and comparing the information on the application with information contained in a voter's record. 25 P.S. §§ 3146.2b, 3150.12b; *see also id.* § 3146.8(g)(4). The county board's determinations on that score are conclusive as to voter eligibility unless challenged prior to Election Day. *Id.*

29. Once the county board verifies the voter's identity and eligibility, it sends a mail-ballot package that contains a ballot, a "secrecy envelope" marked with the words "Official Election Ballot," and the pre-addressed outer return envelope, on which a voter declaration form is printed (the "Return Envelope"). *Id.* §§ 3146.6(a), 3150.16(a). Poll books kept by the county show which voters have requested mail ballots and which have returned them. *Id.* §§ 3146.6(b)(3), 3150.16(b)(3).

30. At "any time" after receiving their mail-ballot package, the voter marks their ballot, puts it inside the secrecy envelope, and places the secrecy envelope in the Return Envelope. 25 P.S. §§ 3146.6(a), 3150.16(a).

31. The Election Code provides that the voter "shall...fill out, date and sign the declaration" printed on the outer envelope used to return their mail ballots. *See* 25 P.S. §§ 3146.6(a), 3150.16(a).

32. The voter delivers the ballot, in the requisite envelopes, by mail or in person, or by other designated method, to their county board of elections.

33. A mail ballot is timely so long as the county board of elections receives it by 8 p.m. on Election Day. *Id.* §§ 3146.6(c), 3150.16(c). Upon receipt of a mail ballot, county boards

of elections stamp the Return Envelope with the date of receipt to confirm its timeliness and log it in the Department of State’s Statewide Uniform Registry of Electors (“SURE”) system, the statewide database counties use to, among other purposes, generate poll books.<sup>10</sup>

34. Timely mail-in ballots are then verified consistent with procedures set forth in 25 P.S. § 3146.8(g)(3). Any ballot that has been so verified by the county board of elections and has not been challenged is counted and included with the election results. *Id.* § 3146.8(d), (g)(4).

### **B. The Date Provision Serves No Purpose**

35. Pennsylvania’s adoption of mail voting has been a boon for voter participation in the Commonwealth. For example, in 2020, 2.7 million Pennsylvanians voted by mail ballot.<sup>11</sup>

36. In the 2024 primary election, more than 4,000 mail-in ballots across Pennsylvania were marked as canceled in the SURE system due to a missing or incorrect handwritten date. *See* Declaration of Ariel Shapell at ¶ 12(b).<sup>12</sup>

37. The enforcement of the dating provision results in the arbitrary and baseless rejection of thousands of timely ballots. *See NAACP I*, 703 F.Supp.3d at 680 (finding the record “replete with evidence that the county boards’ application of the [date requirement] in the November 2022 general election created inconsistencies across the Commonwealth in the way ‘correctly dated’ and ‘incorrectly dated’ ballots were rejected or counted by different counties”).

38. This is not new. In the 2022 election, over 10,000 timely absentee and mail-in ballots were rejected because of the dating provision. *See NAACP I*, 703 F. Supp.3d at 668.

---

<sup>10</sup> Pa. Dep’t of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes*, at 2-3 (Apr. 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>.

<sup>11</sup> Pa. Dep’t of State, *Report on the 2020 General Election* at 9 (May 14, 2021), <https://www.dos.pa.gov/VotingElections/Documents/2020-General-Election-Report.pdf>.

<sup>12</sup> A true and correct copy of the Declaration of Ariel Shapell is attached hereto as Exhibit 3.

39. The date written on the envelope serves no purpose. In particular, it is not used to establish whether the mail ballot was submitted on time. Indeed, lawsuits in both state and federal court raising statutory challenges have conclusively demonstrated that the date is meaningless, necessary neither to establish voter eligibility nor timely ballot receipt. *See, e.g., NAACP II*, 97 F.4th at 129 (“Nor is [the handwritten date] used to determine the ballot’s timeliness because a ballot is timely if received before 8:00 p.m. on Election Day, and counties’ timestamping and scanning procedures serve to verify that. Indeed, not one county board used the date on the return envelope to determine whether a ballot was timely received in the November 2022 elections.”); *see also NAACP I*, 703 F. Supp.3d at 679 (“Whether a mail ballot is timely, and therefore counted, is not determined by the date indicated by the voter on the outer return envelope, but instead by the time stamp and the SURE system scan indicating the date of its receipt by the county board.”); *B-PEP*, 2024 WL 4002321, at \*32 (“As has been determined in prior litigation involving the dating provisions, the date on the outer absentee and mail-in ballot envelopes is not used to determine the timeliness of a ballot, a voter's qualifications/eligibility to vote, or fraud.”).<sup>13</sup>

40. A voter whose mail ballot was timely received could have signed the voter declaration form *only* in between the date their county board sent the mail-ballot packages and the Election-Day deadline. Ballots received by county boards *after* 8 p.m. on Election Day are not counted regardless of the handwritten envelope date. *See NAACP I*, 703 F.Supp.3d at 679 (“Irrespective of any date written on the outer Return Envelope’s voter declaration, if a county board received and date-stamped a . . . mail ballot before 8:00 p.m. on Election Day, the

---

<sup>13</sup> The courts’ findings in *NAACP I* and *NAACP II* that this voter-written date serves no purpose, plays no role in establishing a ballot’s timeliness or voter eligibility and is not used to prevent fraud are based on a complete record including discovery from all 67 county boards of elections, including Philadelphia.

ballot was deemed timely received...[I]f the county board received a mail ballot after 8:00 p.m. on Election Day, the ballot was not timely and was not counted, despite the date placed on the Return Envelope”), *rev’d on other grounds, NAACP II*, 97 F.4th 120 (3d Cir. 2024).

**C. The Board Timely Received Petitioners’ Mail-In Ballots.**

41. Petitioners are qualified voters who are registered to vote in Pennsylvania.

42. Petitioners validly applied for, received, and timely submitted their mail-in ballots prior to the Special Election on September 17, 2024.

43. Before the day of the Special Election and upon receipt of the mail-in ballots at issue here, the election staff reviewed the envelopes and determined that Petitioners had made an error that would prevent the Board from counting them under Pennsylvania law. Specifically, both Petitioners forgot to handwrite a date on the mail ballot declaration envelope.

44. On September 9, 2024, the Board posted a list of mail-in ballots on its website that had been received ahead of the 2024 Special Election that were “administratively determined to be potentially flawed.”<sup>14</sup> The public notice stated that “[t]hese ballot submissions have the possibility of **NOT** being counted” and provided information about requesting a replacement ballot or casting a provisional ballot.<sup>15</sup> Petitioners’ names appeared on this list of defective mail-in ballots received prior to Election Day, but they did not correct the error on their mail ballot envelopes before 8 p.m. on the day of the Special Election.

---

<sup>14</sup> See Philadelphia Board of Elections, *2024 Special Election: Unverifiable Identification, Undeliverable and/or Potentially Flawed Ballots* (Sept. 9, 2024), <https://vote.phila.gov/news/2024/09/09/2024-special-election-unverifiable-identification-undeliverable-and-or-potentially-flawed-ballots/>.

<sup>15</sup> *Id.*

#### **D. The Board Voted to Not Count Petitioners' Mail-in Ballots in the 2024 Special Election**

45. The Board convened at a public meeting on Saturday, September 21, 2024 to adjudicate mail-in ballots and make “sufficiency determinations” about mail ballot packets with flaws.<sup>16</sup>

46. The Board was informed that 23 mail-in ballots had been segregated due to a “missing date.” Commissioner Sabir moved that “this Board not accept ballots with a missing date.” The motion was seconded by Commissioner Bluestein.<sup>17</sup>

47. Commissioner Deeley responded to the motion by reading from the Commonwealth Court’s August 30, 2024 opinion in which the Board was named as a Respondent including that:

The fundamental right to vote guaranteed by our Constitution is at issue. For this reason, a strict scrutiny standard of review applies to the dating provisions’ restriction on that right. Under this standard of review, the government bears the heavy burden of proving that the law in question is narrowly tailored to serve a compelling government interest and where the governmental fails to satisfy its burden, the law or its application is unconstitutional. As has been determined in prior litigation, the date on the outer mail-in ballot envelopes is not used to determine the timeliness of a ballot, a voter’s qualifications/eligibility to vote, or fraud. Therefore, the dating provisions serve no compelling government interest. The refusal to count undated or incorrectly dated but timely mail ballots submitted by otherwise eligible voters because of meaningless and inconsequential paperwork errors violates the fundamental right to vote recognized in the Free and Equal Elections Clause.

48. Commissioner Deeley observed that the Commonwealth’s order was vacated “on technical grounds” by the Pennsylvania Supreme Court, which “did not rule on the merits of the

---

<sup>16</sup> See Philadelphia Board of Elections, *Agenda of the Philadelphia City Commissioners Return Board Meeting* (Sept. 21, 2024), [https://vote.phila.gov/media/Agenda\\_for\\_09\\_21\\_2024.pdf](https://vote.phila.gov/media/Agenda_for_09_21_2024.pdf).

<sup>17</sup> See Philadelphia Board of Elections, *Livestream Meetings: Return of Board Meeting on 9-21-2024*, <https://vote.phila.gov/resources-data/commissioner-meetings/livestream-meetings/>. The allegations in paragraphs 47-54, *infra*, recount the proceedings as recorded in this livestream.

constitutional arguments.” Commissioner Deeley concluded, in light of the Commonwealth Court’s ruling, that “not counting these ballots because of meaningless and inconsequential errors that do not affect determinations of the timeliness of a ballot, a voter’s eligibility to vote, or the prevention of fraud, would be a violation of the Pennsylvania Constitution.”

49. Commissioner Deeley further explained that as Commissioner she is legally required to swear an oath to uphold the Pennsylvania Constitution at the beginning of each term. “The Pennsylvania Constitution is one of the documents that we swear to support, obey, and defend. Therefore, I believe...that we should count these ballots.”

50. Commissioner Bluestein responded to the remarks by stating, “While I agree in principle with Vice-Chair Deeley that these ballots *should* count, the Pennsylvania Supreme Court vacated the Commonwealth Court ruling and we have an obligation to follow the law as it currently stands. Unfortunately, that means that we are not able to count these ballots in my opinion.”

51. The Board voted 2-1 to not count mail-in ballots that arrived in undated declaration envelopes.

52. The Board was then informed that 46 ballots had arrived in envelopes that were “incorrectly dated.” The Board moved to not count “incorrectly dated” ballots, and Commissioner Deeley again noted her objection in light of the *B-PEP* ruling, stating “I believe the Free and Equal Election Clause of the Pennsylvania Constitution requires us to count these ballots.”

53. Commissioner Sabir responded that he “agree[d] with the sentiments” expressed by his colleague.

54. The Board voted 2-1 to not count mail-in ballots that arrived in “incorrectly dated” declaration envelopes. Thus, Petitioners’ votes were not counted in the 2024 Special Election.

### **GROUND FOR APPEAL**

55. The Board’s decision to not count Petitioners’ mail ballots violated Petitioners’ fundamental right to vote under the Free and Equal Elections Clause.

56. In Pennsylvania, the right to vote is enshrined in and protected by the Free and Equal Elections Clause, which states: “Elections 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 means not only that voters must have an equal opportunity to participate in elections, but also that: “each voter under the law has the right to cast [their] ballot and have it honestly counted.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914).

57. Under this guarantee “all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth.” *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018). Likewise, the Pennsylvania Constitution forbids the imposition of rules applicable to the right to vote when such regulation denies the franchise or subverts the right to vote. *Winston*, 91 A. at 523.

58. The Pennsylvania Supreme Court has repeatedly held that the right to vote guaranteed by the Free and Equal Elections Clause is fundamental. *See, e.g., Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 361 (Pa. 2020) (employing a construction of the Election Code that “favors the fundamental right to vote and enfranchises, rather than disenfranchises, the electorate”); *Banfield v. Cortés*, 110 A.3d 155, 176 (Pa. 2015) (observing

that “the right to vote is fundamental and ‘pervasive of other basic civil and political rights’”) (quoting *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999)).

59. Strict scrutiny applies to any restriction on this fundamental right. *See, e.g., Petition of Berg*, 712 A.2d 340, 342 (Pa. Cmwlth. 1998), *aff’d*, 713 A.2d 1106 (Pa. 1998) (“It is well settled that laws which affect a fundamental right, such as the right to vote..., are subject to strict scrutiny”); *Applewhite v. Commonwealth* (“*Applewhite II*”), No. 330 M.D. 2012, 2014 WL 184988, at \*20 (Pa. Cmwlth. Jan. 17, 2014) (laws that “infringe[] upon qualified electors’ right to vote” are analyzed “under strict scrutiny.”); *James v. SEPTA*, 477 A.2d 1302, 1306 (Pa. 1984) (“[W]here a...fundamental right has been burdened, another standard of review is applied: that of strict scrutiny.”).

60. Under strict scrutiny, the party defending the challenged action must prove that it serves a compelling government interest. *Pap’s A.M. v. City of Erie*, 812 A.2d 591, 596 (Pa. 2002); *see also, e.g., In re Nader*, 858 A.2d 1167, 1180 (Pa. 2004), *abrogated on other grounds by In re Vodvarka*, 140 A.3d 639 (Pa. 2016) (“[W]here a precious freedom such as voting is involved, a compelling state interest must be demonstrated”).

61. The Board cannot demonstrate a compelling interest that justifies its complete disenfranchisement of voters where the handwritten date requirement on mail ballot envelopes serves absolutely no purpose in determining timeliness of receipt or voter qualifications. The Board acknowledged at the September 21 hearing that the date requirement serves no purpose.

62. The only court to have tested the envelope-date provisions in 25 P.S. §§ 3146.6(a), 3150.16(a) against the guarantee of the right to vote under Article I, § 5 concluded that the envelope-date provisions “serve no compelling government interest” and that the “refusal to count undated or incorrectly dated but timely mail ballots submitted by otherwise



eligible voters because of meaningless and inconsequential paperwork errors violates the fundamental right to vote recognized in the free and equal elections clause.” *B-PEP*, 2024 WL 4002321, at \*1.

63. The Board’s application of the Election Code’s envelope dating provisions, 25 P.S. §§ 3146.6(a), 3150.16(a), to reject Petitioners’ timely mail ballots based solely on the inadvertent failure to add a meaningless, superfluous handwritten date next to their signature on the mail ballot Return Envelope is an unconstitutional interference with the exercise of the right to suffrage in violation of the Free and Equal Elections Clause.

WHEREFORE, Petitioners respectfully request that this Honorable Court enter an order reversing the decision of the Philadelphia Board of Elections, declaring that the Pennsylvania Constitution requires the counting of Petitioners’ ballots, directing the Board to count the mail ballots cast by Petitioners in the September 17, 2024 Special Election, and enter such other and further relief as provided by the Pennsylvania Election Code or as this Court deems just and appropriate.

Respectfully submitted,

Dated: September 23, 2024

MARIAN K. SCHNEIDER (No. 50337)  
STEPHEN A. LONEY (No. 202535)  
KATE STEIKER-GINZBERG (No. 332236)  
ACLU OF PENNSYLVANIA  
P.O. Box 60173  
Philadelphia, PA 19102  
215-592-1513  
267-573-3054 (fax)  
mschneider@aclupa.org  
sloney@aclupa.org  
ksteiker-  
ginzberg@aclupa.org

WITOLD J. WALCZAK (No. 62976)  
ACLU OF PENNSYLVANIA  
P.O. Box 23058  
Pittsburgh, PA 15222  
412-681-7864  
vwalczak@aclupa.org

/s/ Claudia De Palma  
MARY M. MCKENZIE (No. 47434)  
BENJAMIN GEFFEN (No. 310134)  
CLAUDIA DE PALMA (No. 320136)  
Public Interest Law Center  
1500 JFK Blvd., Suite 802  
Philadelphia, PA 19102  
(267) 546-1319  
mmckenzie@pubintl.org  
bgeffen@pubintl.org  
cdepalma@pubintl.org

JOHN A. FREEDMAN\*  
ARNOLD & PORTER KAYE  
SCHOLER LLP  
601 Massachusetts Ave., NW  
Washington, DC 20001  
(202) 942-5000  
john.freedman@arnoldporter.com

*Counsel for Petitioners*  
*\*Pro hac vice applications*  
to be filed

**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: September 23, 2024

/s/ Claudia De Palma  
Claudia De Palma  
*Counsel for Petitioners*

## VERIFICATION

I, BRIAN T. BAXTER, hereby state:

1. The statements made in the foregoing *Petition for Review in the Nature of a Statutory Appeal* are true and correct to the best of my own personal knowledge, information, and belief; and
2. I understand that false statements herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Brian T. Baxter

Dated: September 23, 2024

## VERIFICATION

I, Susan T. Kinniry, hereby state:

1. The statements made in the foregoing *Petition for Review in the Nature of a Statutory Appeal* are true and correct to the best of my own personal knowledge, information, and belief; and
2. I understand that false statements herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.



A handwritten signature in black ink, appearing to read "Susan T. Kinniry", is written over a horizontal line.

Dated: September 23<sup>rd</sup>, 2024

# EXHIBIT

1

## DECLARATION OF BRIAN T. BAXTER

I, Brian T. Baxter, hereby declare as follows:

1. I have personal knowledge of the matters in this declaration and this is what I would testify to if called as a witness in Court.

2. I am 81 years old and am otherwise competent to testify.

3. I live in Philadelphia, Pennsylvania.

4. I have lived in Philadelphia for fourteen years. I lived in Harrisburg in the 1980s and later resided in Cherry Hill, New Jersey before moving to Philadelphia. I am happily married to my wife Ilene and a proud father.

5. I am presently retired. For most of my career, I worked for elected officials, both Republicans and Democrats, at the state and local level in Pennsylvania, New Jersey, and New York. I have a master's degree in public policy from Princeton University, and I am very interested in politics and elections. Some of my professional roles include serving as city administrator of Trenton, New Jersey for nine years, working for Elizabeth Holtzman when she was the Comptroller of New York City, and working for Governor Christine Todd Whitman of New Jersey. I gained experience with political campaigns in the City of Philadelphia by supporting Joseph Rock's run for City Controller in 1989. I most recently worked as a lobbyist at S.R. Wojdak & Associates, the largest lobbying firm in the state. I continue to stay involved with political work by volunteering on the 35 Doors Project for Indivisible Pennsylvania.

6. I am a registered voter in Philadelphia. I vote in every election,

including primary and general elections.

7. Voting is very important to me and I believe it is the responsibility of every citizen to vote. Voting is a critical way to participate in shaping the policies under which we live.

8. I started voting by mail about two years ago. I prefer to vote by mail because it provides time to do internet research and gather information about the candidates and issues on the ballots before I submit my vote. I believe that voting around the kitchen table results in smarter voting because I can review the ballot in advance. I do not want to walk into the voting booth without the proper amount of information and vote on a ballot that I am seeing for the first time.

9. I voted by mail in the Philadelphia's Special Election this year for State Representative in the 195th District. About one month before the September 2024 special election, I received a mail-in ballot from the Philadelphia City Commissioners.

10. After I received my ballot, I marked it, inserted it into the secrecy envelope and the outer return envelope. I thought I had filled out everything on the ballot correctly when I submitted it. I was aware that there were lawsuits and efforts in the state legislature to change the envelope dating requirement and I tried to follow all the directions so that my vote would be counted.

11. As far as I know, I have never made a mistake that disqualified my ballot in prior elections when I voted by mail. I am getting older and more



forgetful, which may have contributed to my mistake when completing the mail-in ballot envelope.

12. I believe that my vote should be counted. After reading dozens of articles about this issue, I am not aware of any rationale for why the date is helpful or necessary. The date on the envelope is not important because it is the date that the ballot arrives in the election office that determines whether the vote is valid. I tried to comply with the mail-in ballot rules, but this bureaucratic stumbling block will prevent my vote from counting.

13. I returned my mail-in ballot on time and I believe that denying a citizen's vote because they didn't include the date on the mail-in ballot envelope is taking away that person's vote for no good reason.

I understand that false statements herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Executed this 22<sup>nd</sup> of September, 2024 in Philadelphia, Pennsylvania.

A handwritten signature in black ink that reads "Brian T. Baxter". The signature is written in a cursive style and is positioned above a horizontal line.

Brian T. Baxter

# EXHIBIT

2

## DECLARATION OF SUSAN T. KINNIRY

I, Susan T. Kinniry, hereby declare as follows:

1. I have personal knowledge of the matters in this declaration and this is what I would testify to if called as a witness in Court.

2. I am 38 years old and am otherwise competent to testify.

3. I am a resident of Philadelphia, Pennsylvania.

4. I grew up in Jenkintown, Pennsylvania. I attended high school and law school in Philadelphia.

5. I have worked as an attorney for the Social Security Administration since 2017. My work initially focused on the disability program and presently involves labor and employee relations issues.

6. I have been a registered voter in Philadelphia since around 2018. I try to vote in every primary and general election.

7. Voting is very important to me because it is one of the most direct ways that citizens can influence what kind of government we have and who represents our interests. I try not to pass up that opportunity to participate in governance.

8. I started voting by mail in Philadelphia in 2019. I prefer to vote by mail because it is more convenient than voting in person, and because I like having time to review the ballot at home before casting my vote.

9. I voted by mail this year in Philadelphia's Special Election for State Representative in the 195th District. I made an annual request for mail-in

ballots and received a mail-in ballot from the Philadelphia City Commissioners a few weeks before the September 2024 special election.

10. After I received my ballot, I marked it, inserted it into the secrecy envelope and the outer return envelope. I signed the declaration on the outer envelope. I thought I had filled out the outer envelope correctly when I submitted it. I was aware that elections offices in Pennsylvania cannot count ballots for immaterial reasons, so I am embarrassed that I forgot to include the date.

11. As far as I know, I have never made any mistakes on prior mail-in ballots. I do not recall ever receiving an email stating that my ballot was invalid before this September 2024 special election.

12. After I returned my ballot, I received an email from the Pennsylvania Department of State on August 27, informing me that I did not date my ballot return envelope and that my vote would not be counted if I didn't take additional steps to fix this mistake. A true and correct copy of the email dated August 27 is attached hereto as Exhibit A.

13. I was annoyed at myself when I learned that my ballot would not be counted because I forgot the date. I also thought that if I made this mistake, despite my experience with technical, legal requirements, many others must make the same mistake.

14. I did not attempt to fix my ballot because shortly after receiving the email stating that I forgot to date my ballot return envelope, I read in the news

about a recent Commonwealth Court decision finding that it was unconstitutional to reject ballots that do not comply with the date requirement. I thought that the Court had reached the right result.

15. I wish that my vote had been counted in this election. I think it is important to participate in off-cycle elections to show that voters are paying attention to what local officials are doing. Often voter turnout is low in these kinds of special elections, so I made an intentional effort to submit my ballot.

16. I believe that voting rules should encourage more participation, not less. The envelope dating requirement seems like an unnecessary stumbling block that will result in fewer ballots being counted. That is not the result that is in everyone's best interest.

I understand that false statements herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Executed this 22<sup>nd</sup> of September, 2024 in Philadelphia, Pennsylvania.

A handwritten signature in black ink, appearing to read 'Susan T. Kinniry', written over a horizontal line.

Susan T. Kinniry

# Declaration Exhibit A

From: <[RA-voterregstatcert@state.pa.us](mailto:RA-voterregstatcert@state.pa.us)>  
Date: Tue, Aug 27, 2024, 4:58 PM  
Subject: Your Ballot Status Has Changed – Check for Updates  
To: <[SUSANKINNIRY@gmail.com](mailto:SUSANKINNIRY@gmail.com)>

Dear SUSAN T KINNIRY,

After your ballot was received by PHILADELPHIA County, it received a new status.

Your ballot may not be counted because you did not date your ballot return envelope. If you receive this email on or before election day, you can go to your polling place on election day before 8 p.m. and request a provisional ballot.

You can get more information on your ballot's new status by going to <https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx>.

If you have questions or need more information after checking your ballot's status, please contact PHILADELPHIA County at (215) 686-VOTE.

Para leer esta información en español, vaya a <https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx> .  
要閱讀此資訊的中文版，請造訪 <https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx>。

Thank you.

\*\*\*\*Please do not reply to this email.\*\*\*\*

Case ID: 240902481  
Control No.: 24094566

# EXHIBIT

3



**DECLARATION OF ARIEL SHAPELL  
IN SUPPORT OF PETITIONERS' PETITION FOR REVIEW**

1. I, Ariel Shapell, am an attorney at the American Civil Liberties Union of Pennsylvania (“ACLU-PA”) and have a background in data analytics.

2. I received a B.S.B.A. with majors in mathematics and finance from Washington University in St. Louis in 2011 and a J.D. from the University of Pennsylvania Carey Law School in 2021.

3. In 2014 and 2015, I served as the Director of Business Intelligence at Beatport LLC, a digital music and entertainment company, where I was responsible for organizing, analyzing, and reporting the company’s business data. In my role, I performed data analyses and visualizations and developed systems to extract, transform, and load data. I also supervised a team of three data scientists and analysts.

4. From 2015 until 2018, I served as the lead product manager at Postlight LLC, a technology consultancy. At Postlight LLC, I oversaw data analytics and digital product development projects for large entertainment, finance, and cultural institutions.

5. From 2019 through the present, I have worked as a volunteer, intern, and now legal fellow at the ACLU-PA. During my time with the ACLU-PA, I have conducted numerous analyses of large data sets for both litigation and advocacy.

6. During my time with the ACLU-PA, I have conducted numerous analyses of large data sets for both litigation and advocacy.

7. I have been asked by the ACLU-PA, Arnold & Porter Kaye Scholer LLP, and the Public Interest Law Center (collectively, “Petitioners’ Counsel” or “Counsel”) to apply my training and expertise to assess the number of mail-ballots that were coded as canceled or pending because the voter neglected to write the date on the outer envelope or because the voter wrote a date that was deemed “incorrect.”

8. I have been informed and understand that on August 21, 2023, ACLU-PA attorney Kate Steiker-Ginzberg received access from the Pennsylvania Department of State to the “Pennsylvania Statewide Mail-Ballot File,” which contains point-in-time public information about each mail-ballot application and mail-ballot recorded in Pennsylvania’s Statewide Uniform Registry of Electors (“SURE”) system.

9. Attorney Steiker-Ginzberg made two versions of the Pennsylvania Statewide Mail-Ballot File available to me: (1) a version of the file generated on November 17, 2023 based on Department of State data from the SURE system corresponding to mail-ballots submitted in the November 2023 municipal election, under the file name VR\_SWMailBallot\_External 20231117.TXT; and (2) a version of the file generated on May 14, 2024 based on Department of State data from the SURE system corresponding to mail-ballots received in the April 2024 Pennsylvania

presidential primary election, under the file name VR\_SWMailBallot\_External 20240514.TXT.

10. For the May 14, 2024 SURE file, I identified mail ballots that were coded as canceled or pending because the voter neglected to write the date on the outer envelope by selecting the rows in the files where the “Ballot status reason” field was set to “CANC - NO DATE” or “PEND – NO DATE.” For the November 17, 2023 SURE file, I identified mail ballots that were coded as canceled because the voter neglected to write the date on the outer envelope by selecting the rows in the files where the “Ballot status reason” field was set to “CANC - NO DATE.” No “PEND – NO DATE” “Ballot status reason” values were present in the November 17, 2023 SURE file.

11. Similarly, for the May 14, 2024 SURE file, I identified mail ballots that were coded as canceled or pending because the voter wrote a date that was deemed “incorrect” by selecting the rows in the files where the “Ballot status reason” field was set to “CANC - INCORRECT DATE” or “PEND – INCORRECT DATE”. For the November 17, 2023 SURE file, I identified mail ballots that were coded as canceled because the voter wrote a date that was deemed “incorrect” by selecting the rows in the files where the “Ballot status reason” field was set to “CANC - INCORRECT DATE.” No “PEND – INCORRECT DATE” “Ballot status reason” values were present in the November 17, 2023 SURE file.

12. Based on the methodology described above, I determined that:

- a. As of November 17, 2023, **6,804 mail-ballots** submitted in the November 2023 municipal election had been coded in the SURE file as canceled because the voter neglected to write the date on the outer envelope or because the voter wrote a date that was deemed “incorrect.” Of that total, 4,849 ballots were coded as canceled because the voter neglected to write the date on the outer envelope, and 1,955 were coded as canceled because the voter wrote a date that was deemed “incorrect.”
- b. As of May 14, 2024, **4,421 mail-ballots** submitted in the April 2024 Pennsylvania presidential primary election had been coded in the SURE file as canceled or pending because the voter neglected to write the date on the outer envelope or because the voter wrote a date that was deemed “incorrect.” Of that total, 1,216 ballots were coded as canceled or pending because the voter neglected to write the date on the outer envelope, and 3,205 were coded as canceled or pending because the voter wrote a date that was deemed “incorrect.”

13. My conclusions, and the bases for my conclusion, are presented in this declaration. My work on these matters is ongoing, and I may make necessary

revisions or additions to the conclusions in this declaration should new information become available or to respond to any opinions and analyses proffered by Respondents. I am prepared to testify on the conclusions in this declaration, as well as to provide any additional relevant background. I reserve the right to prepare additional exhibits to support any testimony.

The statements made in this Declaration are true and correct to the best of my knowledge, information, and belief. I understand that false statements made herein are subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

A handwritten signature in blue ink that reads "Ariel Shapell". The signature is written in a cursive style with a horizontal line underneath it.

Ariel Shapell

5/27/2024