

IN THE SUPREME COURT OF PENNSYLVANIA

DOCKET NO. _____ OF 2020

IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF
NOVEMBER 3, 2020 GENERAL ELECTION; BUCKS COUNTY COURT OF
COMMON PLEAS NO. 2020-05786

DNC SERVICES CORPORATION/DEMOCRATIC NATIONAL
COMMITTEE'S APPLICATION FOR THE COURT TO EXERCISE
EXTRAORDINARY JURISDICTION

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF JURISDICTION.....	3
STATEMENT OF QUESTIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	4
BASIS FOR EXTRAORDINARY JURISDICTION.....	11
ARGUMENT	14
I. There is no statutory basis to invalidate ballots that comply with all statutory instructions.	16
A. There is no statutory instruction that voters print their full name and address on the outer envelope.	16
B. There is no statutory requirement that the secrecy envelopes be sealed; the challenged ballots comply with both the language and intent of the statute.	19
II. There is no basis in the law to invalidate ballots based solely on an immaterial technicality.	21
A. The statutory language does not require invalidating the challenged ballots.....	24
B. There is no compelling reason to invalidate ballots with omitted handwritten names and addresses because, in addition to there being no such statutory requirement, the same information already is available on the outer envelope.	25
C. There is no compelling reason to invalidate ballots when the Election Code does not require invalidation and there is no allegation that the ballots were untimely or fraudulent.	27
D. The Court’s denial of a cure process in <i>Pennsylvania Democratic Party</i> does not require the invalidation of ballots contained in outer envelopes that lack a dated declaration.....	30

TABLE OF CONTENTS
(continued)

	Page
III. Not allowing the challenged ballots potentially violates federal law.	33
CONCLUSION	34

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TABLE OF AUTHORITIES

Page(s)

CASES

<i>Appeal of Gallagher</i> , 41 A.2d 630 (Pa. 1945).....	22
<i>Appeal of McCracken</i> , 370 Pa. 562, 88 A.2d 787 (1952).....	11
<i>Appeal of Norwood</i> , 382 Pa. 547, 116 A.2d 552 (1955).....	29
<i>Appeal of Petrucci</i> , 38 Pa. D. & C.2d 675 (C.P. Luzerne Cnty. 1965).....	11
<i>Bd. of Revision of Taxes v. City of Phila.</i> , 607 Pa. 104, 4 A.3d 610 (2010).....	10, 12
<i>Commw. v. Morris</i> , 565 Pa. 1, 771 A.2d 721 (2001).....	10, 12
<i>In Re: 2,349 Ballots in the 2020 Gen. Election</i> , 337 WAL 2020 (Pa. Nov. 20, 2020).....	13, 14, 30
<i>In Re: 2,349 Ballots in the 2020 General Election</i> , No. 1162 C.D. 2020 (Pa. Commw. Ct. Nov. 19, 2020).....	30
<i>In re 2003 Election for Jackson Twp. Sup’r</i> , 840 A.2d 1044 (Pa. Commw. Ct. 2003).....	12
<i>In Re: Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election</i> , No. 31-35 EAP 2020 (Pa. 2020).....	13
<i>In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election</i> , 577 Pa. 231, 843 A.2d 1223 (2004).....	27
<i>In re Duquesne Appeals from Cnty. Bd. of Elections</i> , 39 Pa. D. & C.2d 545 (C.P. Allegheny Cnty. 1965).....	22
<i>Pa. Democratic Party v. Boockvar</i> , 238 A.3d 345 (Pa. 2020).....	passim

TABLE OF AUTHORITIES

	Page(s)
<i>Petition of Ross</i> , 411 Pa. 45, 190 A.2d 719 (1963).....	14
<i>Shambach v. Bickhart</i> , 845 A.2d 793 (Pa. 2004).....	passim
<i>Sivick v. State Ethics Comm’n</i> , No. 62 Map 2019, 2020 WL 5823822 (Pa. Oct. 1, 2020)	17, 18
<i>Weiskerger Appeal</i> , 447 Pa. 418, 290 A.2d 108.....	22, 25, 29, 31
 STATUTES	
25 P.S. § 2642	12
25 P.S. § 2868	23
25 P.S. §§ 3014(a), 3049(b)(3), 3152(a), 3146.7(c).....	20
25 P.S. § 3146.4	5
25 P.S. § 3146.6	18
25 P.S. § 3146.6(a).....	16, 20, 21
25 P.S. § 3146.6a(3).....	17
25 P.S. § 3146.8(d).....	22
25 P.S. § 3146.8(g)(3).....	11, 22
25 P.S. § 3150.14(b).....	17
25 P.S. § 3150.16(a).....	16, 20, 21, 28
25 P.S. § 3150.16(a.1).....	17
25 P.S. § 3146.8(g)(3).....	6
42 Pa. C.S. § 726.....	3, 10, 11, 14
3 U.S.C. §§ 1 <i>et seq.</i>	12
52 U.S.C. § 10101(a)(2)(B)	32

TABLE OF AUTHORITIES

Page(s)

OTHER AUTHORITIES

Pa.R.A.P. 3309.....3
Pennsylvania Rule of Appellate Procedure 1115(f), I.....1

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INTRODUCTION

As part of its increasingly desperate attempt to change the outcome of the Presidential election, and flouting statutory law and the longstanding policy in the Commonwealth to protect the elective franchise, Donald J. Trump for President, Inc., (the “Campaign”), continues to hunt for trivial reasons to disenfranchise voters and invalidate thousands of ballots in Bucks County and other counties the Campaign believes to be unfavorable for its candidate. As this case makes clear, no perceived irregularity is too minor for the Campaign to latch onto as a basis for suppressing the valid vote tallies.

Here, the Campaign seeks to disenfranchise nearly 2,000 registered and qualified Bucks County voters who made the effort to cast their votes in the midst of an ongoing pandemic. The Campaign *admits* that the ballots were cast by lawfully-registered voters and *admits* that there is not one iota of evidence that any of the ballots are tainted by fraud or any other misconduct. Moreover, all agree that the voters whose ballots are in jeopardy timely requested an application to vote by mail or absentee and timely filled out and submitted their ballots. And each voter complied with the instructions on the outer envelope—to sign the voter’s declaration and enclose the ballot in the secrecy envelope. After considering those facts, the Bucks County Board of Elections (the “Board”) correctly decided to count these ballots. And yet the Campaign appealed to the Court of Common Pleas to invalidate

the ballots and disenfranchise 1,995 voters based solely on minor technicalities. After briefing and full argument, the Court of Common Pleas of Bucks County upheld the decision of the Board in a 21-page opinion. Continuing its quixotic quest, the Campaign appealed again to the Commonwealth Court.

Because this Court has already exercised its extraordinary jurisdiction over similar matters now before this Court from the Philadelphia and Allegheny County Boards of Elections, because these issues are too important and too urgent to be left to regular procedures, and because Monday, November 23, 2020 is the deadline for the election to be certified, Intervenors respectfully suggest that this Court should immediately exercise extraordinary jurisdiction over this matter and promptly resolve these pressing questions of Pennsylvania law.

As the court below held, the Board correctly accepted the ballots at issue here, and the Campaign's challenges are about merely immaterial issues, none of which provides reason to invalidate ballots and disenfranchise the voters who cast them. First, there is no statutory requirement that voters must write their name and address on the outer envelope containing the ballot, or that voters seal the privacy envelope in order to be counted. Second, unlike elsewhere in the Election Code, there is no statutory requirement that these the Campaign identifies nothing in the Election Code requiring that these ballots be voided for such minor issues or for a missing date. The Campaign would have this Court read into the Election Code consequential

language that General Assembly chose not to include and invalidate the ballots for minor trivialities, in direct contravention of longstanding and oft-repeated direction from the Pennsylvania Supreme Court. Third, the Campaign identified *no interest*, let alone a compelling or weighty interest, that is served by imposing the harsh sanction of disenfranchisement here.

And that, if nothing else, is fatal to the Campaign's effort to suppress the vote tally: as this Court has consistently held, ballots with "mere minor irregularities should only be stricken for compelling reasons." *Shambach v. Bickhart*, 845 A.2d 793, 795 (Pa. 2004). That is because "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen." *Perles v. County Return Bd. of Northumberland County*, 202 A.2d 538, 540 (Pa. 1964).

STATEMENT OF JURISDICTION

For the reasons discussed below, the Court has jurisdiction to take this case through its Extraordinary Jurisdiction. *See* 42 Pa. C.S. § 726; Pa.R.A.P. 3309.

STATEMENT OF QUESTIONS INVOLVED

1. Whether the Pennsylvania Supreme Court should assume extraordinary jurisdiction over the matter, given the immediate and significant public importance of the issues raised by this case and the need to promptly finalize election results.

The Court of Common Pleas did not address this question.

2. Whether a qualified elector's vote must be canceled where the elector failed to handwrite the full date on the outer envelope of an absentee or

mail-in ballot, even where there is no dispute that the ballot was timely submitted and received before 8:00 p.m. on Election Day.

The Court of Common Pleas correctly answered this question in the negative.

3. Whether a qualified elector's vote must be canceled where the elector failed to handwrite his or her name and complete address on the outer envelope of an absentee or mail-in ballot, even where there is no requirement in the Election Code to do so and where the elector's name and address are otherwise identifiable from the envelope.

The Court of Common Pleas correctly answered this question in the negative.

4. Whether a qualified elector's vote must be canceled where the secrecy envelope is "unsealed" in some unidentified way, but where (a) the elector securely placed the ballot inside a secrecy envelope and placed the secrecy envelope inside a sealed outer envelope as directed by statute; (b) the secrecy of the elector's identity was maintained; and (c) the Board was unable to determine whether the envelope became "unsealed" after the elector sealed it.

The Court of Common Pleas correctly answered this question in the negative.

STATEMENT OF THE CASE

I. Background on absentee and mail-in application and voting procedures.

A. Absentee and mail-in application procedures.

Electors in the Commonwealth who wish to vote absentee or by mail must submit applications for such ballots to their county board of elections. In submitting such applications, electors must supply the address at which they are registered to vote and sign a declaration affirming, among other things, that they are "eligible to

vote by mail-in [or absentee] ballot at the forthcoming primary or election,” and that “all of the information” supplied in the mail-in or absentee ballot application is “true and correct.”

Before sending an absentee or mail-in ballot to the elector, the county board of elections must confirm the elector’s qualifications and verify that the elector’s address on the application matches the elector’s registration. There is no allegation that did not occur here.

B. Balloting materials, elector declaration, and the voting procedure.

Upon approval of the application, the elector is provided: 1) the ballot; 2) instructions for completing and returning the ballot; 3) an inner secrecy envelope into which the ballot is placed; and 4) an outer envelope into which the secrecy envelope containing the ballot is placed and returned to the board. On one side of the outer envelope is a pre-printed voter’s declaration, and the elector’s name and address are pre-printed below the declaration, just below a unique nine-digit bar code that links the outer envelope to the voter’s registration file contained in the Statewide Uniform Registry of Electors (“SURE”) system. After receiving a mail-in or absentee ballot envelope, the board scans the bar code to identify and record the elector that submitted the enclosed ballot.

The General Assembly delegated to the Secretary of State the authority to determine the form of the voter declaration for absentee and mail-in ballots. 25 P.S.

§ 3146.4. On September 11, 2020, the Secretary of State issued Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes (“9.11.20 Guidance,” attached as Exhibit A).

II. Procedural history.

A. The Board’s decision.

On November 7, 2020, during the course of the canvass meeting, the Board met to determine, pursuant to 25 P.S. § 3146.8(g)(3), whether the declarations on the outer envelopes of certain ballots were “sufficient.” See Exhibit B (Stipulated Facts, attached without exhibits) ¶ 18. “The meeting and vote were conducted in the presence of authorized representatives of both Republican and Democratic candidates and parties. No one objected to or challenged the segregation of ballots into the designated categories.” Exhibit C, Order at 5.

The Campaign challenges ballots accepted by the Board in the following categories. In each category, the issue identified is the only alleged irregularity:

- Category 1: 1,196 ballots with no date or a partial date handwritten on the outer envelope, Ex. C, Order at 6;
- Category 2: 644 ballots with no handwritten name or address on the outer envelope, *id.*;
- Category 3: 86 ballots with a partial handwritten address on the outer envelope, *id.*; and

- Category 5: 69 ballots with “unsealed” privacy envelopes, *id.*¹

C. What is *not* at issue in this case.

The Campaign admitted and stipulated to the following facts.

1. No fraud, misconduct, impropriety, or undue influence.

There is no allegation or evidence of any fraud, misconduct, impropriety, or undue influence in connection with the challenged ballots. Ex. B, Stipulated Facts, ¶¶ 27–30.

2. No ineligible voters, deceased voters, or impersonations.

There is no allegation or evidence that any elector was ineligible to vote. *Id.* ¶ 33. There is no allegation or evidence that any of the challenged ballots were cast by, or on behalf of, a deceased person or by someone other than the elector whose signature is on the outer envelope. *Id.* ¶¶ 34–35.

3. No missing signatures or naked ballots.

There is no allegation or evidence that the Board counted any ballots without signatures on the outer envelope or counted “naked ballots” (ballots that did not arrive in a secrecy envelope). *Id.* ¶¶ 31–32.

¹ Although the Campaign initially challenged ballots in two other categories (identified as Category 4 and Category 6 in the stipulated facts), the Campaign orally withdrew their challenges to those categories at the hearing before the Court of Common Pleas. *Compare* Hearing Tr. at 114–15 (attached as Exhibit D), *with* Ex. B, Stipulated Facts ¶ 24.

When the challenged ballots were received by the Board, each was inside a privacy envelope, and the privacy envelope was inside a sealed outer envelope with a voter's declaration signed by the elector. *Id.* ¶ 45. With respect to Category 5 (the 69 ballots in “unsealed” privacy envelopes), the Campaign agrees that the Board was unable to determine whether the privacy envelopes were initially sealed by the elector but later became unsealed. *Id.* ¶ 46.

4. No challenge to electors' applications for absentee or mail-in ballots.

The Campaign did not challenge the electors' applications for the absentee or mail-in ballots on or before the Friday before the November 3rd election. *Id.* ¶ 36.

5. The ballots were timely cast and received.

No mail-in or absentee ballots were mailed to electors before October 7, 2020 and each of the challenged ballots was timely received by the Board before 8:00 p.m. on Election Day, November 3, 2020. *Id.* ¶¶ 37–38. Consequently, each of the challenged ballots was completed, and the outer envelope signed, between October 7 and November 3, 2020.

6. No notice has been provided to the electors whose ballots are being challenged.

The Campaign never notified the electors whose ballots are at issue that it is seeking to have their votes invalidated and not counted. *Id.* ¶ 47.

III. The Court of Common Pleas decision.

On November 19, 2020, the Bucks County Court of Common Pleas denied the Petition in full. In its written decision, the court “noted that the parties specifically stipulated in their comprehensive stipulation of facts that there exists no evidence of any fraud, misconduct, or any impropriety with respect to the challenged ballots. There is nothing in the record and nothing alleged that would lead to the conclusion that any of the challenged ballots were submitted by someone not qualified or entitled to vote in this election. At no time did the Campaign present evidence or argument to the contrary. The challenges are all to form rather than substance[.]” Ex. C, Order at 4.

The court acknowledged two “overriding principles” that govern the interpretation of the Election Code: strict enforcement and flexible interpretation “in favor of the right to vote.” *Id.* at 7–8. It explained that this Court has balanced these principles by distinguishing between “mandatory” and “directory” provisions in the code. *Id.* at 8. And under longstanding Court precedent, “[b]allots should not be disqualified based upon failure to follow directory provisions of the law.” *Id.* (citing *Shambach*, 845 A.2d at 803, and *Weiskerger Appeal*, 447 Pa. 418, 421, 290 A.2d 108, 109 (Pa. 1972)).

The court then applied the law to the stipulated facts. It noted that the Campaign did not allege fraud, misconduct, impropriety, or undue influence as to

the challenged ballots, and that all of the challenged ballots were timely received. Ex. C., Order at 9. As to the first category of ballots (the 1,196 ballots with no date or with a partial date handwritten on the outer envelope), the court found that ballots with partial dates complied with statutory requirements and that the Campaign had waived its right to challenge the undated ballots. Order at 15–16. The court also found that the second and third categories of ballots (644 ballots with no handwritten name or address on the outer envelope and 86 ballots with a partial handwritten address on the outer envelope) should be counted because they involved “ministerial, technical errors,” not “error[s] of law.” *Id.* at 19. It reasoned that a handwritten name and address were “not necessary to prevent fraud,” and counting the ballots would not undermine any other significant interest. *Id.* Finally, the court found that the fourth category of ballots (69 ballots with “unsealed” privacy envelopes) should be counted because no evidence showed that they “had not been sealed by the elector prior to” canvassing, and it was possible that the glue on the envelope had failed. *Id.* at 20.

IV. The Campaign’s appeal.

On November 20, 2020, the Campaign appealed the Court of Common Pleas’ ruling to the Commonwealth Court.

BASIS FOR EXTRAORDINARY JURISDICTION

The Court should assume extraordinary jurisdiction over this case because the underlying dispute “involves an issue of immediate public importance,” there is an unquestionable need to “expedite the proceedings,” and the rights of the DNC are clear. 42 Pa. C.S. § 726 (first quotation); *Commw. v. Morris*, 771 A.2d 721, 731 (Pa. 2001) (second quotation); *see also Bd. of Revision of Taxes v. City of Phila.*, 4 A.3d 610, 620 (Pa. 2010) (extraordinary jurisdiction allows the Court to assume “plenary jurisdiction over a matter of immediate public importance that is pending before another court of this Commonwealth”).

First, this matter unquestionably involves issues of immediate public importance. *See* 42 Pa. C.S. § 726. The outcome of this appeal will determine whether 1,995 voters in Bucks County will have their timely-cast, timely-received absentee and mail-in ballots rejected solely because of minor trivialities, even though there are no allegations of fraud, misconduct, impropriety, or undue influence. The DNC asks the Court to hold that the Election Code does not require county boards of elections to discard such ballots, and that the decision whether to do so lies within the sound discretion of the county boards, who are delegated the responsibility for examining the outer envelope and determining whether the declaration is “sufficient.” 25 P.S. § 3146.8(g)(3); *see Appeal of McCracken*, 370 Pa. 562, 565, 88 A.2d 787, 788 (1952) (observing that county election boards have “plenary powers

in the administration of the election code”); *see also Appeal of Petrucci*, 38 Pa. D. & C.2d 675, 677 (C.P. Luzerne Cty. 1965) (“The court, in reviewing the rulings of the board, may reverse the board of elections only for a mistake of law or for a clear abuse of discretion, including a capricious disregard of the testimony.”). The resolution of this question will affect 1,995 qualified Bucks County voters in this election, untold numbers of qualified voters in future elections, and the administration of mail-in and absentee voting across Pennsylvania.

Second, time is of the essence. *See Morris*, 771 A.2d at 731 (extraordinary jurisdiction is appropriate when the Court’s plenary jurisdiction is needed to expedite the proceedings). Under Pennsylvania law, Bucks County must certify its election results by November 23, 2020—just 2 days from now. 25 P.S. § 2642. There simply isn’t time for this case to wend its way through the ordinary appellate process. *Cf. In re 2003 Election for Jackson Twp. Sup’r*, 840 A.2d 1044, 1046 (Pa. Commw. Ct. 2003) (“The Election Code reflects a clear intention of the General Assembly to expeditiously resolve election disputes and provide for the prompt certification of the vote.”). And timely certification is critically important because federal law sets additional deadlines for determining electors and the Electoral College vote. *See 3 U.S.C. §§ 1 et seq.*

Third, for the reasons explained below, the DNC has a clear right to relief. *Bd. of Revision of Taxes*, 4 A.3d at 620. The legislature, through the Election Code, has

not directed the Board to reject the ballots at issue. There is no statutory requirement that voters print their full names and addresses on the outer envelope, nor is there a statutory requirement that voters seal the secretary envelope before placing it in the outer envelope. *See infra* pp. 16–21. And even if the Election Code explicitly directed voters to write their full names and addresses on the outer envelope and seal the inner one, there is still no statutory basis for rejecting ballots that fail to follow such technical requirements. *See infra* pp. 21–25. This is for good reason: doing so not only serves no compelling interest, it also offends federal law. *See infra* pp. 25–34.

Allowing this appeal would be consistent with the Court’s recent acceptance of King’s Bench and extraordinary jurisdiction over two similar cases addressing overlapping issues. In *In Re: Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, Nos. 31–35 EAP 2020 (Pa. 2020), the Court exercised its extraordinary jurisdiction to determine whether “the Election Code require[s] county boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed their ballot’s outer envelopes but did not handwrite their name, their address, and/or a date, where no fraud or irregularity has been alleged[.]” *Id.* And just yesterday, the Court granted a Petition for Allowance of Emergency Appeal in *In Re: 2,349 Ballots in the 2020 Gen. Election*, 337 WAL 2020 (Pa. Nov. 20, 2020), to decide whether “the Election Code require the Allegheny County Board of

Elections to disqualify mail-in ballots submitted by qualified electors who signed their ballot's outer envelopes but did not handwrite a date, where no other fraud or irregularity has been alleged, and the ballot is timely received[.]” *Id.*

This Application involves similar and equally weighty questions of public importance. There is a “longstanding and overriding policy in this Commonwealth to protect the elective franchise.” *Shambach*, 845 A.2d at 798 (citations omitted); *see also Petition of Ross*, 190 A.2d 719, 720 (Pa. 1963) (“The Election Code must be liberally construed so as not to deprive . . . the voters of their right to elect a candidate of their choice.”). The Campaign’s arguments, if credited, would disenfranchise 1,995 qualified voters in Bucks County for nothing more than a missing date or address on their signed outer envelopes, or an unsealed secrecy envelope—otherwise immaterial omissions since these voters’ ballots were timely received and there are no allegations of fraud or impropriety. Review is thus warranted, and the Application should be granted, pursuant to 42 Pa. C.S. § 726.

ARGUMENT

The Court of Common Pleas correctly held that the Election Code does not require the rejection of the ballots at issue here. First, no provision of the Election Code requires a voter to handwrite their name or their address on the outer envelope, or to seal the inner envelope, of an absentee or mail-in ballot, let alone ensure that it remains sealed while in transit to the board of elections. Second, while the Election

Code states that a voter “shall” input the date on the envelope, no provision mandates that ballots be disqualified for lack of a date on an envelope, especially in the absence of fraud or wrongdoing, and particularly given that these ballots were all received timely, before 8:00 p.m. on Election Day. Third, despite the Campaign’s dogged push to suppress the votes of thousands of registered Pennsylvania voters, it has identified *no interest*, let alone a compelling or weighty interest, that the harsh sanction of disenfranchisement for these minor irregularities would further.

The Campaign’s argument, made clear at the hearing in the Court of Common Pleas, is premised on the misguided notion that a voter must input their name, a date, and their address on the outer envelope, and seal the inner envelope, “in order for the vote to be counted.” *See* Ex. D, Hearing Tr., at 191-94. There is no such language is absent from the Election Code. Moreover, the directions on the outer envelope say nothing of the sort—they direct the voter only to sign the declaration and enclose the ballot in the secrecy envelop. Disenfranchising voters for such trivialities, particularly were they were not instructed that such steps were required to have their votes count, would be a grave injustice contrary to the “longstanding and overriding policy in this Commonwealth to protect the elective franchise” and to the repeated direction from this that the “goal must be to enfranchise and not to disenfranchise the electorate.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 360–61 (Pa. 2020) (quoting *Shambach*, 845 A.2d at 798 and *Weiskerger Appeal*, 290 A.2d at 109).

To ensure that thousands of eligible registered voters are not so disenfranchised, the Court should affirm the Court of Common Pleas and make clear that the Election Code does not require invalidation of these ballots. This is particularly important here where the voters have not been provided notice that their ballots are in jeopardy of not being counted.

I. There is no statutory basis to invalidate ballots that comply with all statutory instructions.

A. There is no statutory instruction that voters print their full name and address on the outer envelope.

The Board correctly denied the Campaign's challenges to ballots in Category 2, with no printed name or address, and to ballots in Category 3, with a partial address, because the Election Code does not require voters to provide this information. The relevant statutes instruct that, after marking the ballot, "[t]he elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election." 25 P.S. § 3146.6(a) (absentee ballots); 25 P.S. § 3150.16(a) (same instructions for mail-in ballots).

Nowhere in these instructions is a requirement that voters handwrite their name and address under their declaration. Notably, the General Assembly chose to include such a requirement elsewhere in the same section, in the provision

addressing voters unable to sign their declaration due to illness or physical disability. *That* section requires that a witness provide, along with their signature, their complete address. *See* 25 P.S. § 3146.6a(3); 25 P.S. § 3150.16(a.1). But for voters who are able to sign their declaration, there is no such instruction. *See Sivick v. State Ethics Comm’n*, No. 62 Map 2019, 2020 WL 5823822, at *10 (Pa. Oct. 1, 2020) (noting “it is axiomatic that we may not add statutory language where we find the extant language somehow lacking” and that “under the doctrine of *expressio unius est exclusio alterius*, the inclusion of a specific matter in a statute implies the exclusion of other matters”).

While sections 3146.6(a) and 3150.16(a) state that the voter shall “fill out” the declaration, they do not specify what that entails, and the General Assembly expressly delegated to the Secretary the determination of the form of such declaration, requiring only that it include “a statement of the elector’s qualifications, together with a statement that the elector has not already voted in the primary or election.” 25 P.S. § 3150.14(b). The Secretary has, in turn, issued guidance to the county boards of elections about the examination of absentee and mail-in envelopes, generally, and about the declaration, specifically. *See* Ex. A, 9.11.20 Guidance. The Secretary’s guidance instructs that ballot return envelopes must be set aside and not counted if the declaration is “blank,” but otherwise, “[i]f the Voter’s Declaration on the return envelope is signed and *the county board is satisfied that the declaration*

is sufficient, the mail-in or absentee ballot should be approved for canvassing[.]” *Id.* at 3 (emphasis added).

Moreover, the instructions to electors on the outer envelope direct a voter only to sign the declaration, not to input their name or address. Under the declaration on the outer envelope is the directive: “Voter, sign or mark here.” Ex. B, Stipulated Facts ¶ 9. And above the declaration, on the envelope flap, is a checklist for the voter, asking: “Did you ... sign the voter’s declaration in your own handwriting [and] Put your ballot inside the secrecy envelope and place it in here?” *Id.* at ¶ 10.

The Campaign does not dispute that each outer envelope at issue here includes a declaration signed by the voter. Each envelope thus includes the information specifically required by the Election Code and directed by the instructions on the outer envelope. *See* 25 P.S. § 3146.6. The Campaign admits that the voter’s name and address is already printed on the envelope below the declaration. Ex. B, Stipulated Facts ¶ 13. The only potential deficiency with these envelopes is the lack of a *complete handwritten* name and address below the voter’s signature. But because a name and address are not specified in statute; because the Secretary has made clear that an outer envelope must be set aside only if the declaration is blank; and because the county board otherwise determines whether the declaration is sufficient, the Board here did not act unlawfully in deciding that the ballots inside

these envelopes, all containing the printed name and address of the voter, should be counted.

B. There is no statutory requirement that the secrecy envelopes be sealed; the challenged ballots comply with both the language and intent of the statute.

The Campaign challenges 69 ballots (Category 5) on grounds that they were enclosed in secrecy envelopes that were “unsealed.” The Campaign does not allege that the secrecy envelopes were tampered with in any way or that the lack of a seal compromised ballot secrecy at all. To the contrary, the Campaign agrees that when the challenged ballots were received by the Board, each of the ballots was inside a privacy envelope and the privacy envelope was inside a sealed outer envelope with a voter’s declaration that had been signed by the elector. The Campaign also concedes that there is no basis for determining whether the privacy envelopes were initially sealed by the elector, but later became unsealed. *See* Ex. B, Stipulated Facts ¶¶ 42, 43. Indeed, as the Court of Common Pleas noted, there is no evidence showing that the envelopes “had not been sealed by the elector prior to” canvassing, and it was possible that envelopes had been sealed and the glue simply failed. Ex. C, Order, ¶ 9. In the absence of a showing that voters did not seal their envelope, the Campaign cannot demonstrate that the Board acted unlawfully by accepting these ballots.

Moreover, the relevant statute does not even require that the inner envelope be sealed; it requires that the *ballot* be secure within the envelope: “the mail-in

elector shall . . . mark the ballot . . . and then fold the *ballot*, enclose and securely seal *the same* in the envelope[.]” 25 P.S. § 3150.16(a) (emphases added); 25 P.S. § 3146.6(a) (same). It is all the more clear that the statute does not require the voter to seal the inner envelope when, just sentences later, it expressly requires the voter to seal the *outer* envelope. 25 P.S. § 3150.16(a) (“This envelope shall then be placed in the second one . . . *Such [second] envelope shall then be securely sealed.*”) (emphasis added); 25 P.S. § 3146.6(a) (same). As used in the reference to the ballot inside the inner envelope, securely sealing the ballot in the envelope could mean little more than placing it in the inner envelope so that it does not fall out in transit or otherwise. That could be accomplished by folding the flap over, by tucking the flap inside the envelope, or by fastening the flap with glue. Significantly, the word “seal”—which is not statutorily defined—is not a term of art. It is a commonly used word meaning “to close” or “to make secure.” *See* Merriam-Webster Dictionary. There is no allegation here that the envelopes were not closed or that the ballots were not made secure within the envelopes.

When the Legislature intends that an envelope be sealed, it unequivocally states so. *See, e.g.*, 25 P.S. §§ 3014(a), 3049(b)(3), 3152(a), 3146.7(c). Indeed, in the relevant statute here—Section 3150.16(a)—the Legislature clearly differentiated between directing the elector to securely seal *the ballot* in the inner envelope and directing the elector to seal *the outer envelope*:

[T]he mail-in elector shall, in secret, proceed to mark the ballot . . . and then fold *the ballot*, enclose and *securely seal the same* in the envelope on which is printed, stamped or endorsed ‘Official Election Ballot.’ This envelope shall then be placed in the second one . . . *Such [second] envelope shall then be securely sealed* and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of elections.

25 P.S. § 3150.16(a) (emphases added); 25 P.S. § 3146.6(a) (same). Because the plain language of the statute does not require the secrecy envelope to be sealed, the Board correctly counted the ballots.

Here, each of the 69 challenged ballots was securely contained in an unmarked secrecy envelope and further contained in an outer sealed envelope. When the secrecy envelope was removed from the outer envelope, the identity of the elector remained secret. As a result, unlike with naked ballots, counting the ballots here—where the elector’s identity is protected—is not contrary to the statutory purpose. *See Pa. Democratic Party*, 2020 WL 5554644, at *25 (purpose of the two-envelope statutory requirement is to ensure that “secrecy in voting [is] protected”).

II. There is no basis in the law to invalidate ballots based solely on an immaterial technicality.

Even if the relevant statute directs that voters shall take a certain action—as it does for the date on the envelope—the question is whether noncompliance with that directive alone requires the harsh sanction of disenfranchisement. Nothing in the Election Code mandates that consequence, and this Court has made clear that not

every failure to comply with an instruction in the Election Code is grounds to reject a ballot. *E.g.*, *Weiskerger Appeal*, 290 A.2d at 109 (refusing to invalidate ballots marked in red or green ink); *Shambach*, 845 A.2d at 803 (refusing to invalidate ballots where voter wrote in name of candidate in contravention of statute). “The power to throw out a ballot for minor irregularities . . . must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons.” *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945); *see also In re Duquesne Appeals from Cty. Bd. of Elections*, 39 Pa. D. & C.2d 545, 557 (C.P. Allegheny Cty. 1965) (same).

The General Assembly has provided no instruction—explicitly or implicitly—that ballots lacking a handwritten name, address, or date on the outer envelope must be rejected and disqualified. Moreover, no section of the Election Code and no weighty interest would be undermined or defeated if the ballots at issue were counted—voiding these ballots would serve no compelling state interest.

In contrast, the General Assembly has identified elsewhere in the Election Code particular instances in which an absentee ballot must be rejected or set aside and not counted:

1. The ballot of a deceased elector “shall be rejected by the canvassers,” 25 P.S. § 3146.8(d), and “set aside,” *id.* § 3146.8(g)(3).

2. If the secrecy envelope contains any marking that identifies the elector's identity, political affiliation, or candidate preference, "the envelopes and the ballots contained therein shall be set aside and declared void." *Id.* § 3146.8(g)(4)(ii).
3. Where the eligibility of an elector has been challenged, the elector's ballot "shall be placed unopened in a secure, safe and sealed container" until the challenge is resolved. *Id.* § 3146.8(g)(5).

None of these issues is implicated here. The Campaign does not challenge whether an elector is deceased or ineligible to vote; it likewise does not allege that any secrecy envelopes at issue contain identifying markings. Thus, the contested ballots do not fall within any of the discrete categories of ballots that the Legislature has instructed not be counted.²

² Comparison with a separate section of the Election Code lends further support for the conclusion that the General Assembly knows how to impose specific consequences for a missing date. Because dated signatures on candidate nominating petitions are essential to determining whether and which signatures are valid under the statutory scheme governing such petitions—unlike for absentee and mail-in ballots, which can be voted as soon as they are issued, one cannot lawfully sign a nominating petition *prior* to a particular date—the General Assembly has provided, "*no signature shall be counted unless it bears a date affixed not earlier than the thirteenth Tuesday nor later than the tenth Tuesday prior to the primary.*" 25 P.S. § 2868 (emphasis added). There is no parallel statutory prohibition on counting undated absentee and mail-in ballots.

A. The statutory language does not require invalidating the challenged ballots.

The lack of a prescribed consequence for ballots that do not flawlessly comply with Sections 3150.16(a) and 3146.6(a) is a telltale sign of the Legislature's intent for two reasons.

First, when construing a statute, this Court not only reviews what a statute says; it "must also listen attentively to what it does *not* say." *Com. v. Giulian*, 141 A.3d 1262, 1268 (Pa. 2016). The Legislature knew how to command when to set aside a ballot. It chose not to here, and it is not for courts to guess that the Legislature meant what it did not say. *See id.* ("[C]ourts should not add, by interpretation, a requirement not included by the General Assembly.").

And second, it is axiomatic that the Legislature drafts statutes against the backdrop of this Court's prior interpretation of statutory language and other decisional law. As this Court has explained: "[T]he words of a statute are to be interpreted in light of antecedent case law, and the legislative intent to effectuate a drastic change in the law is not to be inferred by mere omission and implication." *Fonner v. Shandon, Inc.*, 724 A.2d 903, 906 (Pa. 1999). The Commonwealth's policy favoring enfranchisement is "longstanding." *Shambach*, 845 A.2d at 798; *see also Ross*, 190 A.2d at 720. So is the Court's practice to "liberally construe voting laws in the absence of fraud." *Wieskerger*, 290 A.2d at 109. The Court should not

presume that the Legislature intended to impose the severe sanction of disenfranchisement where the statutes say no such thing.

These ballots fall within the category of valid ballots with “mere minor irregularities,” which “should only be stricken for compelling reasons[.]” *Shambach*, 845 A.2d at 795. No such compelling reason exists here.

B. There is no compelling reason to invalidate ballots with omitted handwritten names and addresses because, in addition to there being no such statutory requirement, the same information already is available on the outer envelope.

As noted, the statute does not direct voters to handwrite their name and address on the outer envelope. But even if there were such an instruction, there would be no compelling reason to disenfranchise the voters here because that information already is available on the outer envelope. First, outer envelopes contain, on the same side as the voter’s declaration, a unique nine-digit bar code that links the envelope to the voter’s registration file contained in the SURE system, and the specific voter’s information—including name and address—is visible when scanned. *See* Ex. A, 9.11.20 Guidance, at 2. Further, the voter’s address is pre-printed on the outer envelope. *See* Board Decision, ¶ 3 (attached as Exhibit E).

The fact that the voter’s name and address is readily identifiable would make throwing out these ballots a grave injustice. Requiring voters to handwrite their name and address below their signature serves no “weighty interest,” and there is no “concrete provision” that would be rendered ineffective if these ballots were

counted. *Cf. Pa. Democratic Party*, 2020 WL 5554644, at *26. Indeed, whatever the interest is in having the voter's name and address identifiable from the outside of the ballot is met here because the voter's name and address is identifiable in at least one (and more often multiple) ways from the ballot envelope.

The lack of any weighty interest that would be undermined by allowing these ballots to be counted makes this case most analogous to *Weiskerger Appeal*, 290 A.2d 108, where this Court held that ballots marked in a different color ink from those enumerated in the statute should be counted. The Court held that the purpose underlying the limitation on marking ballots in certain colors was to ensure that individual ballots were not identifiable. *Id.* Given that there was no indication the ballots at issue were marked in a different color for the purpose of making the ballot identifiable or otherwise indicating fraud, the Court held they should be counted. *Id.* As in *Weiskerger*, the Campaign offers no suggestion that the failure to include a complete address here was an effort at committing voter fraud, and such an attempt would be virtually impossible given that the voter's address is identifiable in at least one way on the outer envelope of each of these ballots. Disenfranchising voters based on this minor technicality, when every voter's address is still readily identifiable to the Board, would be directly contrary to the "longstanding and overriding policy in this Commonwealth to protect the elective franchise." *Shambach*, 845 A.2d at 798.

C. There is no compelling reason to invalidate ballots when the Election Code does not require invalidation and there is no allegation that the ballots were untimely or fraudulent.

While the Election Code states that a voter “shall” date the outer envelope, as noted above, when the General Assembly intended for a ballot to be “set aside” and not counted, it expressly said so—four times. *See supra* Section II (setting forth statutes). Failure to handwrite the date on the outer envelope is not one of them.

Given the absence of any express provision disqualifying ballots submitted in undated ballot envelopes, it is clear that the General Assembly did not intend a missing date to cause disenfranchisement. As this Court’s analysis in *Pennsylvania Democratic Party v. Boockvar* illustrates, noncompliance with a “shall” provision in the Election Code does not automatically require rejection of the voter’s ballot. Instead, the outcome turns on legislative intent and the nature of the interest served by the directive, which in the absence of a sanction for noncompliance are determined by reviewing the statutory language in context.

At the extreme, “where legislative intent is clear and supported by a weighty interest like fraud prevention,” or the General Assembly has “signaled beyond cavil” that an issue implicated by the directive, like ballot secrecy, is “so essential” to the voting process, noncompliance merits disqualification. *Pa. Democratic Party v. Boockvar*, 238 A.3d at 380. But “ballots containing mere minor irregularities should only be stricken for compelling reasons” and this Court has consequentially

“refuse[d] to read an all-out prohibition into [statute] where one is not explicitly required, particularly given this Commonwealth’s longstanding policy to protect the elective franchise.” *Shambach*, 845 A.2d at 798, 802.

The date requirement in this case is markedly different from the secrecy-envelope requirement that the Court concluded was mandatory in *Pennsylvania Democratic Party*.³ There, the Court found that Section 3150.16(a)’s directive to use a secrecy envelope, when “read *in pari materia*” with Section 3146.8(g)(4)(ii)’s directive to “set aside and declare[] void” ballots in envelopes with markings that compromised secrecy, “ma[d]e clear the General Assembly’s intention that . . . it should not be readily apparent who the elector is, with what party he or she affiliates, or for whom the elector has voted,” and that any contravention of that goal required the invalidation of the ballot. *Pa. Democratic Party*, 238 A.3d at 378; accord *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1232 (Pa. 2004) (emphasizing the General Assembly’s commitment to votes “remain[ing] secret and inviolate” in interpreting ban on third-person delivery as mandatory, not directory). Only *after* considering multiple sections of the Election Code regarding secrecy envelopes—and the fact that ballot secrecy is “protected expressly by Article

³ This requirement—that ballots be put in a secrecy ballot and then that secrecy ballot be put in a second outer ballot—is not the issue in this case. Here, the Campaign concedes that each challenged ballot was in a secrecy ballot, it simply contends that the secrecy ballot was not sealed.

VII, Section 4 of th[e] Court’s state charter”—did the Court conclude that the General Assembly had “signaled beyond cavil that ballot confidentiality . . . *is so essential* as to require disqualification.” *Pa. Democratic Party*, 238 A.3d at 379–80 (emphasis added).

No similar interest justifies voiding a ballot for a missing handwritten date on the outer envelope. Under the Election Code, a ballot must be voted before 8:00 p.m. the day of the primary or election to be counted. 25 P.S. § 3150.16(a). Thus, while the date on the ballot envelope may in some circumstances further the purpose of allowing election officials to confirm that the ballot was timely voted, there is no dispute here, as the Campaign crucially admits, these ballots were received before 8:00 p.m. on Election Day. Indeed, the receipt date of the ballots is verifiable. The County Board “stamp[s] the date of receipt on the ballot-return” and “record[s] the date the ballot is received” in the SURE system. *See* Ex. A, 9.11.20 Guidance, at 2. The date stamp provides an objective indicator of timeliness that renders any handwritten date superfluous. Once the County Elections Division, acting under guidance issued by the Secretary of State, scans ballots upon receipt and separately time-stamped them, the legislative purpose had been met—there can be no doubt that the 1,196 challenged ballots were timely cast. *Pa. Democratic Party*, 238 A.3d at 356 (“[T]he Election Code should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice.”). And there simply

is no legislative interest served by invalidating the lawful votes of eligible voters under these circumstances. *See Weiskerger Appeal*, 290 A.2d at 109 (“[t]he proper interpretation of this portion of the statute considering the occasion for its enactment, the mischief to be remedied, and the policy to liberally construe voting laws in the absence of fraud, is that the ballot is valid unless there is a clear showing that the ink used was for the purpose of making the ballot identifiable”)⁴

Because the timeliness of the ballots is not in dispute, requiring strict compliance would serve no purpose other than to disenfranchise 1,196 registered and qualified voters who timely cast their votes in the midst of an ongoing pandemic. Instead, “[e]very rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.” *Appeal of Norwood*, 382 Pa. 547, 552, 116 A.2d 552, 554–55 (1955).

D. The Court’s denial of a cure process in *Pennsylvania Democratic Party* does not require the invalidation of ballots contained in outer envelopes that lack a dated declaration.

On November 19, 2020, a split Commonwealth Court panel ordered the Allegheny County Board of Elections to exclude 2,349 absentee and mail-in ballots

⁴ For this reason, a voter’s failure to comply with the requirement that he or she “date” the declaration may logically carry different consequences than a failure to comply with the requirement that he or she “sign” the declaration. A voter’s failure to date a declaration—at least in the context of an absentee or mail-in ballot—may be remedied by clear evidence that the vote was timely cast. The same is not true where a voter fails to sign the declaration at all.

solely because they were submitted in outer envelopes that had undated declarations. *In Re: 2,349 Ballots in the 2020 General Election*, No. 1162 C.D. 2020 (Pa. Commw. Ct. Nov. 19, 2020). The opinion was issued over the strong dissent of Judge Wojcik, and it relied on a flawed legal analysis of this Court’s decision in *Pennsylvania Democratic Party*. The Commonwealth Court decision is now on appeal before this Court in a different proceeding. *See In Re: 2,349 Ballots in the 2020 Gen. Election*, 337 WAL 2020 (Pa. Nov. 20, 2020). Because the Commonwealth Court’s reasoning could be read to apply to the issues in this appeal, and because it is currently pending before this Court on appeal, the DNC briefly explains why the majority opinion is wrong, and the Court should take this opportunity to clarify that *Pennsylvania Democratic Party* does not require the invalidation of the ballots at issue here.

In *Pennsylvania Democratic Party*, the petitioners asked this Court to create a process that would (1) notify voters of technical imperfections on the envelopes of their absentee or mail-in ballots and (2) give them an opportunity to “cure” the defect. The Court ultimately rejected their request. The Commonwealth Court interpreted this holding to mean that ballots with uncured technical errors should not be counted at all. But nothing in *Pennsylvania Democratic Party* compels that result—and it is wrong, for at least three reasons.

First, the Court’s analysis did not discuss what would happen to a ballot with a minor facial defect if no cure process existed. Instead, the Court considered

whether there was a legal *requirement* to provide a cure process (it found there was none). The Court declined to create a cure process without statutory authorization, which it thought was a policy task best suited for the Legislature. *Pa. Democratic Party*, 238 A.3d at 372. This case presents a different question: whether the courts should defer to the Board's decisions to count certain ballots with minor deficiencies. It does not require the Court to legislate new election procedures in the first instance.

Second, *Pennsylvania Democratic Party's* discussion of minor facial defects makes clear that the Court did not suppose every such defect would require invalidation. The Court provided two examples of minor errors: "not completing the voter declaration[,], or using an incorrect ink color to complete the ballot." *Id.* But in doing so, the Court could not have meant that a ballot would be discarded for being marked in an ink color not permitted by statute; well-established precedent says the opposite. *See Weiskerger Appeal*, 290 A.2d at 109 (refusing to invalidate ballots marked in red or green ink). Thus, while *some* errors on the outer envelope, such as the lack of a signature on the declaration, can invalidate a ballot if they are not cured, that does not mean *all* errors will result in a ballot's rejection.

Third, Justice Wecht's concurrence in *Pennsylvania Democratic Party* appropriately recognized that "adequate instructions for completing the declaration of the elector—including conspicuous warnings regarding the consequences of

failing strictly to adhere—could mitigate against the risk of ballot invalidation caused by “objective[ly]” defective ballots. 238 A.3d at 389 (Wecht, J., concurring) (emphasis added). Where a conspicuous warning was provided, he reasoned, a notice and cure process might not be necessary. But here, voters received no “conspicuous warning[]” that a failure to date their declarations could lead to invalidation. Instead, voters were simply reminded to “[s]ign the voter’s declaration in your own handwriting” and “[p]ut your ballot inside the secrecy envelope and place it in here.” Ex. B, Stipulated Facts ¶ 10. The Campaign has provided no evidence that the Secretary or the Board conspicuously communicated to voters that their absentee or mail-in ballot would not be counted if the declaration was not dated. As Justice Wecht recognized by implication, discarding these ballots without an appropriate warning is not compelled by statute.

III. Not allowing the challenged ballots potentially violates federal law.

Interpreting the Election Code to deny the right to vote for minor, immaterial omissions on absentee or mail-in ballot envelopes would also potentially violate federal law. Nobody acting under color of state law may deny anyone the right to vote “in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B). Here, the omission

of a handwritten date is not material in determining whether the elector was a qualified voter. No party contests that the outer envelope SURE barcode provides a readily available means to determine that all ballots at issue were cast by voters “qualified under State law to vote in such election” and further allows the Board and the Commonwealth to confirm each voter’s name and address among other information. And the handwritten date in the declaration is not material to determining whether an individual is qualified to vote, not allowing these votes to count would violate federal law.

CONCLUSION

Due to the public importance of the issues presented and the need for immediate resolution, the DNC respectfully requests that this Court assume extraordinary jurisdiction over this matter and affirm that the Election Code does not require county boards of elections to disqualify ballots for the technical minor defects at issue in this case.

Dated: November 21, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Pennsylvania Rule of Appellate Procedure 1115(f), I hereby certify that this PETITION FOR ALLOWANCE OF APPEAL has a word count of 8,331 words, as counted by Microsoft Word's word count tool.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Petition for Allowance of Appeal was served upon counsel of record, on the 21st day of November, 2020, by this Court's electronic filing system to the following:

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