

IN THE SUPREME COURT OF PENNSYLVANIA

**IN RE: CANVASS OF ABSENTEE
AND MAIL-IN BALLOTS OF
NOVEMBER 3, 2020 GENERAL
ELECTION; PHILADELPHIA
COURT OF COMMON PLEAS
CASE NOS. 201100874-201100878
(per the Honorable James Crumlish)**

No. 90 EM 2020

Philadelphia County Board of
Elections' Application for the Court to
Exercise Extraordinary Jurisdiction
Over the Commonwealth Court Cases
Docketed at 1140 CD 2020, 1139 CD
2020, 1138 CD 2020, 1137 CD 2020,
and 1136 CD 2020

ANSWER OF THE DEMOCRATIC NATIONAL COMMITTEE

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INTRODUCTION

The Democratic National Committee is an intervenor-defendant in *Donald J. Trump for President, Inc., et al. v. Philadelphia Cnty. Bd. of Elections*, Nos. 1136, 1137, 1138, 1139, and 1140 CD 2020 (Pa. Commw. Ct.). In that case, Donald J. Trump for President, Inc., and Elizabeth J. Elkin (collectively the “Campaign”) filed five appeals asking the Court of Common Pleas to invalidate 8,329 absentee and mail-in ballots submitted by Philadelphia County electors solely because they arrived in outer envelopes that lacked a handwritten name, address, date, or some combination thereof. The trial court denied all five appeals, holding that the Philadelphia County Board of Elections (the “Board”) did not abuse its discretion or commit an error of law in counting the challenged ballots. The DNC now joins the Board’s application to this Court to invoke its extraordinary jurisdiction to resolve this issue of critical importance. Exercise of the Court’s extraordinary jurisdiction is necessary to provide uniform and timely resolution of issues that are currently being litigated all across the Commonwealth on an expedited timeline. To ensure that every valid ballot is counted and to allow the Commonwealth to certify its election results by the requisite deadlines, the Board’s application should be granted.

STATEMENT OF SUPPORT FOR THE APPLICATION

I. Exercise of extraordinary jurisdiction is appropriate in this case.

This Court has the authority under its extraordinary jurisdiction to assume jurisdiction over any matter pending in the Commonwealth involving an issue of

immediate public importance. *See* 42 Pa.C.S.A. § 726. The purpose of extraordinary jurisdiction is “to conserve judicial resources, expedite the proceedings and provide guidance to the lower courts on a question that is likely to recur.” *Commonwealth v. Morris*, 771 A.2d 721, 731 (Pa. 2001). This Court should exercise that power here to make clear that voters who sent in signed mail-in and absentee ballots should not be disenfranchised because of technical defects with the affidavit—an issue that is likely to recur and must be addressed expeditiously to ensure Pennsylvania’s 67 counties can certify their election results in time for Pennsylvania to participate in the federal safe harbor deadline for choosing its electors. In particular, this Court should grant the Board’s application because (1) the application presents a question of public importance, (2) granting the application would resolve significant uncertainty across the Commonwealth’s county boards of elections and lower courts in a timely fashion, and (3) the application presents a pure question of law which requires no additional fact-finding.

First, the Court should grant the application because it raises a question of public importance—namely, whether voters should be disenfranchised over minor defects in the affidavit on their ballot return envelope that serve no important or compelling purpose. Of course, “all qualified voters have a constitutionally protected right to vote . . . and to have their votes counted.” *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). But resolution of this question is important to more than the voters

whose vote hangs in the balance; resolution is also critical for Commonwealth of Pennsylvania, which cannot certify its election results until the count of ballots is final, and to the people of the United States, the vast majority of whom wish to see the General Election come to a swift and neat resolution.

Second, this Court should grant the application precisely because this statutory question *must* be resolved in a timely manner. Counties must certify their results by November 23, *see* 25 P.S. § 2642, and Pennsylvania must finalize its slate of electors before December 14th when the electoral college meets. 3 U.S.C. §§ 5, 7; 25 P.S.C. § 2642(k). Those deadlines are fast-approaching.

Should this Court decline the application, it could delay resolution of these time-sensitive issues. Courts across the Commonwealth are being confronted with this and similar questions.¹ And while they have thus far ruled consistently, there is an ever-present risk that these bodies may come to different conclusions on whether such ballots should be counted. The combination of this uncertainty and the need for swift resolution makes this Court's use of its extraordinary jurisdiction particularly

¹ *See Donald J. Trump for President, Inc. v. Montgomery Cty. Bd. of Elects.*, No. 2020-18680 (Pa. Ct. Com. Pl. Nov. 13, 2020); *In re: Canvass of Absentee and Mail-In Ballots*, No. 201100878 (Pa. Ct. Com. Pl. Nov. 13, 2020); *In re: Canvass of Absentee and Mail-In Ballots*, No. 201100877; *In re: Canvass of Absentee and Mail-In Ballots*, No. 201100876 (Pa. Ct. Com. Pl. Nov. 13, 2020); *In re: Canvass of Absentee and Mail-In Ballots*, No. 201100875 (Pa. Ct. Com. Pl. Nov. 13, 2020); *In re: Canvass of Absentee and Mail-In Ballots*, No. 201100874 (Pa. Ct. Com. Pl. Nov. 13, 2020); *In re: Canvass of Absentee and/or Mail-In Ballots of November 3, 2020 General Election*, No. 20-05786-35 (Pa. Ct. Com. Pleas, Bucks County).

appropriate because this Court can offer an “expeditious and determinate” resolution that no other Court can. *In re Bruno*, 101 A.3d 635, 670 (Pa. 2014); *cf. Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 884 (Pa. 2020), (exercising King’s Bench powers to review Governor Wolf’s Executive Order in part because “continued challenges to the Executive Order will cause further uncertainty”), *cert. denied*, No. 19-1265, 2020 WL 5882242 (U.S. Oct. 5, 2020). Swift resolution is of this issue is precisely what is needed here.

Third, and finally, this Court should exercise its extraordinary jurisdiction because the application presents a pure question of law that requires no additional factfinding. To resolve this application, this Court need only interpret the relevant statutes.

Without a definitive ruling from this Court, voters could be unlawfully disenfranchised, and the ballot challenge process will be unnecessarily lengthy and convoluted, leading to delays when time is of the essence. For all of these reasons, this Court should grant this application and resolve this important issue of state law.

II. The Court should grant the requested relief.

A. There is no statutory basis to invalidate ballots where the outer envelope is signed.

Nothing in the Election Code requires that voters handwrite their names and addresses on the outer envelope, yet the Campaign seeks to invalidate thousands of votes on those grounds. But the Campaign cannot add mandatory voting procedures

that are not prescribed in law. The Board did not err by refusing to invalidate votes that complied with every statutory instruction.

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).

Absent from these instructions is any requirement that voters include their handwritten 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 who are unable to sign their declaration due to illness or physical disability. That section requires 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 can 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. 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).

B. There is no compelling reason to disenfranchise thousands of voters based on mere technicalities.

Technical defects with a signed declaration on the outer envelope are not grounds to reject a ballot. Nothing in the Election Code requires rejection for failure to input a handwritten name, date, or address, and there is no compelling reason for an elector to include such information, particularly where, as here, the name and address already appear on the outer envelope and each of the challenged ballots was timely received.

Not every failure to comply with an instruction in the Election Code is grounds to reject a ballot. *Weiskerger Appeal*, 447 Pa. 418, 421 (1972) (holding the statutory instruction that voters shall mark their ballot in blue, black, or blue-black ink is not mandatory); *Pa. Dem. Party v. Boockvar*, 238 A.3d 345, 378 (Pa. 2020) (“[w]hile both mandatory and directory provisions of the Legislature are meant to be followed, the difference between a mandatory and directory provision is the consequence for non-compliance: a failure to strictly adhere to the requirements of a directory statute will not nullify the validity of the action involved”) (quoting *JPay, Inc. v. Dep’t of Corr. & Governor’s Office of Admin.*, 89 A.3d 756, 763 (Pa. Cmwlth. 2014)). “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 Cnty. Bd. of Elections*, 39 Pa. D. & C.2d 545, 557 (Pa. Com. Pl. 1965) (same). A lack of perfect compliance is not a compelling reason to disenfranchise a voter. *See Shambach v. Bickhart*, 845 A.2d 793, 799 (Pa. 2004) (“[M]arking 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.”).

1. The Election Code does not provide that ballots with technical imperfections shall be “set aside.”

The General Assembly has provided no instruction—explicitly or implicitly—that ballots shall not be counted if they are in an outer envelope that lacks a handwritten date, name, or address. It could have done so if it wanted. In fact, the General Assembly has specified elsewhere in the Election Code instances in which an absentee ballot must be rejected:

- i. 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).
- ii. 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).
- iii. 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).

None of these issues is implicated here. The Campaign expressly disclaims any challenge related to whether an elector is deceased or ineligible to vote, and it does not claim that any secrecy envelopes contain identifying markings. Thus, the

ballots at issue do not fall within any of the discrete categories of invalid ballots that the General Assembly says should not be counted.²

The Pennsylvania Supreme Court has identified only two special and related instances where the legislative scheme requires deficient ballots to be voided even though the statute does not say so explicitly. But those cases turned on the paramount role, clearly apparent from the Election Code, that ballot secrecy serves to ensure the integrity of the election. In *Pennsylvania Democratic Party*, the Court explained that “naked ballots” lacking a secrecy envelope must not be counted because “the Legislature signaled beyond cavil that ballot confidentiality up to a certain point in the process is so essential as to require disqualification.” 238 A.3d at 380. The Court recognized that the secrecy envelope requirement served a role nearly identical to the prohibition on identifying marks, the violation of which requires invalidation. *Id.*; see 25 P.S. § 3146.8(g)(4)(ii). Because a naked ballot could reveal “critical identifying information,” the Court determined that the omission of a secrecy envelope would “defeat” the General Assembly’s intention that the votes marked on

² Comparison with a separate section of the Election Code lends further support for the fact that the General Assembly knows how to require information such as a date when it intends to. Because dated signatures on candidate nominating petitions are essential to determine whether and which signatures are valid under the statutory scheme governing these petitions, the General Assembly 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. § 2368. There is no parallel consequence for a missing date, name, or address in the statutes governing absentee and mail-in ballots.

a ballot shall not be traceable to the voter. *Id.* Similarly, in *In re Canvass of Absentee Ballots of November 4, 2003 General Election*, 843 A.2d 1223 (Pa. 2004), the Court held that absentee ballots delivered by third persons on behalf of non-disabled voters were invalid because the statutory limitation on third-person delivery would be “meaningless” and “absurd” if it were not mandatory. 843 A.2d at 1232. Again emphasizing the imperative of ballot secrecy, the Court noted the provision is “consistent with the spirit and intent of our election law, which requires that a voter cast his ballot alone, and that it remain secret and inviolate.” *Id.*

The unique considerations pertaining to ballot secrecy are not implicated where the Campaign complains that voters should have included more identifying information on the outer envelope. An envelope that lacks a handwritten name, date, or address is not analogous to a ballot submitted by a deceased or otherwise unqualified voter, and the omission plainly does not jeopardize the privacy of the vote. Nor would counting these ballots render the statutory scheme meaningless or absurd. Additional indicia on the outer envelope of the voter’s identity may be useful insurance for the unlikely but conceivable situation where the SURE system’s barcode fails to scan, just as a dated signature may be relevant evidence where the timeliness of a ballot is in dispute. But in the event where neither the identity of the elector nor the timeliness of the ballot are in any doubt—and the Campaign has explicitly represented that neither fact is contested here—no legislative purpose

would be served by invalidating the lawful votes of eligible voters. There is no basis here for the judiciary to take the legislative pen and add to the circumscribed reasons that a ballot may be set aside, especially where deferring to statutory silence does not defeat the General Assembly's obvious intentions. Because the General Assembly has not instructed otherwise, the Board did not abuse its discretion by deciding that these votes should be counted.

2. A complete name and address are not necessary because the statute does not require it and this information already is available on the outer envelope.

The statutory instructions do not direct voters to write their name and address on the outer envelope, but even if that were required, there would be no compelling reason to disenfranchise voters who fail to print their full name and address under the declaration because this 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 barcode that links the outer 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. Further, the voter's address is pre-printed on the outer envelope. In the proceeding below, the Campaign admitted that none of the contested ballots lacked this indicia of the voter's address.

The fact that the voter's name and address is readily identifiable would make throwing out these ballots a grave injustice. Requiring voters to input 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*, 238 A.3d at 380. Indeed, whatever the interest is in having the voter’s name and address identifiable from the outside of the ballot—likely an identification mechanism to prevent double voting—it is met here because the voter’s name and address is identifiable in at least one (and more often multiple) ways from the outside of every 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 *Wieskerger Appeal*, 290 A.2d at 109. As in *Wieskerger*, the Campaign has made no suggestion that the failure to include a complete name and address here was an effort at committing voter fraud, and such an attempt would be virtually impossible given that the voter’s name and 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 name and 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.

Further (and relatedly), the Campaign’s interpretation of state law would lead to a violation of federal law by asking the state to deny the right to vote for immaterial reasons. 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 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” by allowing the Board and the state to readily confirm each voter’s name and address along with other information. The handwritten name and address under the declaration is not material to determining whether an individual is qualified to vote, and not allowing these votes to count would be in violation of this provision of federal law.

3. A date is not necessary because there is no dispute these ballots were received before 8:00 p.m. on Election Day.

The purpose of the date on the outer envelope, when read in context with the rest of the election code, is apparent. Under Pennsylvania law, a ballot must be voted before eight o’clock P.M. the day of the primary or election to be counted. 25 P.S. § 3150.16(a). Thus, the date serves the purpose of allowing election officials to confirm that the ballot was timely voted. In this case, a handwritten date is not necessary for such confirmation, as the Campaign admitted that the ballots at issue in this case were received before 8:00 pm on Election Day. Moreover, 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.

The date stamp provides an objective indicator of timeliness that renders any handwritten date superfluous. Thus, there can be no doubt that the 2,349 challenged ballots were timely cast and should be counted. *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.”).

Although the statute provides that electors shall date the declaration, that directive—like others listed in the statute—is not mandatory. The Supreme Court has made clear that “[i]n construing election laws while we must strictly enforce all provisions to prevent fraud our overriding concern at all times must be to be flexible in order to favor the right to vote. Our goal must be to enfranchise and not to disenfranchise.” *Wieskerger Appeal*, 290 A.2d at 109. The directive to date the declaration is much like the directive to use blue or black ink in marking one’s ballot—it serves a purpose, but when that purpose has been met without strict compliance, the votes should be counted. *Id.* (“The 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.”).

CONCLUSION

DNC respectfully requests this Court to exercise its extraordinary jurisdiction and confirm that ballots shall not be rejected for a missing handwritten date, name, or address on the outer envelope.

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