Supreme Court of Pennsylvania

Court of Common Pleas
Civil Cover Sheet

Allegheny **County**

For Prothonotary Use Only:	TIME STAMP
Docket No:	

The information collected on this form is used solely for court administration purposes. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

SECTION A

Commencement of Action:
☐ Complaint ☐ Writ of Summons ☒ Petition
☐ Transfer from Another Jurisdiction ☐ Declaration of Taking

Lead Plaintiff's Name:	Lead Defendant's Name:
Nicole Ziccarelli	Allegheny County Board of Elections
Are money damages requested? ☐ **Yes** ☒ **No**	Dollar Amount Requested: (check one) ☐ within arbitration limits ☐ outside arbitration limits
Is this a *Class Action Suit*? ☐ **Yes** ☒ **No**	**Is this an *MDJ Appeal*?** ☐ **Yes** ☒ **No**

Name of Plaintiff/Appellant's Attorney: Matthew H. Haverstick

☐ **Check here if you have no attorney (are a Self-Represented [Pro Se] Litigant)**

SECTION B

Nature of the Case: Place an "X" to the left of the **ONE** case category that most accurately describes your ***PRIMARY CASE***. If you are making more than one type of claim, check the one that you consider most important.

TORT (*do not include Mass Tort*)
- ☐ Intentional
- ☐ Malicious Prosecution
- ☐ Motor Vehicle
- ☐ Nuisance
- ☐ Premises Liability
- ☐ Product Liability *(does not include mass tort)*
- ☐ Slander/Libel/ Defamation
- ☐ Other:

MASS TORT
- ☐ Asbestos
- ☐ Tobacco
- ☐ Toxic Tort - DES
- ☐ Toxic Tort - Implant
- ☐ Toxic Waste
- ☐ Other:

PROFESSIONAL LIABLITY
- ☐ Dental
- ☐ Legal
- ☐ Medical
- ☐ Other Professional:

CONTRACT (*do not include Judgments*)
- ☐ Buyer Plaintiff
- ☐ Debt Collection: Credit Card
- ☐ Debt Collection: Other
- ☐ Employment Dispute: Discrimination
- ☐ Employment Dispute: Other
- ☐ Other:

REAL PROPERTY
- ☐ Ejectment
- ☐ Eminent Domain/Condemnation
- ☐ Ground Rent
- ☐ Landlord/Tenant Dispute
- ☐ Mortgage Foreclosure: Residential
- ☐ Mortgage Foreclosure: Commercial
- ☐ Partition
- ☐ Quiet Title
- ☐ Other:

CIVIL APPEALS
Administrative Agencies
- ☐ Board of Assessment
- ☒ Board of Elections
- ☐ Dept. of Transportation
- ☐ Statutory Appeal: Other
- ☐ Zoning Board
- ☐ Other:

MISCELLANEOUS
- ☐ Common Law/Statutory Arbitration
- ☐ Declaratory Judgment
- ☐ Mandamus
- ☐ Non-Domestic Relations Restraining Order
- ☐ Quo Warranto
- ☐ Replevin
- ☐ Other:

Updated 1/1/2011

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

COVER SHEET

Plaintiff(s)
Nicole Ziccarelli

Vs

Defendant(s)
Allegheny County Board of Elections

Case Number :

Type of pleading:
Petition - Civil Appeal Board of Elections

Code and Classification :

Filed on behalf of
Nicole Ziccarelli

(Name of the filing party)

☑ Counsel of Record
☐ Individual, If Pro Se

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Attorney's State ID : 85072

Attorney's Firm ID :

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY

IN RE: 2,349 Ballots in the 2020 General Election.	*No.* _____

ORDER FOR HEARING

AND NOW, this 12th day of November, 202, upon consideration of the Petition For Review In The Nature Of A Statutory Appeal filed by Nicole Ziccarelli, it is hereby ORDERED that a hearing is scheduled for the _____ day of November, 2020, at ____ o'clock _.m., in Courtroom ___ of the Allegheny County Court of Common Pleas.

_____, J.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY

IN RE: 2,349 Ballots in the 2020 General Election.	*No.* _____

ORDER

AND NOW, this 12th day of November, 202, upon consideration of the Petition For Review In The Nature Of A Statutory Appeal filed by Nicole Ziccarelli, and any responses thereto, the Allegheny County Board of Elections is hereby ORDERED to set aside the 2,349 mail-in ballots containing undated, or otherwise incomplete voter declaration that to the extent any such mail-in ballots have been canvassed, or tabulated, the Allegheny County Board of Elections is FURTHER ORDERED to subtract any votes recorded on said mail-in ballots from the total.

_____, J.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY

IN RE: 2,349 Ballots in the 2020 General Election.	*No.* _____

PETITION FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL

Nicole Ziccarelli, candidate for the Senate of Pennsylvania from the 45th Senatorial District, hereby appeals from the decision of the Allegheny County Board of Elections (the "Board") directing the acceptance, canvassing, and computation of certain mail-in ballots containing undated voter declarations, and in support thereof, avers as follows:

INTRODUCTION

1. This appeal concerns the authority of the Board of Electors to unilaterally alter the statutory criteria governing the casting of ballots via mail for the November 3, 2020 General Election.

JURISDICTION AND VENUE

2. The Court has jurisdiction over this statutory appeal and venue is proper in this Court pursuant to Section 3157 of the Election Code. *See* 25 P.S. § 3157(a).

PARTIES

3. Petitioner Nicole Ziccarelli is the Republican candidate for Senate from the 45th Senatorial District, which encompasses parts of Allegheny and Westmoreland Counties.

4. The Board is a local governmental agency generally responsible for overseeing the conduct of all elections in Allegheny County, including, *inter alia*, the pre-canvass and canvass of absentee and mail-in votes. *See id.* at § 2642 (detailing the powers and duties of the county boards of elections); *see also* City of Pittsburgh Charter, Art. X, § 1.10-1006.

DETERMINATION SOUGHT TO BE REVIEWED

5. Ziccarelli appeals from the Board's decision to canvass 2,349 defective mail-in ballots.

FACTS AND PROCEDRUAL BACKGROUND

6. On October 31, 2019, Governor Tom Wolf signed Act 77 into law, which, among other things, authorized widespread mail-in voting in Pennsylvania, whereby any registered voter could apply for a mail-in ballot and vote by submitting the same to the appropriate county board of elections.

7. The individual county boards of electors must begin processing ballots fifty days prior to the date of an election (*i.e.*, September 14, 2020 for the 2020 General Election). *See* 25 P.S. § 3150.12a.

8. Indeed, in Allegheny County, by September 25, 2020, the Board had delivered over 70,000 mail-in ballots.[1]

9. Concomitantly, the mail-in voting statutory regime established certain safeguards to ensure the integrity of the electoral process.

10. Specifically—and of particular relevance to this matter—Section 3150.16(a) imposes the following requirements:

[1] https://pittsburgh.cbslocal.com/2020/09/24/allegheny-county-mail-in-ballots/

i. The voter must mark the ballot by eight o'clock p.m. on the day of the election;

ii. The ballot must be securely sealed in the secrecy envelope bearing the official stamp "Official Election Ballot," and placed inside a second envelope (the "Outer Envelope"), on which must be printed "the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector." 25 P.S. § 3150.16(a); and

iii. Prior to mailing the ballot or delivering the same in-person, "the elector ***shall*** . . . fill out, ***date*** and ***sign*** the declaration printed on [the Outer Envelope]." *Id.* (emphasis added)

11. Importantly, although the Secretary of the Commonwealth has discretion in crafting its precise wording, the voter declaration appearing on the Outer Envelope must contain: (i) "a statement of the elector's qualifications[;]" and (ii) "a statement that the elector has not already voted in the primary or election." *Id.* at § 3150.14(b).

12. The canvassing of mail-in ballots—*i.e.*, the process by which ballots are received, reviewed, and tabulated—is governed by Section 3146.8(g) of the Election Code, which imposes three discrete duties on the county boards of elections, including, as relevant herein, the duty to ensure "that the declaration [on the Outer Envelope] is sufficient."

13. Upon being satisfied that the declaration is sufficient and that the ballot otherwise comports with the statutory requirements, the mail-in ballot is to be treated as "verified" and "counted and included with the returns of the applicable election district." 25 P.S. § 3146.8(g)(4)(a).

14. The 2020 General Election was conducted on November 3, 2020 marking the first time a general election was conducted under the mail-in voting regime established by Act 77.

15. In Allegheny County, an estimated 350,000 mail-in ballots were received by the Board, of which, 2,349 contain a signed—but undated—declaration (the "Disputed Ballots").

16. Recognizing that the Disputed Ballots' compliance with the Election Code's criteria is, at a minimum, arguable, the Board initially segregated these ballots pending further internal deliberations.

17. On Tuesday, November 10, 2020, the Board conducted "a special virtual meeting … for the consideration of submitted ballots for the November 3, 2020 election[,]"[2] during which it considered the question of whether the Disputed Ballots should be set aside as invalid, or canvassed in accordance with Section 3146.8 of the Election Code.

18. After a short deliberation, which lasted approximately six minutes, the Board, by a 2-1 vote, decided to canvass the Disputed Ballots and directed the Manger of the Elections Division to proceed.

GROUNDS FOR APPEAL

I. Because a mail-in ballot with an undated voter declaration is per se insufficient under Section 3146.8(g), the Board is required to set aside the Disputed Ballots.

19. As discussed above, under Section 3146.8(g)(3), the Board may not pre-canvass or canvass a mail-in ballot unless it is first "satisfied that the declaration is sufficient." 25 P.S. § 3146.8(g)(3).

20. Examining the precise provision presently in question, the Supreme Court unanimously held that a county election board's obligation to assess the sufficiency of the voter

[2] https://www.alleghenycounty.us/elections/board-of-elections.aspx

declaration is one of its three enumerated duties and a prerequisite to the ballot proceeding to the pre-canvass/canvassing stage. *See In re Nov. 3, 2020 Gen. Election*, No. 149 MM 2020, __ A.3d __, __, 2020 WL 6252803, at *9–10 (Pa. Oct. 23, 2020).[3]

21. In this regard, incorporating the requirements of that Section 3150.16(a), *see* ¶ 8(ii) *supra*, the Court held that "in determining whether the declaration is 'sufficient' for a mail-in or absentee ballot at canvassing, the county board is required to ascertain whether the declaration on the return envelope has been filled out, ***dated***, and signed." *Id.* at * 12 (citing 25 P.S. § 3150.16(a)).

[3] As explained more fully by the Court:

> Section 3146.8(g)(3) of the Election Code enumerates only three duties of the county boards of elections during the pre-canvassing and canvassing process:
>
> > (1) to "examine the declaration on the envelope of each ballot not set aside under subsection (d) [requiring rejection of ballots for deceased voters] and shall compare the information thereon with that contained in the 'Registered Absentee and Mail-in Voters File,' the absentee voters' list and/or the 'Military Veterans and Emergency Civilians Absentee Voters File,' whichever is applicable";
> > (2) to verify "the proof of identification as required under this act," and
> > (3) to be "satisfied that the declaration is sufficient and the information contained in the 'Registered Absentee and Mail-in Voters File,' the absentee voters' list and/or the 'Military Veterans and Emergency Civilians Absentee Voters File' verifies his right to vote."
>
> If an absentee or mail-in ballot comports with these statutory requirements, and it has not been challenged under Section 3146.2b (providing for challenges to approval of absentee ballot application on the ground that the applicant was not a "qualified absentee elector," or a "qualified elector"), or Section 3150.12b (providing that the exclusive means for challenging a mail-in ballot application is "on the grounds that the applicant was not a qualified elector"), then Section 3146.8(g)(4) requires the ballot to be considered "verified" and directs that it "shall be counted and included with the returns of the applicable election district."

22. As such, *In re Nov. 3 2020 Gen. Election*, by its plain terms, confirms that the sufficiency of a mail-in ballot is predicated not only upon being properly "filled out . . . and signed," but also upon being "dated."

23. Moreover, nothing in the Supreme Court's decision suggests that an elector's failure to date the declaration—which is a requirement imposed by statute—may be overlooked or treated as an insignificant or ancillary defect.

24. Neither the Election Code, nor any other legal principle governing the conduct of the Board, permits the Board to exercise discretion relative to the examination of mail-in ballots or alter the scope and nature of its duties.

25. In short, by directing the Disputed Ballots to be canvassed, the Board has ignored a core feature of its statutory duty to examine a mail-in ballot's sufficiency and improperly attempted to exercise discretion it has not been granted.

II. The Election Code's requirements relative to the voter declaration appearing on the Outer Envelope is mandatory, rather than directory.

26. As previously noted, Section 3150.16(a) provides that "the elector ***shall*** . . . fill out, ***date*** and sign the declaration" prescribed by statute. *Id.*

27. Because "the word 'shall' carries an imperative or mandatory meaning," Section 3150.16(a)'s requirement that a declaration must be dated is presumptively mandatory. *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231 (Pa. 2004); *see also Oberneder v. Link Computer Corp.*, 696 A.2d 148, 150 (Pa. 1997) ("By definition, 'shall' is mandatory.").

28. Indeed, during the hearing, counsel for the Board acknowledged that under settled precepts of statutory construction, Section 3150.16(a)'s requirements are mandatory and, thus, a mail-in elector's failure to date the declaration would ordinarily render the ballot defective.

29. Nevertheless, the Board's counsel maintained that accepting the Disputed Ballots would be consistent with the overarching judicial preference in favor of enfranchisement, as well as the State Supreme Court's interpretation of the term "shall" as merely directory in the context of the Election Code.

30. As explained below, however, Section 3150.16(a)'s requirements relative to the voter declaration are mandatory and, thus, where the Outer Envelope contains a voter declaration that has been signed, but not dated, the enclosed ballot is invalid.

31. In this regard, the Supreme Court's recent decision in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 2020 WL 5554644 (Pa. 2020), provides substantial guidance.

32. To begin, although it related to Section 3150.16(a)'s requirement relative to the inner "secrecy" envelope, rather than the declaration on the Outer Envelope, the Supreme Court's precise holding in *Boockvar* is nevertheless significant.

33. Specifically, the Court held that "the secrecy provision language in Section 3150.16(a)"—which provides that the elector's ballot "shall" be enclosed in a secrecy envelope—"is mandatory and the mail-in elector's failure to comply with such requisite by enclosing the ballot in the secrecy envelope renders the ballot invalid." *Id.* at *26.

34. Given that, parts of statutes relating to "the same relate to the same persons or things or to the same class of persons or things" are to be read *in pari materia*, *Cozzone ex rel. Cozzone v. W.C.A.B. (Pa Mun./E. Goshen Twp.)*, 73 A.3d 526, 536 (Pa. 2013), *Boockvar*'s interpretation of the term "shall" in the context of Section 3150.16(a)'s secrecy provision applies with equal force to the requirement that a voter declaration must be dated.

35. Absent a compelling showing of a material distinction between two passages within the same subsection—*i.e.* Section 3150.16(a)—the Board's decision to canvass the Disputed ballots is untenable under *Boockvar*'s holding.

36. Setting aside the Board's decision to accept the Disputed Ballots contravenes the Supreme Court's interpretation of the same term—found in the very same term provision presently in question—the *Boockvar* panel's detailed rendition of the mandatory-versus-directory dichotomy in the context of the Election Code further undermines the Board's construct.

37. Specifically, although the *Boockvar* panel acknowledged that it has occasionally construed mandatory language as merely directory, it declined to expand the scope of those decisions.

38. To the contrary, carefully distinguishing its prior decisions in *Shambach v. Bickhart*, 845 A.2d 793 (Pa. 2004), and *Appeal of Weiskerger*, 290 A.2d 108 (Pa. 1972), the Court clarified that it has treated a mandatory provision as directory only under limited circumstances. *See Boockvar*, 2020 WL 5554644, at *25 ("[T]his case is distinguishable from those cases relied upon by the Secretary, which deemed mandatory language merely directory and without consequence.").

39. Turning, initially, to *Bickhart*, the Court explained that its decision to affirm the validity of write-in vote cast for a candidate named on the ballot proper in that case was premised in principal part on the inherent imprecision involved in ***marking*** a ballot. *See Boockvar*, 2020 WL 5554644, at *25; *see also Bickhart*, 845 A.2d at 798-99 ("Marking a ballot in voting is not a matter of precision engineering but of an unmistakable registration of the voter's will in substantial conformity to the statutory requirements." (quoting *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945))).

40. As for *Appeal of Weiskerger*, where the Court declined to invalidate a ballot because it was completed in the wrong color of ink, the *Boockvar* panel held that the mandatory direction in the provision at issue in that case related to "the canvassers who receive the ballots, not the electors who prepared them" and, thus, "[i]n providing that ballots completed in the right color must be counted, the Legislature neither stated nor implied that ballots completed in a different color must not be counted." *Boockvar*, 2020 WL 5554644, at *25.

41. Concluding that neither *Bickhart*, nor *Weiskerger* supplied the proper framework, the Court relied on *Appeal of Pierce*—which it characterized as "most analogous to the . . . case" before it—holding that "the Election Code's 'in-person' ballot delivery requirement was mandatory, and that votes delivered by third persons must not be counted." *Boockvar*, 2020 WL 5554644, at *25 (internal citations omitted).

42. Against the foregoing backdrop, Section 3150.16(a)'s requirement relative to voter declarations, like the secrecy portion of the provision at issue in *Boockvar*, should be regarded as mandatory, rather than directory.

43. In contrast to *Bickhart* and *Weiskerger*, both of which examined provisions governing the manner in which a qualified voter's ballot is marked/complete, Section 3150.16(a), like the provisions at issue in *Boockvar* and *Appeal of Pierce*, relates to the process by which the ballot is prepared, transmitted, and ultimately cast.

44. Indeed, the distinction between statutes concerning the ***marking*** of ballots, as compared to the ***casting*** of ballots, was at the core of *Appeal of Pierce*'s admonition that mandatory provisions aimed at preventing fraud and safeguarding the integrity of the electoral process should not be treated as directory.

45. To illuminate, while laws regulating ballot completion presupposes that the ballot is being cast by an elector whose qualification to vote in that election has been established, provisions relating to the submission of ballots exist for the precise purpose of ensuring that the ballot is cast by a qualified elector.

46. Moreover, because the requirement that a declaration be dated is a necessary safeguard against fraud, under the framework established by *Appeal of Pierce*—and applied more recently in *Boockvar*—that directive is mandatory, such that failure to strictly comply with its dictate renders the ballot invalid. *See id.* at *26 ("The clear thrust of *Appeal of Pierce* . . . is that, even absent an express sanction, where legislative intent is clear and supported by a weighty interest like fraud prevention, it would be unreasonable to render such a concrete provision ineffective for want of deterrent or enforcement mechanism.").

47. In this regard, it bears reiterating that by executing the voter declaration, the mail-in elector is not only attesting to the ballot's submission but also representing, under penalty of law, that the voter is: (a) qualified to cast the enclosed ballot; and (b) the voter did not already vote in the election for which the ballot was issued. *See id.* at § 3150.14(b); *see also In re Nov. 3, 2020 Gen. Election*, No. 149 MM 2020, 2020 WL 6252803, at *1 (Pa. Oct. 23, 2020) ("The voter's declaration is a pre-printed statement required to appear on the ballot return envelope containing a voter's absentee or mail-in ballot declaring: that the voter is qualified to vote the ballot enclosed in the envelope, and that the voter did not already vote in the election for which the ballot was issued.").

48. The accuracy of both representations is contingent on the date on which the representation was made:

a. First, whether a person is a "qualified elector" entitled to vote at a particular election depends on the specific date on which that individual either became a resident of a given district or ceased residing there. *See* 25 P.S. § 2811 (explaining that every citizen of the Commonwealth eighteen years of age or older is qualified to vote, provided, *inter alia*, "[h]e or she shall have resided in the election district where he or she shall offer to vote at least thirty days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within thirty days preceding the election.").

b. Second, whether an elector has already voted in the election for which the ballot was issued, by its very nature, depends on the date on which the declaration was signed.

49. Indeed, while recognizing the settled principle that "the Election Code is to be construed so as not to deny a candidate the opportunity to run or deprive the electorate of the right to vote for the candidate of choice[,]" *In re Nomination Petition of Brown*, 846 A.2d 783, 787 (Pa. Cmwlth. 2004), the Commonwealth Court has repeatedly held that, where the Election Code requires an elector to record the date of signing, failure to do so is a fatal defect that will result in the voter's signature being struck. *See id.* (invalidating several signatures "because the signer did not record the date of signing" and noting that the Commonwealth Court "has held that a signature will be struck when the signer omits only the year in the date of signing"; *In re Morrison-Wesley*, 946 A.2d 789, 795 (Pa. Cmwlth. 2008) ("The failure to provide the date of

one's signing violates Section 908 of the Election Code and, thus, invalidates the signature." (citing *In re Silcox*, 674 A.2d 224, 225 (Pa. 1996)).

50. Indeed, far from being a minor defect that can be overlooked, the Commonwealth Court has explained that "[t]he date is essential to determine the validity of the signature." *In re Morrison-Wesley*, 946 A.2d at 795.

WHEREFORE, Petitioner Nicole Ziccarelli respectfully requests that this Court issue an Order reversing the decision of the Allegheny County Board of Electors and directing it to set aside the 2,349 mail-in ballots containing an undated voter verification.

Respectfully submitted,

Dated: November 12, 2020

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Attorneys for Petitioner

VERIFICATION

I, Shohin H. Vance hereby swear or affirm that I am counsel of record for Petitioner Nicole Ziccarelli in the within action, that the verification of said Petitioner could not be obtained within the time allowed for filing this Petition, and that the facts contained in the attached Petitioner are true and correct to the best of my knowledge.

This statement is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsifications to authorities.

Dated: November 12, 2020

Shohin H. Vance

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 12, 2020

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Petition to be served on the following persons via hand-delivery on the date set forth below:

Allegheny County Board of Elections
County Office Building
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Pittsburgh, PA 15219

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County Solicitor – Allegheny County
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Dated: November 12, 2020

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