

IN THE SUPREME COURT OF PENNSYLVANIA

NO. ____ MM ____

**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)**

**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**

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INTRODUCTION

This case concerns the appeal of Donald J. Trump for President, Inc. (the Campaign) of the Philadelphia County Board of Elections' decisions to count 8,329 absentee and mail-in ballots that were timely cast by eligible Philadelphia voters and received by the Philadelphia County Board of Elections (the Board) on or before Election Day. Although the Campaign does not claim that the voters that cast the ballots are not qualified electors or that any fraud was involved, the Campaign claims that these 8,329 ballots should not be counted because the voters failed to handwrite their name, street address, date, or some combination thereof on the ballot-return envelope. The Philadelphia Court of Common Pleas upheld the Board's decisions to count these ballots, but the Campaign has pursued an appeal to the Commonwealth Court. The statutory deadline for the Board to certify the election results to the Secretary of the Commonwealth is only seven days away.

Extraordinary jurisdiction is appropriate here for two reasons. First, the Campaign's contention that various technical deficiencies on ballot-return envelopes mean that votes should be discarded raises important and novel issues of statutory interpretation that will impact the rights of not only 8,329 Philadelphia voters, but of voters throughout the Commonwealth in this and future elections. Second, if this Court does not immediately exercise extraordinary jurisdiction over this case, it will threaten the Board's, and potentially the Commonwealth's, ability

to meet statutory reporting and certification deadlines, as the fate of these 8,329 ballots will be the subject of ongoing litigation.

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. Given the immediate and significant public importance of the state law statutory interpretation issues raised by these cases, and the need to finalize election results promptly, should the Court assume immediate jurisdiction over this action pursuant to its Extraordinary Jurisdiction?

Suggested answer: Yes.

2. Does the Election Code require 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?

Suggested answer: No.

STATEMENT OF THE CASE

On November 9, 2020, the Board held a public hearing, during which it considered whether to count mail-in and absentee ballots whose declarations had various technical insufficiencies. The Board decided that it could not reject ballots on the basis of a missing handwritten date, voter name, and/or address, and that it would count 8,329 ballots with such technical flaws. Plaintiff's counsel was present at the hearing, but offered no reason that these ballots should not be counted. On November 10, the Campaign appealed the Board's November 9

decisions to the Philadelphia County Court of Common Pleas. The appeals, Common Pleas Numbers 201100874, 201100875, 201100876, 201100877, 201100878, corresponding to Commonwealth Court Numbers 1140 CD 2020, 1139 CD 2020, 1138 CD 2020, 1137 CD 2020, and 1136 CD 2020¹, were assigned to the Honorable James Crumlish.

As the Trump Campaign confirmed in the Common Pleas hearing, the Campaign does not allege fraud; that the ballots in question were not filled out by the elector in whose name the ballots were issued; or that the ballots were untimely. *See* Hearing Transcript dated November 13, 2020, attached as Exhibit 1, at 13:23 – 14:17, 18:9-18, 31:9-18, 37:13-38:6. Instead, the Campaign claims that counting these ballots would violate the Election Code (25 P.S. §§ 3146.6(a) and 3150.16(a)).

On November 13, 2020, after a hearing on the merits of the Campaign's appeals, the Philadelphia Court of Common Pleas affirmed the Board's determination that the ballots at issue should be counted. *See* Orders dated November 13, 2020, attached as Exhibit 2. The Campaign appealed to the Commonwealth Court the next day. The day after that, the Board moved for

¹ The categories of technical issues raised in these appeals are: declarations that are signed and dated, but lack a handwritten name or address (4,466 ballots; No. 1136 CD 2020); declarations that lack only a handwritten address (860 ballots; No. 1137 CD 2020); declarations that lack only a handwritten name printed under the signature (553 ballots; No. 1138 CD 2020); declarations that lack only a date (1,259 ballots; No. 1139 CD 2020); and declarations that have a signature but not a date, printed name, or address (1,211 ballots; No. 1140 CD 2020).

immediate transfer of the appeal from Commonwealth Court to this Court. *See* Motion to Transfer dated November 15, 2020, attached as Exhibit 3. On November 16, 2020, the Commonwealth Court issued a scheduling order, which ordered the parties to file briefs on the merits by November 18, 2020, at 12:00 p.m. The order directed the parties to address the jurisdictional issues raised in the Motion to Transfer, as well as the merits. *See* Exhibit 4. Argument is scheduled for Thursday, November 19.

This appeal is the first, but may well not be the last, to address the issue of whether mail-in and absentee ballot declarations must have handwritten names, addresses, and dates to be counted. A candidate for the Pennsylvania Senate, Nicole Zicarelli, filed an Application to Intervene in the Commonwealth Court action on November 15, 2020. In her Application, Ms. Zicarelli alleges that the issues raised in this appeal are the same as those raised in an appeal of a decision of the Allegheny County Board of Elections. *See* Exhibit 5. That appeal is scheduled to be argued in the Allegheny County Court of Common Pleas on Tuesday, November 17, 2020; so is a similar appeal in the Bucks County Court of Common Pleas. *Nicole Zicarelli v. Allegheny County Board of Elections*, No. GD-20-011654 (Allegheny Cty. Ct. Com. Pl.), *Donald J. Trump for President Inc. v. Bucks Cty Board of Elections*, No. 2020-05786 (Bucks Cty. Ct. Com. Pl.). An appeal involving similar issues was recently decided in the Montgomery County

Court of Common Pleas; the appeal period on that matter has not yet run. *Donald J. Trump for President, Inc., et al. v. Montgomery Cty Board of Elections*, No. 2020-18680 (Nov. 13, 2020, Montgomery Cty. Ct. Com. Pl) (Haaz, J.).

BASIS FOR EXTRAORDINARY JURISDICTION

This case presents questions of immediate and significant importance that directly affect both thousands of individual Philadelphia voters, and, potentially, other voters throughout the Commonwealth. Whether the Board must deny the franchise to 8,329 Philadelphia voters for minor technical irregularities on their ballot declarations is of crucial importance to the county's ability to promptly compute and certify its election results.

This Court may assume, at its discretion, plenary jurisdiction over a matter of immediate public importance that is pending before another court of the Commonwealth. *See* 42 Pa.C.S. § 726. *See, e.g., League of Women Voters v. Commonwealth*, 178 A.3d 737, 766–67 (Pa. 2018) (taking extraordinary jurisdiction over redistricting case). In exercising its discretion regarding extraordinary jurisdiction, this Court considers the immediacy of the issue raised, *Bd. of Revisions of Taxes v. City of Phila.*, 4 A.3d 610, 620 (Pa. 2004); that is, whether there is some intervening need to expedite the proceeding and truncate the normal judicial process. *Commonwealth v. Morris*, 771 A.2d 721, 731 (Pa. 2001).

Should this case proceed through the traditional appeal process, it could unreasonably delay the Board's computation and certification of its election results. Despite the Commonwealth Court's admirable efforts to expedite the case, it undoubtedly will need time to make a determination after the scheduled November 19 argument. Given the importance of the issues at stake, the losing party will likely seek review in this Court. In the meantime, important deadlines will be passing by. The Election Code requires Boards, with some exceptions, to certify the results of the November 3 election to the Secretary of the Commonwealth no later than November 23, 2020. 25 P.S. § 2642. The Code also requires Boards to announce their computations of results at least five days before their final certification. 25 P.S. § 3154(f). Prompt computation and certification is especially critical in a Presidential election year, because federal law carries its own deadlines for the ascertainment of electors and the Electoral College vote. *See* 3 U.S.C. §§ 1 *et seq.* The longer an appeal such as the Campaign's is ongoing, the longer these steps will be delayed beyond the ordinary deadlines contemplated by the Code and the more compressed the Electoral College timeline will become.

Ultimately, the Pennsylvania "Election Code reflects a clear intention of the General Assembly to expeditiously resolve election disputes and provide for the prompt certification of the vote." *In re 2003 Election for Jackson Twp. Sup'r*, 840 A.2d 1044, 1046 (Pa. Commw. Ct. 2003) (citing *In re Petition of Jones*, 346 A.2d

260 (Pa. 1975)); *see also id.* (“The integrity of the election process requires immediate resolution of disputes that prevent certification.”). The Election Code provides several different “procedures and associated requirements” for challenging whether a ballot should be counted and disputing “the accuracy of a vote count,” *Rinaldi v. Ferrett*, 941 A.2d 73, 76 (Pa. Commw. Ct.), but none of these procedures should be construed to frustrate the overall purpose of the Election Code to “prompt[ly] certify[] the vote.” This overarching principle of interpretation provides further justification for this Court to exercise its extraordinary jurisdiction here.

ARGUMENT

Upon exercising extraordinary jurisdiction over these cases, this Court should affirm the decisions of the Court of Common Pleas. The Court of Common Pleas was required to affirm the decisions of the Board of Elections unless it found an abuse of discretion or error of law. *See Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 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 Cnty. 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

Court of Common Pleas correctly found that no such abuse of discretion or error of law had occurred.

Here, the Campaign does not claim that the voters who cast the ballots involved were not qualified electors, and does not claim that anyone did anything fraudulent or improper. Rather, the Campaign asserts that these voters, at worst, made technical mistakes in filling out their voter declarations and, therefore, that they should be disenfranchised. But these 8,329 voters filled out their ballots and properly placed their ballots inside two envelopes. And these 8,329 voters also signed their voter declarations. The mail-in ballots of these 8,329 mail-in voters were received by the Board on or before Election Day.

The Board made no error of law in determining that the technical errors made by the 8,329 voters should not result in disenfranchisement. Nothing in the Election Code requires the Board to set aside ballots that are missing handwritten names, street addresses, and/or dates on the voter declaration.

First, the Code does not require that a ballot envelope declaration include an address or the voter's printed name at all. It states that "[t]he form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain, among other things, 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. It is the Secretary, not the legislature, that decided

what other information the form should include; the legislature could not have intended that a voter who failed to include all that information should be disenfranchised.

Similarly, a voter's failure to handwrite the date on which they signed their declaration is of no consequence. The date of signing has no role in the Board's comparison of the voter declaration to the applicable voter list, and a Board can reasonably determine that a voter declaration is sufficient even though it lacks a handwritten date. Each of the 8,329 ballots challenged here arrived before 8:00 p.m. on Election Day, so there is no danger that any of the ballots was untimely, or fraudulently back-dated. The Board does not use the handwritten date to confirm that the voter was qualified to cast a ballot; this determination depends on the voter's age and length of residence in a district as of the date of the election, not the date the voter signed the declaration. *See* 25 P.S. § 2811. It also does not use the date to determine whether a voter has attempted to cast duplicate ballots; duplicates are identified by use of bar codes, and the Board identifies the earlier-cast ballot by looking to the date it received the ballot, not the date on the declaration.

Further, it is clear that the declarations must have been signed within a narrow period of time. Counties began mailing ballots out to voters no earlier than late September, 2020, when the Pennsylvania Supreme Court resolved a dispute

over who would appear on the ballot, *see In re Scroggin*, 237 A.3d 1006 (Pa. 2020), and received them back no later than the Friday after the election. *Cf. Montgomery v. Ruxton Health Care, IX, LLC*, No. 06-24, 2006 WL 3746145, at *3 (E.D. Va. Dec. 15, 2006) (collecting authority) (explaining that even though 28 U.S.C. § 1746 states that unsworn declarations should be “dated,” “undated declarations are acceptable ... when extrinsic evidence demonstrates the approximate date or ‘the period’ in which the declarations were executed”); *Pieszak v. Glendale Adventist Med. Ctr.*, 112 F. Supp. 2d 970, 999 (C.D. Cal. 2000) (finding § 1746 satisfied where extrinsic evidence indicated the month in which the document was signed); *Hollyfied v. Tullos*, No. 18-1738, 2018 WL 3475376, at *2 (E.D. La. July 19, 2018) (collecting authority).

The procedural mistakes at issue in these cases are similar to the types of minor mistakes that Pennsylvania courts have long held should not result in ballots being stricken. *See Bickhart*, 845 A.2d at 798-99; *In re Luzerne Cty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972). Here, the voters successfully maintained the secrecy of their ballot by using the inner secrecy envelope. They signed a declaration stating that they were eligible to vote, had not already voted, and had filled out their ballot in secret. And they took the necessary steps to mail or deliver their ballot such that it was received by the Board on or before Election Day. They simply made errors in failing to fill out, by hand, one or more pieces of information

in the voter declaration form. But these pieces of information have no impact on the Board's ability to ascertain the voter's right to vote, nor do they have any impact on the secrecy or sanctity of the ballot.

Recent decisional authority confirms that some elements of a mail-in ballot are so essential to the secrecy and integrity of ballots that even inadvertent mistakes by voters will render a ballot invalid. *See, e.g., Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020). In line with these decisions, the Board voted *not* to count 4,027 ballots that were sent to the Board without an inner secrecy envelope, 472 ballots that did not include any declaration signature or handwritten information in the declaration form, 225 ballots that did not include any declaration signature, and 112 ballots on which the handwritten declaration information did not match the voter information contained on the label affixed to the declaration envelope.

The voter omissions at issue here, however, are failures to follow directory, rather than mandatory, language in the Election Code and are therefore not grounds for disqualification. And even if the Board *could* discard ballots under these provisions, it is not at all clear that they *must*, and even less clear that the Board's decisions to count these ballots were "based on a clear error of law."

This Court should deny the Campaign's appeals because they misconstrue the Election Code's directions to mail-in and absentee voters as bars to the

franchise itself, such that anything short of perfect compliance prevents the Boards from counting the voter's ballots. *See* 25 P.S. §§ 3146.6(a) 25 P.S. § 3150.16(a). The omissions the Campaign points to – missing or misplaced names, dates, or addresses – do not disqualify a ballot because these directions do not carry the penalty of cancellation for noncompliance. Only “mandatory” requirements subject a ballot to cancellation, and these 8,329 ballots offend no mandatory requirements of the Election Code.

Pennsylvania courts have consistently held that noncompliance with directions in the Election Code, as opposed to mandates carrying penalties, are not grounds for cancelling a ballot. Generally speaking, “[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.” *See JPay, Inc. v. Dep't of Corr. & Governor's Office of Admin.*, 89 A.3d 756, 763 (Pa. Commw. Ct. 2014) (internal citation omitted). In the Election Code context, in *In re Luzerne Cty. Return Bd.*, this Court found that an absentee voter's ballot filled out in red ink did not disqualify the otherwise valid ballot—despite the code providing that “any ballot that is marked in blue, black, or blue-black ink...shall be valid and counted.” 290 A.2d at 109. *See also Bickhart*, 845 A.2d at 803 (holding that although the

Election Code provides that an elector may cast a write-in vote for any person not printed on the ballot, a write-in vote for a candidate whose name, in fact, appears on the ballot is not invalid where there is no evidence of fraud and the voter's intent is clear). The Election Code does not provide a “consequence for non-compliance” for the failure to date a mail-in ballot, or to include a printed name next to a signature. *See JPay*, 89 A.3d at 763. Therefore, while these expectations are “directory,” they do not rise to the level of “mandatory” such that failure to comply completely nullifies the act of voting.

The Code’s use of the word “shall” does not change the analysis, because “shall,” on its own, does not make a statutory phrase mandatory as opposed to directory. Below, the Campaign argued that *all* “requirements set forth in Election Code Sections 3146.6(a) and 3150.16(a) are mandatory,” even that the elector “fold the ballot.” But, as indicated above, Pennsylvania courts have held that failure to comply with such directions does not void an otherwise valid ballot. The Campaign did not argue, for example, that ballots filled out in green or red pen are invalid, despite the language of the Election Code that the “elector *shall*...mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink...” *See* 25 P.S. § 3146.6(a) (emphasis added). The Code also directs that the elector “shall...then fold the ballot.” *Id.* Following the Campaign’s logic, a ballot that was stuffed, rather than folded into its security envelope would be subject to

invalidation; likewise with a ballot filled-out in red pen. In light of *In re Luzerne County*, 290 A.2d 108, this cannot be a correct reading of Sections 3146.6(a) or 3050.16(a), which include no penalty for failure to fold a ballot or use a blue pen. Instead, this Court should affirm the Court of Common Pleas and find the direction that voters “shall fill out, date and sign the declaration” on their absentee and mail-in ballots in Sections 3146.6(a) and 3050.16(a) to be directory, because it does not correspond to a penalty laid out elsewhere in the Code.²

The Board’s decisions to count ballots that were signed by the voter but merely lacking one or more other pieces of handwritten information on the voter declaration form are consistent with the Election Code and the recent applicable case law. Nothing in the Election Code or decisional authority requires the Board to invalidate the votes of qualified electors who fail to fully “fill out” the voter declaration form. As indicated above, there is no authority mandating that the

² To the extent there exists ambiguity on whether the Election Code penalizes omissions like those at issue here, the Secretary of State’s interpretation detailed in the guidance issued on September 11, 2020—directing county boards of elections to count these ballots—is entitled to deference. *Crown Castle NG East LLC v. Pennsylvania Pub. Util. Comm’n*, --A.3d --, No. 2 MAP 2019, 2020 WL 4152006, at *9 (Pa. July 21, 2020). The Secretary’s guidance provides: “If 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 unless challenged in accordance with the Pennsylvania Election Code.” GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES, available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf>.

Board invalidate a ballot that contains an error or omission with respect to filling out or dating the declaration.

And finally, this Court has the final word on these novel questions of state law, and a prompt exercise of that power is necessary to avoid the disruption that would occur if these cases were allowed to work their way through the typical appeal process. Despite the Commonwealth Court's best efforts, a final ruling on all of these issues simply cannot be issued quickly enough to give this Court sufficient time to receive and review briefing, and then conclusively resolve these issues before the critical, impending state and federal deadlines. Due to the public importance of the issues presented and the need for immediate resolution, the Board respectfully requests that this Court do the following:

- (1) Assume Extraordinary jurisdiction over this matter; and
- (2) Resolve the legal issues concerning whether the Election Code requires county boards of elections to disqualify ballots containing minor defects, specifically:
 - (a) no additional information beyond a signature,
 - (b) missing date,
 - (c) missing printed name,
 - (d) missing street address,
 - (e) missing printed name and address.

CONCLUSION

For the foregoing reasons, this Court should immediately take jurisdiction of these cases and decide these critically important election issues.

Respectfully submitted,

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CERTIFICATION

This 17th day of November, 2020, I certify that:

Electronic version. The electronic version of this brief that has been provided to the Court in .pdf format in an electronic medium today is an accurate and complete representation of the paper original of the document that is being filed by the Philadelphia County Board of Elections.

Public Access Policy. I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Word Count. I certify that this brief contains 3,704 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate I have relied on the word count of the word-processing software system used to prepare this brief.

The undersigned verifies that the preceding Brief does not contain or reference exhibits filed in the Commonwealth Court under seal. Therefore, the preceding Brief does not contain confidential information.

Service. I am this day serving this Brief in the manner indicated below,
which service satisfies the requirements of Pennsylvania Rule of Appellate
Procedure 121:

/s/ Mark A. Aronchick
Mark A. Aronchick

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EXHIBIT 1

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FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
COURT OF COMMON PLEAS FOR PHILADELPHIA COUNTY
ELECTION COURT

- - -

In re: :
: CASE NOS. 2011-00874
: 2011-00875
CANVASS OF ABSENTEE AND : 2011-00876
MAIL-IN BALLOTS OF : 2011-00877
NOVEMBER 3, 2020 GENERAL : 2011-00878
ELECTION :
: Filed on behalf of:
: Donald J. Trump for
: President, Inc.
:

- - -

Friday, November 13, 2020

- - -

MOTIONS COURT, TRAFFIC COURT

800 SPRING GARDEN STREET

PHILADELPHIA, PA

- - -

BEFORE: THE HONORABLE JAMES C. CRUMLISH, J.

- - -

MOTION

- - -

1 facts or may be different.

2 MS. KERNS: Sure, Your Honor. The
3 facts are actually related. The Clerk's
4 officer had actually asked me to put them in
5 five different petitions. That's the only
6 reason that there are five different petitions
7 before Your Honor. I had originally planned to
8 just file one petition and list the different
9 categories.

10 THE COURT: My question, Ms. Kerns,
11 is: There are five categories, but each have
12 distinct and different facts upon which you
13 rely upon to object; is that correct?

14 MS. KERNS: Yes. There are five
15 different categories of ballots, and in each
16 category, there's a different issue. Just by
17 way of example, category 3 is where the voter
18 had only signed and not provided any other
19 information, and then each category has a
20 description as to something that the voter did
21 not do on the declaration. But, it's five
22 different categories.

23 THE COURT: Having read your moving
24 papers, would you agree with me that you are
25 not proceeding based on allegations of fraud or

1 misconduct; is that correct?

2 MS. KERNS: I am not proceeding on
3 those allegations. I'm simply proceeding on
4 3157 of the election code as well as 3246.

5 THE COURT: All right. More directly
6 to my question, you are not alleging fraud or
7 irregularity as the basis, you are alleging an
8 error of law; is that correct?

9 MS. KERNS: I'm alleging that these
10 ballots were not filled out correctly, yes.
11 That's what I'm alleging.

12 THE COURT: It is important, and I'd
13 ask you to listen carefully if I'm not being
14 clear. You are alleging that the Board
15 committed an error of law in deciding to vote
16 to count these ballots; is that correct?

17 MS. KERNS: Yes.

18 THE COURT: Okay. Now I'll hear from
19 the other parties, and we will then proceed to
20 the petitioners' argument. Who would go first
21 in this group of esteemed colleagues?

22 MS. HANGLEY: I believe I would, Your
23 Honor, after Ms. Kerns.

24 THE COURT: Fine, thank you.

25 Ms. Hangley.

1 that that should result in the
2 disenfranchisement of Philadelphia voters.

3 The DNC's position is similar to the
4 county's position. These are, at most, minor
5 technical irregularities of the sort that the
6 Supreme Court of Pennsylvania has repeatedly
7 said do not warrant disenfranchisement.

8 THE COURT: Thank you.

9 Ms. Kerns, if I may ask, do we all
10 agree that the thousands of ballots that are
11 under challenge all represent eligible voters?

12 MS. KERNs: Was the question that I
13 agree that these were eligible voters?

14 THE COURT: Yes, taking aside, for
15 the moment, whether or not they properly filled
16 out the mail-in or absentee ballot envelope.

17 MS. KERNs: Yes, I'm not challenging
18 their eligibility.

19 THE COURT: Then, secondly, we can
20 agree that your client did not file a challenge
21 on the Friday proceeding the election and post
22 a bond challenging the ballots under the
23 statute?

24 MS. KERNs: To challenge their
25 eligibility?

1 Just a word on the equal protection
2 argument that Ms. Kerns seems to be making.
3 That's not before this Court. There's no
4 evidence of what any other county in this
5 Commonwealth does, and certainly it is not Your
6 Honor's job to disenfranchise Philadelphians
7 based on unsupported statements that other
8 counties are doing the same thing.

9 THE COURT: Ms. Kerns, just as a
10 follow-up, is there any dispute that these
11 mail-in or absentee ballots were received in a
12 timely fashion, that is, on or before election
13 day?

14 MS. KERNS: No.

15 THE COURT: No dispute. So they were
16 received timely by the County Board of
17 Elections; is that right?

18 MS. KERNS: Yes.

19 THE COURT: We had a discussion, your
20 argument -- can you direct me where the phrase
21 "date" is statutorily described in a "shall"
22 language? I didn't see the word "date." Did I
23 miss it?

24 MS. KERNS: Are you addressing me?

25 THE COURT: Yes, ma'am.

1 issue of whether or not the voter actually did
2 it. But that is not -- the basis of my appeal
3 is not whether or not it was the actual voter
4 because I have no evidence of that.

5 THE COURT: Right, and you didn't
6 raise it as an issue. This is not a serious
7 dispute before this Court, that this is the
8 elector attempting to have their ballot
9 counted, right?

10 MS. KERNS: Your question is, is this
11 the elector attempting to have their ballot
12 counted?

13 THE COURT: There is no serious --

14 MS. KERNS: Yes.

15 THE COURT: -- dispute that this is
16 the elector who has signed and sent a ballot in
17 to be counted to the County Board of Elections;
18 is that correct?

19 MS. KERNS: This is a ballot that the
20 -- Your Honor, I don't know. I cannot say
21 whether or not the electors who signed these
22 were actually -- it was actually their ballot.
23 That was not the basis of my appeal. So, I'm
24 not disputing whether or not these 4,466
25 ballots were each signed by the electors whose

1 name were on it.

2 THE COURT: Okay, fine.

3 MS. KERNS: I can't dispute that. I
4 don't have that evidence.

5 THE COURT: You just don't dispute
6 it. I got it, thank you.

7 Ms. Hangle, is there anything more
8 on this group that we've been discussing and
9 the statutory interpretation of "mandatory"
10 versus "directory?"

11 MS. HANGLEY: Your Honor, there's
12 certainly more to say on the statutory
13 interpretation of "directory" versus
14 "mandatory." On this particular group of
15 ballots, Your Honor never needs to reach that
16 point. There is no "shall" relating to
17 addresses or to a voter's printed name. There
18 is nothing in the code that requires that.

19 The argument, as I understand it,
20 seems to be that since the code says the voter
21 has to fill out the declaration, that there
22 must be absolute technical perfection in every
23 aspect of that. But, we know from Supreme
24 Court precedent, and we know from the rest of
25 the statute, that what that means is the voter

EXHIBIT 2

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IN RE: CANVASS OF ABSENTEE AND MAIL-IN
BALLOTS OF NOVEMBER 3, 2020 GENERAL
ELECTION

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

NOVEMBER TERM, 2020

No. 201100874

ORDER

AND NOW, to-wit, this 13th day of November, 2020, upon consideration of Petitioner Donald J. Trump for President, Inc.'s Notice of Appeal via Petition for Review of the Decision of the Philadelphia County Board of Elections, the response of the Philadelphia County Board of Elections and the submissions on behalf of Intervenor, DNA Services Corp./Democratic National Committee and the arguments of counsel, it appearing that Petitioner has properly and timely sought review of the decision of the Board of Elections pursuant to 25 Pa. C.S.A. §3146(g)(6), it further appearing that Petitioner is not contending that there has been fraud, that there is evidence of fraud or that the ballots in question were not filled out by the elector in whose name the ballot was issued, and it further appearing that Petitioner does not allege fraud or irregularity in the canvass and counting of the ballots, and the Court finding that the Intervenor's Objection to the consideration of the appeal as an "eligibility challenge" pursuant to 25 Pa. C.S.A. §3146.8 is a mischaracterization of the above-referenced review (and therefore a meritless objection), the Court finds as follows:

1. Petitioner asserts a challenge to the decision of the Board of Elections to count the votes represented in the grouping designated Category 3, those being 1,211 ballots on

which the outer envelope contains only the Elector's signature but which do not have the date, printed name or the elector's address filled out in the space provided.

2. The envelope provided to the elector from the Secretary of State of the Commonwealth contains a direction in the form of a checklist on the back of the envelope that directs the elector to sign the declaration, but makes no mention of filling out the date or other information.
3. The Election Code provides that a voter shall "fill out, date and sign the declaration" on the outer envelope.
4. The term "fill out" in the Code is not a defined term and is ambiguous.
5. The pre-printed ballot already contains the elector's name and address on the pre-printed exterior envelope.
6. Neither a date nor the elector's filling out of the printed name or of the address are requirements necessary to prevent fraud.
7. The Petitioner concedes that all ballots by a qualified elector in this category were timely received.
8. The Election Code directs the Court of Common Pleas in considering appeals from the County Board of Elections to make such decree as right and justice may require.

25 Pa. C.S.A. §3157.

WHEREFORE, the Court ORDERS and DECREES that the Petition is **DENIED**. The Court further ORDERS AND DECREES that the decision of the Philadelphia County Board of Elections in canvassing and counting 1,211 absentee and mail-in ballots containing the elector's signature on the Declaration envelope but missing the date and other "fill out" information is

AFFIRMED as in accordance with the provisions of the Election Code and the decisions of the Courts interpreting the Code.

BY THE COURT,


Crumlish, J.

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IN RE: CANVASS OF ABSENTEE AND MAIL-IN
BALLOTS OF NOVEMBER 3, 2020 GENERAL
ELECTION

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

NOVEMBER TERM, 2020

No. 201100875

ORDER

AND NOW, to-wit, this 13th day of November, 2020, upon consideration of Petitioner Donald J. Trump for President, Inc.'s Notice of Appeal via Petition for Review of the Decision of the Philadelphia County Board of Elections, the response of the Philadelphia County Board of Elections and the submissions on behalf of Intervenor, DNA Services Corp./Democratic National Committee and the arguments of counsel, it appearing that Petitioner has properly and timely sought review of the decision of the Board of Elections pursuant to 25 Pa. C.S.A. §3146(g)(6), it further appearing that Petitioner is not contending that there has been fraud, that there is evidence of fraud or that the ballots in question were not filled out by the elector in whose name the ballot was issued, and it further appearing that Petitioner does not allege fraud or irregularity in the canvass and counting of the ballots, and the Court finding that the Intervenor's Objection to the consideration of the appeal as an "eligibility challenge" pursuant to 25 Pa. C.S.A. §3146.8 is a mischaracterization of the above-referenced review (and therefore a meritless objection), the Court finds as follows:

1. Petitioner asserts a challenge to the decision of the Board of Elections to count the votes represented in the grouping designated Category 4, those being 1,259 ballots on which the outer envelope contains only the Elector's signature and hand-printed address but which do not have the date on which the Elector signed the envelope.

2. The envelope provided to the elector from the Secretary of State of the Commonwealth contains a direction in the form of a checklist on the back of the envelope that directs the elector to sign the declaration, but makes no mention of filling out the date or other information.
 3. The Election Code provides that a voter shall “fill out, date and sign the declaration” on the outer envelope.
 4. The term “fill out” in the Code is not a defined term and is ambiguous.
 5. The pre-printed ballot already contains the elector’s name and address on the pre-printed exterior envelope.
 6. Neither a date nor the elector’s filling out of the printed name or of the address are requirements necessary to prevent fraud.
 7. The Petitioner concedes that all ballots by a qualified elector in this category were timely received.
 8. The Election Code directs the Court of Common Pleas in considering appeals from the County Board of Elections to make such decree as right and justice may require.
- 25 Pa. C.S.A. §3157.

WHEREFORE, the Court ORDERS and DECREES that the Petition is **DENIED**. The Court further ORDERS AND DECREES that the decision of the Philadelphia County Board of Elections in canvassing and counting 1,259 absentee and mail-in ballots containing the elector’s signature, hand-printed name and address on the Declaration envelope but missing the date is

AFFIRMED as in accordance with the provisions of the Election Code and the decisions of the Courts interpreting the Code.

BY THE COURT,


Crumlish, J.

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IN RE: CANVASS OF ABSENTEE AND MAIL-IN
BALLOTS OF NOVEMBER 3, 2020 GENERAL
ELECTION

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

NOVEMBER TERM, 2020

No. 201100876

ORDER

AND NOW, to-wit, this 13th day of November, 2020, upon consideration of Petitioner Donald J. Trump for President, Inc.'s Notice of Appeal via Petition for Review of the Decision of the Philadelphia County Board of Elections, the response of the Philadelphia County Board of Elections and the submissions on behalf of Intervenor, DNA Services Corp./Democratic National Committee and the arguments of counsel, it appearing that Petitioner has properly and timely sought review of the decision of the Board of Elections pursuant to 25 Pa. C.S.A. §3146(g)(6), it further appearing that Petitioner is not contending that there has been fraud, that there is evidence of fraud or that the ballots in question were not filled out by the elector in whose name the ballot was issued, and it further appearing that Petitioner does not allege fraud or irregularity in the canvass and counting of the ballots, and the Court finding that the Intervenor's Objection to the consideration of the appeal as an "eligibility challenge" pursuant to 25 Pa. C.S.A. §3146.8 is a mischaracterization of the above-referenced review (and therefore a meritless objection), the Court finds as follows:

1. Petitioner asserts a challenge to the decision of the Board of Elections to count the votes represented in the grouping designated Category 5, those being 533 ballots on which the outer envelope contains the Elector's signature , the date and the elector's

address filled out in the space provided but do not have the Elector's name printed under the signature.

2. The envelope provided to the elector from the Secretary of State of the Commonwealth contains a direction in the form of a checklist on the back of the envelope that directs the elector to sign the declaration, but makes no mention of filling out the date or other information.
3. The Election Code provides that a voter shall "fill out, date and sign the declaration" on the outer envelope.
4. The term "fill out" in the Code is not a defined term and is ambiguous.
5. The pre-printed ballot already contains the elector's name and address on the pre-printed exterior envelope.
6. Neither a date nor the elector's filling out of the printed name or of the address are requirements necessary to prevent fraud.
7. The Petitioner concedes that all ballots by a qualified elector in this category were timely received.
8. The Election Code directs the Court of Common Pleas in considering appeals from the County Board of Elections to make such decree as right and justice may require.

25 Pa. C.S.A. §3157.

WHEREFORE, the Court ORDERS and DECREES that the Petition is **DENIED**. The Court further ORDERS AND DECREES that the decision of the Philadelphia County Board of Elections in canvassing and counting 533 absentee and mail-in ballots containing the elector's signature, hand-written address and date on the Declaration envelope but missing the hand-

printed name under the signature is **AFFIRMED** as in accordance with the provisions of the Election Code and the decisions of the Courts interpreting the Code.

BY THE COURT,


Crumlish, J.

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IN RE: CANVASS OF ABSENTEE AND MAIL-IN
BALLOTS OF NOVEMBER 3, 2020 GENERAL
ELECTION

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

NOVEMBER TERM, 2020

No. 201100877

ORDER

AND NOW, to-wit, this 13th day of November, 2020, upon consideration of Petitioner Donald J. Trump for President, Inc.'s Notice of Appeal via Petition for Review of the Decision of the Philadelphia County Board of Elections, the response of the Philadelphia County Board of Elections and the submissions on behalf of Intervenor, DNA Services Corp./Democratic National Committee and the arguments of counsel, it appearing that Petitioner has properly and timely sought review of the decision of the Board of Elections pursuant to 25 Pa. C.S.A. §3146(g)(6), it further appearing that Petitioner is not contending that there has been fraud, that there is evidence of fraud or that the ballots in question were not filled out by the elector in whose name the ballot was issued, and it further appearing that Petitioner does not allege fraud or irregularity in the canvass and counting of the ballots, and the Court finding that the Intervenor's Objection to the consideration of the appeal as an "eligibility challenge" pursuant to 25 Pa. C.S.A. §3146.8 is a mischaracterization of the above-referenced review (and therefore a meritless objection), the Court finds as follows:

1. Petitioner asserts a challenge to the decision of the Board of Elections to count the votes represented in the grouping designated Category 3, those being 860 ballots on which the outer envelope contains the Elector's signature, hand-printed name and date but which do not have the elector's address filled out in the space provided.

2. The envelope provided to the elector from the Secretary of State of the Commonwealth contains a direction in the form of a checklist on the back of the envelope that directs the elector to sign the declaration, but makes no mention of filling out the date or other information.
 3. The Election Code provides that a voter shall “fill out, date and sign the declaration” on the outer envelope.
 4. The term “fill out” in the Code is not a defined term and is ambiguous.
 5. The pre-printed ballot already contains the elector’s name and address on the pre-printed exterior envelope.
 6. Neither a date nor the elector’s filling out of the printed name or of the address are requirements necessary to prevent fraud.
 7. The Petitioner concedes that all ballots by a qualified elector in this category were timely received.
 8. The Election Code directs the Court of Common Pleas in considering appeals from the County Board of Elections to make such decree as right and justice may require.
- 25 Pa. C.S.A. §3157.

WHEREFORE, the Court ORDERS and DECREES that the Petition is **DENIED**. The Court further ORDERS AND DECREES that the decision of the Philadelphia County Board of Elections in canvassing and counting 860 absentee and mail-in ballots containing the elector’s signature, hand-printed name and date on the Declaration envelope but missing the hand-written

address is **AFFIRMED** as in accordance with the provisions of the Election Code and the decisions of the Courts interpreting the Code.

BY THE COURT,


Crumlish, J.

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IN RE: CANVASS OF ABSENTEE AND MAIL-IN
BALLOTS OF NOVEMBER 3, 2020 GENERAL
ELECTION

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

NOVEMBER TERM, 2020

No. 201100878

ORDER

AND NOW, to-wit, this 13th day of November, 2020, upon consideration of Petitioner Donald J. Trump for President, Inc.'s Notice of Appeal via Petition for Review of the Decision of the Philadelphia County Board of Elections, the response of the Philadelphia County Board of Elections and the submissions on behalf of Intervenor, DNA Services Corp./Democratic National Committee and the arguments of counsel, it appearing that Petitioner has properly and timely sought review of the decision of the Board of Elections pursuant to 25 Pa. C.S.A. §3146(g)(6), it further appearing that Petitioner is not contending that there has been fraud, that there is evidence of fraud or that the ballots in question were not filled out by the elector in whose name the ballot was issued, and it further appearing that Petitioner does not allege fraud or irregularity in the canvass and counting of the ballots, and the Court finding that the Intervenor's Objection to the consideration of the appeal as an "eligibility challenge" pursuant to 25 Pa. C.S.A. §3146.8 is a mischaracterization of the above-referenced review (and therefore a meritless objection), the Court finds as follows:

1. Petitioner asserts a challenge to the decision of the Board of Elections to count the votes represented in the grouping designated Category 3, those being 4,466 ballots on which the outer envelope contains the Elector's signature and the date but which do not have the printed name or the elector's address filled out in the space provided.

2. The envelope provided to the elector from the Secretary of State of the Commonwealth contains a direction in the form of a checklist on the back of the envelope that directs the elector to sign the declaration, but makes no mention of filling out the date or other information.
 3. The Election Code provides that a voter shall “fill out, date and sign the declaration” on the outer envelope.
 4. The term “fill out” in the Code is not a defined term and is ambiguous.
 5. The pre-printed ballot already contains the elector’s name and address on the pre-printed exterior envelope.
 6. Neither a date nor the elector’s filling out of the printed name or of the address are requirements necessary to prevent fraud.
 7. The Petitioner concedes that all ballots by a qualified elector in this category were timely received.
 8. The Election Code directs the Court of Common Pleas in considering appeals from the County Board of Elections to make such decree as right and justice may require.
- 25 Pa. C.S.A. §3157.

WHEREFORE, the Court ORDERS and DECREES that the Petition is **DENIED**. The Court further ORDERS AND DECREES that the decision of the Philadelphia County Board of Elections in canvassing and counting 4,466 absentee and mail-in ballots containing the elector’s signature and the date on the Declaration envelope but missing the other “fill out” information

(hand-printed name and address) is **AFFIRMED** as in accordance with the provisions of the Election Code and the decisions of the Courts interpreting the Code.

BY THE COURT,


Crumlish, J.

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EXHIBIT 3

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | |
|-----------------------------------|---|
| IN RE: CANVASS OF ABSENTEE | : |
| AND MAIL-IN COURT BALLOTS | : |
| OF NOVEMBER 3, 2020 | : |
| GENERAL ELECTION | : |
| | : |
| Appeal of: Donald J. Trump | : |
| for President, Inc. | : |

**Appellee City of Philadelphia Board of Elections' Motion To Transfer
To The Pennsylvania Supreme Court's Exclusive Jurisdiction**

On November 10, 2020, Petitioner Donald J. Trump for President, Inc. (the Campaign) challenged the technical validity of 8,329 ballots in Philadelphia. The Campaign challenged these ballots across five different cases in the Philadelphia Court of Common Pleas (before the Honorable James Crumlish). The five different Philadelphia cases are Common Pleas Numbers 201100874, 201100875, 201100876, 201100877, 201100878, corresponding to Commonwealth Court Numbers 1140 CD 2020, 1139 CD 2020, 1138 CD 2020, 1137 CD 2020, and 1136 CD 2020. The Campaign brought similar challenges in other counties as well.

The Campaign does *not* allege fraud; that the ballots in question were not filled out by the elector in whose name the ballots were issued; that the ballots were untimely; or that the voter failed to sign the ballot-return envelope. Instead, the Campaign claims a violation of the Election Code (25 P.S. § 3146.6(a) and 25

P.S. § 3150.16(a)), and seeks to disqualify the ballots because in each case the voter neglected to include certain handwritten information on the ballot-return envelope, namely the date, the address, or the printed name, or some combination thereof.

On November 13, 2020, the Philadelphia Court of Common Pleas ruled in favor of Appellees-Defendants – the City of Philadelphia Board of Elections, Commissioner Lisa M. Deeley, Commissioner Al Schmidt, and Commissioner Omar Sabir (collectively, the Board), who determined that the ballots at issue should be counted. The Campaign appealed to Commonwealth Court the next day. Because the Pennsylvania Supreme Court has exclusive appellate jurisdiction over the Campaign’s ballot challenge under the Election Code, this Court should transfer to the Supreme Court.

There are two independent bases for exclusive Supreme Court jurisdiction.

First, “[t]he Supreme Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following classes of cases: ... (2) The right to public office.” 42 Pa. C.S. § 722(2). In Appeal of Bowers, 269 A.2d 712, 716 (Pa. 1970), the Court explained that the phrase “right to public office” “undoubtedly includes questions of qualification, eligibility, regularity of the electoral or appointive process and other preconditions to the holding of a particular office.”

Furthermore, in Commonwealth v. Spano, 701 A.2d 566, 567 (Pa. 1997), the Court distinguished between “prequalification actions” (or, put differently, challenges to election results like the current case that occur before the individual is in office) and “removal actions.”

The Court explained why the former warrant immediate Supreme Court review: “[w]hen the results of an election are challenged, the occupancy of a key public office is left uncertain until the legal contest is decided by the courts. For as long as the contest goes on, there is uncertainty over who is the rightful occupant of that office and no policy can be made.” Id.

This reasoning applies here too, where time is of the essence. The Board must receive the computation of ballots by November 18, 2023, see 25 P.S. § 3154(f), the Board must certify the results to the Commonwealth by November 23, 2020, see 25 P.S. § 2642(k), and the federal “safe harbor” date is December 8, 2020, see 3 U.S.C. § 5. Therefore, immediate Supreme Court review is paramount.

Not surprisingly, then, there are cases where the Supreme Court has taken direct review of Common Pleas elections decisions. Egan v. Mele, 634 A.2d 1074, 1075 n.2 (Pa. 1993) (vacating Commonwealth Court opinion under the Election Code because the Supreme Court had exclusive jurisdiction).

And there are cases where the Commonwealth Court has transferred election decisions to the Supreme Court. In re Nomination Petition of Rizzo, 20 A.3d 546

(Pa. Commw.), aff'd per curiam, 18 A.3d 1139 (Pa. 2011) (Commonwealth Court concluded it lacked jurisdiction to hear appeal because this was a matter of right to run for office and therefore the Supreme Court had jurisdiction under section 722(2)); Rastall v. DeBouse, 736 A.2d 756 (Pa. Commw. 1999), aff'd per curiam 742 A.2d 1080 (Pa.) (citing Appeal of Bowers); In re Mancuso, 657 A.2d 136 (Pa. Commw. 1995) (after a panel heard expedited argument, the court concluded it lacked jurisdiction and transferred the appeal to the Supreme Court), aff'd per curiam by an evenly divided court, 657 A.2d 937 (Pa.).

Therefore, this Court should transfer this case to the Supreme Court under section 722(2).

Second, there is an entirely alternative basis for transfer that derives from the Election Code. The Code provides that appeals from Board decisions “must be made to the court of common pleas.” 25 P.S. § 3157(a). Importantly, the Code then provides that “no appeal shall be allowed or granted from any order or decree of the court of common pleas made in pursuance of this section.” 25 P.S. § 3157(b). Thus, the language of the Code itself permits no appeal at all.

The Supreme Court has nonetheless interpreted this language to allow for appeal, but on a certiorari review to the Supreme Court itself. In re Gen. Election, Nov. 3, 1964, 224 A.2d 197, 201 (Pa. 1966); see also In re Reading Sch. Bd. Election, 634 A.2d 170, 171 (Pa. 1993).

We understand that, in 1976, the General Assembly vested the Commonwealth Court with “exclusive jurisdiction of appeals from final orders of the courts of common pleas” in “[a]ll matters ... where is drawn in question the application, interpretation or enforcement of any[] ... statute relating to elections, campaign financing or other election procedures.” 42 Pa. C.S.A. § 762(a)(4)(i)(C). Based on this statute, the Commonwealth Court has opined that section 3157(b) “no longer has force,” and that the Commonwealth Court now has “jurisdiction over appeals in Election Code cases.” Dayhoff v. Weaver, 808 A.2d 1002, 1006 n.7 (Pa. Commw. 2002).

Nonetheless, the Supreme Court has continued after 1976 to hear direct appeals from Common Pleas in section 3157 cases: “appeals which emanate from orders of the Court of Common Pleas which, in turn, are reviewing orders of the county Board of Elections under Section 3157 are accepted by this Court in the nature of certiorari review.” In re Reading Sch. Bd. Election, 634 A.2d 170, 171 (Pa. 1993); see also In re Contest of 1979 Gen. Election for Office of Dist. Atty. of Washington Cty., 414 A.2d 310 (Pa. 1980); Petition of Jones, 346 A.2d 260 (Pa. 1975).¹

¹ There are conflicting Supreme Court decisions regarding the standard of review in such appeals. Compare In re Gen. Election, Nov. 3, 1964, 224 A.2d 197, 201 (Pa. 1966) (narrow certiorari review) with In re Reading Sch. Bd. Election, 634 A.2d 170, 171 (Pa. 1993) (broad certiorari review).

Particularly given the timing of this case, the Supreme Court should exercise appellate jurisdiction here too. Accordingly, we respectfully seek transfer.²

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² Given this matter's urgency, we will also shortly be filing a petition for extraordinary relief in the Pennsylvania Supreme Court.

November 15, 2020

Respectfully submitted,

CITY OF PHILADELPHIA
LAW DEPT.

Marcel S. Pratt, City Solicitor

/s/ Craig Gottlieb

Craig Gottlieb, Senior Attorney (I.D. No. 73983)

Benjamin H. Field, Div. Deputy City Solicitor

Lydia Furst, Deputy City Solicitor

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Robert A. Wiygul (I.D. No. 310760)

John G. Coit (I.D. No. 324409)

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Philadelphia, PA 19103

Telephone: (215) 496-7050

Email: maronchick@hangle.com

Counsel for Appellees

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: November 15, 2020

/s/ Craig Gottlieb
Craig Gottlieb

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Transfer Motion upon counsel of record by electronic filing.

Date: November 15, 2020

/s/ Craig Gottlieb
Craig Gottlieb

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Canvass of Absentee and Mail-In : 1136 CD 2020
Ballots of November 3, 2020 General :
Election :

Appeal of: Donald J. Trump for President, Inc.

PROOF OF SERVICE

I hereby certify that this 15th day of November, 2020, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served: Kahlil Charles Williams
Service Method: eService
Email: williamskc@ballardspahr.com
Service Date: 11/15/2020
Address: 1735 Market St Fl 51
Philadelphia, PA 19103-7507
Phone: 814-883-5262
Representing: Appellee DNC Services Corp. / Democratic National Committee

Served: Linda Ann Kerns
Service Method: eService
Email: linda@lindakernslaw.com
Service Date: 11/15/2020
Address: 1420 Locust Street
Suite 200
Philadelphia, PA 19102
Phone: lin-da@lindakernslaw.com
Representing: Appellant Donald J. Trump for President, Inc.
Appellant Elizabeth J. Elkin

Served: Matthew Ian Vahey
Service Method: eService
Email: vaheym@ballardspahr.com
Service Date: 11/15/2020
Address: Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Phone: 215--66-5-8500
Representing: Appellee DNC Services Corp. / Democratic National Committee

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served: Michael R. McDonald
Service Method: eService
Email: mcdonaldm@ballardspahr.com
Service Date: 11/15/2020
Address: 1735 Market Street
51st Floor
Philadelphia, PA 19103
Phone: 215-864-8425
Representing: Appellee DNC Services Corp. / Democratic National Committee

Served: Ronald Lee Hicks Jr.
Service Method: eService
Email: rhicks@porterwright.com
Service Date: 11/15/2020
Address: Porter Wright Morris & Arthur LLP
6 PPG Place, Third Floor
Pittsburgh, PA 15222
Phone: 412--23-5-1476
Representing: Appellant Donald J. Trump for President, Inc.
Appellant Elizabeth J. Elkin

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Representing: Other Kathleen Marie Kotula

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

/s/ Craig R. Gottlieb

(Signature of Person Serving)

Person Serving: Gottlieb, Craig R.
Attorney Registration No: 073983
Law Firm: Philadelphia Law Department
Address: City Of Phila Law Dept
1515 Arch St 17th Fl
Philadelphia, PA 191021595
Representing: Appellee Deeley, Lisa
Appellee Philadelphia County Board of Elections
Appellee Sabir, Omar
Appellee Schmidt, Al

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | |
|-----------------------------------|---|
| IN RE: CANVASS OF ABSENTEE | : |
| AND MAIL-IN COURT BALLOTS | : |
| OF NOVEMBER 3, 2020 | : |
| GENERAL ELECTION | : |
| | : |
| Appeal of: Donald J. Trump | : |
| for President, Inc. | : |

**Appellee City of Philadelphia Board of Elections' Motion To Transfer
To The Pennsylvania Supreme Court's Exclusive Jurisdiction**

On November 10, 2020, Petitioner Donald J. Trump for President, Inc. (the Campaign) challenged the technical validity of 8,329 ballots in Philadelphia. The Campaign challenged these ballots across five different cases in the Philadelphia Court of Common Pleas (before the Honorable James Crumlish). The five different Philadelphia cases are Common Pleas Numbers 201100874, 201100875, 201100876, 201100877, 201100878, corresponding to Commonwealth Court Numbers 1140 CD 2020, 1139 CD 2020, 1138 CD 2020, 1137 CD 2020, and 1136 CD 2020. The Campaign brought similar challenges in other counties as well.

The Campaign does *not* allege fraud; that the ballots in question were not filled out by the elector in whose name the ballots were issued; that the ballots were untimely; or that the voter failed to sign the ballot-return envelope. Instead, the Campaign claims a violation of the Election Code (25 P.S. § 3146.6(a) and 25

P.S. § 3150.16(a)), and seeks to disqualify the ballots because in each case the voter neglected to include certain handwritten information on the ballot-return envelope, namely the date, the address, or the printed name, or some combination thereof.

On November 13, 2020, the Philadelphia Court of Common Pleas ruled in favor of Appellees-Defendants – the City of Philadelphia Board of Elections, Commissioner Lisa M. Deeley, Commissioner Al Schmidt, and Commissioner Omar Sabir (collectively, the Board), who determined that the ballots at issue should be counted. The Campaign appealed to Commonwealth Court the next day. Because the Pennsylvania Supreme Court has exclusive appellate jurisdiction over the Campaign’s ballot challenge under the Election Code, this Court should transfer to the Supreme Court.

There are two independent bases for exclusive Supreme Court jurisdiction.

First, “[t]he Supreme Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following classes of cases: ... (2) The right to public office.” 42 Pa. C.S. § 722(2). In Appeal of Bowers, 269 A.2d 712, 716 (Pa. 1970), the Court explained that the phrase “right to public office” “undoubtedly includes questions of qualification, eligibility, regularity of the electoral or appointive process and other preconditions to the holding of a particular office.”

Furthermore, in Commonwealth v. Spano, 701 A.2d 566, 567 (Pa. 1997), the Court distinguished between “prequalification actions” (or, put differently, challenges to election results like the current case that occur before the individual is in office) and “removal actions.”

The Court explained why the former warrant immediate Supreme Court review: “[w]hen the results of an election are challenged, the occupancy of a key public office is left uncertain until the legal contest is decided by the courts. For as long as the contest goes on, there is uncertainty over who is the rightful occupant of that office and no policy can be made.” Id.

This reasoning applies here too, where time is of the essence. The Board must receive the computation of ballots by November 18, 2023, see 25 P.S. § 3154(f), the Board must certify the results to the Commonwealth by November 23, 2020, see 25 P.S. § 2642(k), and the federal “safe harbor” date is December 8, 2020, see 3 U.S.C. § 5. Therefore, immediate Supreme Court review is paramount.

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Therefore, this Court should transfer this case to the Supreme Court under section 722(2).

Second, there is an entirely alternative basis for transfer that derives from the Election Code. The Code provides that appeals from Board decisions “must be made to the court of common pleas.” 25 P.S. § 3157(a). Importantly, the Code then provides that “no appeal shall be allowed or granted from any order or decree of the court of common pleas made in pursuance of this section.” 25 P.S. § 3157(b). Thus, the language of the Code itself permits no appeal at all.

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² Given this matter's urgency, we will also shortly be filing a petition for extraordinary relief in the Pennsylvania Supreme Court.

November 15, 2020

Respectfully submitted,

CITY OF PHILADELPHIA
LAW DEPT.

Marcel S. Pratt, City Solicitor

/s/ Craig Gottlieb

Craig Gottlieb, Senior Attorney (I.D. No. 73983)

Benjamin H. Field, Div. Deputy City Solicitor

Lydia Furst, Deputy City Solicitor

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Counsel for Appellees

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: November 15, 2020

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Craig Gottlieb

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Transfer Motion upon counsel of record by electronic filing.

Date: November 15, 2020

/s/ Craig Gottlieb
Craig Gottlieb

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Canvass of Absentee and Mail-In : 1137 CD 2020
Ballots of November 3, 2020 General :
Election :

Appeal of: Donald J. Trump for President, Inc.

PROOF OF SERVICE

I hereby certify that this 15th day of November, 2020, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served: Kahlil Charles Williams
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Philadelphia, PA 19103-7507
Phone: 814-883-5262
Representing: Appellee DNC Services Corp. / Democratic National Committee

Served: Linda Ann Kerns
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Email: linda@lindakernslaw.com
Service Date: 11/15/2020
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Philadelphia, PA 19102
Phone: lin-da@lindakernslaw.com
Representing: Appellant Donald J. Trump for President, Inc.
Appellant Elizabeth J. Elken

Served: Matthew Ian Vahey
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1735 Market Street, 51st Floor
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Served: Ronald Lee Hicks Jr.
Service Method: eService
Email: rhicks@porterwright.com
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November 15, 2020

Respectfully submitted,

CITY OF PHILADELPHIA
LAW DEPT.

Marcel S. Pratt, City Solicitor

/s/ Craig Gottlieb

Craig Gottlieb, Senior Attorney (I.D. No. 73983)

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Counsel for Appellees

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Canvass of Absentee and Mail-In : 1138 CD 2020
Ballots of November 3, 2020 General :
Election :

Appeal of: Donald J. Trump for President, Inc.

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Service

Served: Kahlil Charles Williams
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Address: 1735 Market St Fl 51
Philadelphia, PA 19103-7507
Phone: 814-883-5262
Representing: Appellee DNC Services Corp. / Democratic National Committee

Served: Linda Ann Kerns
Service Method: eService
Email: linda@lindakernslaw.com
Service Date: 11/15/2020
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Suite 200
Philadelphia, PA 19102
Phone: lin-da@lindakernslaw.com
Representing: Appellant Donald J. Trump for President, Inc.
Appellant Elizabeth J. Elkin

Served: Matthew Ian Vahey
Service Method: eService
Email: vaheym@ballardspahr.com
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Address: Ballard Spahr LLP
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Philadelphia, PA 19103
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

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(Signature of Person Serving)

Person Serving: Gottlieb, Craig R.
Attorney Registration No: 073983
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Address: City Of Phila Law Dept
1515 Arch St 17th Fl
Philadelphia, PA 191021595
Representing: Appellee Deeley, Lisa
Appellee Philadelphia County Board of Elections
Appellee Sabir, Omar
Appellee Schmidt, Al

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IN RE: CANVASS OF ABSENTEE :
AND MAIL-IN COURT BALLOTS : **1139 CD 2020**
OF NOVEMBER 3, 2020 :
GENERAL ELECTION :
 :
Appeal of: Donald J. Trump :
for President, Inc. :

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Nonetheless, the Supreme Court has continued after 1976 to hear direct appeals from Common Pleas in section 3157 cases: “appeals which emanate from orders of the Court of Common Pleas which, in turn, are reviewing orders of the county Board of Elections under Section 3157 are accepted by this Court in the nature of certiorari review.” In re Reading Sch. Bd. Election, 634 A.2d 170, 171 (Pa. 1993); see also In re Contest of 1979 Gen. Election for Office of Dist. Atty. of Washington Cty., 414 A.2d 310 (Pa. 1980); Petition of Jones, 346 A.2d 260 (Pa. 1975).¹

¹ There are conflicting Supreme Court decisions regarding the standard of review in such appeals. Compare In re Gen. Election, Nov. 3, 1964, 224 A.2d 197, 201 (Pa. 1966) (narrow certiorari review) with In re Reading Sch. Bd. Election, 634 A.2d 170, 171 (Pa. 1993) (broad certiorari review).

Particularly given the timing of this case, the Supreme Court should exercise appellate jurisdiction here too. Accordingly, we respectfully seek transfer.²

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² Given this matter's urgency, we will also shortly be filing a petition for extraordinary relief in the Pennsylvania Supreme Court.

November 15, 2020

Respectfully submitted,

CITY OF PHILADELPHIA
LAW DEPT.

Marcel S. Pratt, City Solicitor

/s/ Craig Gottlieb

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: November 15, 2020

/s/ Craig Gottlieb
Craig Gottlieb

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Transfer Motion upon counsel of record by electronic filing.

Date: November 15, 2020

/s/ Craig Gottlieb
Craig Gottlieb

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Canvass of Absentee and Mail-In : 1139 CD 2020
 Ballots of November 3, 2020 General :
 Election :

Appeal of: Donald J. Trump for President, Inc.

PROOF OF SERVICE

I hereby certify that this 15th day of November, 2020, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served: Kahlil Charles Williams
 Service Method: eService
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 Representing: Appellee DNC Services Corp. / Democratic National Committee

Served: Linda Ann Kerns
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 Representing: Appellant Donald J. Trump for President, Inc.
 Appellant Elizabeth J. Elkin

Served: Matthew Ian Vahey
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Appellant Elizabeth J. Elkin

Courtesy Copy

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Representing: Other Kathleen Marie Kotula

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

/s/ Craig R. Gottlieb

(Signature of Person Serving)

Person Serving: Gottlieb, Craig R.
Attorney Registration No: 073983
Law Firm: Philadelphia Law Department
Address: City Of Phila Law Dept
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Philadelphia, PA 191021595
Representing: Appellee Deeley, Lisa
Appellee Philadelphia County Board of Elections
Appellee Sabir, Omar
Appellee Schmidt, Al

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IN RE: CANVASS OF ABSENTEE :
AND MAIL-IN COURT BALLOTS : **1140 CD 2020**
OF NOVEMBER 3, 2020 :
GENERAL ELECTION :
 :
Appeal of: Donald J. Trump :
for President, Inc. :

On November 10, 2020, Petitioner Donald J. Trump for President, Inc. (the Campaign) challenged the technical validity of 8,329 ballots in Philadelphia. The Campaign challenged these ballots across five different cases in the Philadelphia Court of Common Pleas (before the Honorable James Crumliss). The five different Philadelphia cases are Common Pleas Numbers 201100874, 201100875, 201100876, 201100877, 201100878, corresponding to Commonwealth Court Numbers 1140 CD 2020, 1139 CD 2020, 1138 CD 2020, 1137 CD 2020, and 1136 CD 2020. The Campaign brought similar challenges in other counties as well.

The Campaign does *not* allege fraud; that the ballots in question were not filled out by the elector in whose name the ballots were issued; that the ballots were untimely; or that the voter failed to sign the ballot-return envelope. Instead, the Campaign claims a violation of the Election Code (25 P.S. § 3146.6(a) and 25

P.S. § 3150.16(a)), and seeks to disqualify the ballots because in each case the voter neglected to include certain handwritten information on the ballot-return envelope, namely the date, the address, or the printed name, or some combination thereof.

On November 13, 2020, the Philadelphia Court of Common Pleas ruled in favor of Appellees-Defendants – the City of Philadelphia Board of Elections, Commissioner Lisa M. Deeley, Commissioner Al Schmidt, and Commissioner Omar Sabir (collectively, the Board), who determined that the ballots at issue should be counted. The Campaign appealed to Commonwealth Court the next day. Because the Pennsylvania Supreme Court has exclusive appellate jurisdiction over the Campaign’s ballot challenge under the Election Code, this Court should transfer to the Supreme Court.

There are two independent bases for exclusive Supreme Court jurisdiction.

First, “[t]he Supreme Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following classes of cases: ... (2) The right to public office.” 42 Pa. C.S. § 722(2). In Appeal of Bowers, 269 A.2d 712, 716 (Pa. 1970), the Court explained that the phrase “right to public office” “undoubtedly includes questions of qualification, eligibility, regularity of the electoral or appointive process and other preconditions to the holding of a particular office.”

Furthermore, in Commonwealth v. Spano, 701 A.2d 566, 567 (Pa. 1997), the Court distinguished between “prequalification actions” (or, put differently, challenges to election results like the current case that occur before the individual is in office) and “removal actions.”

The Court explained why the former warrant immediate Supreme Court review: “[w]hen the results of an election are challenged, the occupancy of a key public office is left uncertain until the legal contest is decided by the courts. For as long as the contest goes on, there is uncertainty over who is the rightful occupant of that office and no policy can be made.” Id.

This reasoning applies here too, where time is of the essence. The Board must receive the computation of ballots by November 18, 2023, see 25 P.S. § 3154(f), the Board must certify the results to the Commonwealth by November 23, 2020, see 25 P.S. § 2642(k), and the federal “safe harbor” date is December 8, 2020, see 3 U.S.C. § 5. Therefore, immediate Supreme Court review is paramount.

Not surprisingly, then, there are cases where the Supreme Court has taken direct review of Common Pleas elections decisions. Egan v. Mele, 634 A.2d 1074, 1075 n.2 (Pa. 1993) (vacating Commonwealth Court opinion under the Election Code because the Supreme Court had exclusive jurisdiction).

And there are cases where the Commonwealth Court has transferred election decisions to the Supreme Court. In re Nomination Petition of Rizzo, 20 A.3d 546

(Pa. Commw.), aff'd per curiam, 18 A.3d 1139 (Pa. 2011) (Commonwealth Court concluded it lacked jurisdiction to hear appeal because this was a matter of right to run for office and therefore the Supreme Court had jurisdiction under section 722(2)); Rastall v. DeBouse, 736 A.2d 756 (Pa. Commw. 1999), aff'd per curiam 742 A.2d 1080 (Pa.) (citing Appeal of Bowers); In re Mancuso, 657 A.2d 136 (Pa. Commw. 1995) (after a panel heard expedited argument, the court concluded it lacked jurisdiction and transferred the appeal to the Supreme Court), aff'd per curiam by an evenly divided court, 657 A.2d 937 (Pa.).

Therefore, this Court should transfer this case to the Supreme Court under section 722(2).

Second, there is an entirely alternative basis for transfer that derives from the Election Code. The Code provides that appeals from Board decisions “must be made to the court of common pleas.” 25 P.S. § 3157(a). Importantly, the Code then provides that “no appeal shall be allowed or granted from any order or decree of the court of common pleas made in pursuance of this section.” 25 P.S. § 3157(b). Thus, the language of the Code itself permits no appeal at all.

The Supreme Court has nonetheless interpreted this language to allow for appeal, but on a certiorari review to the Supreme Court itself. In re Gen. Election, Nov. 3, 1964, 224 A.2d 197, 201 (Pa. 1966); see also In re Reading Sch. Bd. Election, 634 A.2d 170, 171 (Pa. 1993).

We understand that, in 1976, the General Assembly vested the Commonwealth Court with “exclusive jurisdiction of appeals from final orders of the courts of common pleas” in “[a]ll matters ... where is drawn in question the application, interpretation or enforcement of any[] ... statute relating to elections, campaign financing or other election procedures.” 42 Pa. C.S.A. § 762(a)(4)(i)(C). Based on this statute, the Commonwealth Court has opined that section 3157(b) “no longer has force,” and that the Commonwealth Court now has “jurisdiction over appeals in Election Code cases.” Dayhoff v. Weaver, 808 A.2d 1002, 1006 n.7 (Pa. Commw. 2002).

Nonetheless, the Supreme Court has continued after 1976 to hear direct appeals from Common Pleas in section 3157 cases: “appeals which emanate from orders of the Court of Common Pleas which, in turn, are reviewing orders of the county Board of Elections under Section 3157 are accepted by this Court in the nature of certiorari review.” In re Reading Sch. Bd. Election, 634 A.2d 170, 171 (Pa. 1993); see also In re Contest of 1979 Gen. Election for Office of Dist. Atty. of Washington Cty., 414 A.2d 310 (Pa. 1980); Petition of Jones, 346 A.2d 260 (Pa. 1975).¹

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Particularly given the timing of this case, the Supreme Court should exercise appellate jurisdiction here too. Accordingly, we respectfully seek transfer.²

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November 15, 2020

Respectfully submitted,

CITY OF PHILADELPHIA
LAW DEPT.

Marcel S. Pratt, City Solicitor

/s/ Craig Gottlieb

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Benjamin H. Field, Div. Deputy City Solicitor

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Counsel for Appellees

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Craig Gottlieb

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Date: November 15, 2020

/s/ Craig Gottlieb
Craig Gottlieb

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Canvass of Absentee and Mail-In : 1140 CD 2020
Ballots of November 3, 2020 General :
Election :

Appeal of: Donald J. Trump for President, Inc.

PROOF OF SERVICE

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Service

Served: Kahlil Charles Williams
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Philadelphia, PA 19103-7507
Phone: 814-883-5262
Representing: Appellee DNC Services Corp. / Democratic National Committee

Served: Linda Ann Kerns
Service Method: eService
Email: linda@lindakernslaw.com
Service Date: 11/15/2020
Address: 1420 Locust Street
Suite 200
Philadelphia, PA 19102
Phone: lin-da@lindakernslaw.com
Representing: Appellant Donald J. Trump for President, Inc.
Appellant Elizabeth Elkin

Served: Matthew Ian Vahey
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Email: vaheym@ballardspahr.com
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

/s/ Craig R. Gottlieb

(Signature of Person Serving)

Person Serving: Gottlieb, Craig R.
Attorney Registration No: 073983
Law Firm: Philadelphia Law Department
Address: City Of Phila Law Dept
1515 Arch St 17th Fl
Philadelphia, PA 191021595
Representing: Appellee Deeley, Lisa
Appellee Philadelphia County Board of Elections
Appellee Sabir, Omar
Appellee Schmidt, Al

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EXHIBIT 4

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
|-------------------------------------|---|---------------------------------|
| In Re: Canvass of Absentee and | : | |
| Mail-In Ballots of November 3, 2020 | : | CASES CONSOLIDATED |
| General Election | : | |
| | : | |
| Appeal of: Donald J. Trump for | : | Nos. 1136, 1137, 1138, 1139 and |
| President, Inc. | : | 1140 C.D. 2020 |

PER CURIAM

ORDER

NOW, November 16, 2020, it is ORDERED as follows:

1. The above-captioned matters are hereby consolidated. Any further filings shall be captioned as set forth above.
2. The Court of Common Pleas of Philadelphia County shall certify a supplemental record to this Court by no later than 12:00 p.m. on November 17, 2020, to include the transcript, if any, of the hearing or other proceeding on November 13, 2020.
3. Appellant's and Appellees' briefs (4 copies) shall be filed and served on or before November 18, 2020 by 12:00 p.m., in the Prothonotary's Office in Harrisburg. Briefs and other filings should be filed via PACFile (the Pennsylvania appellate court electronic filing system) OR by email to CommCourtFiling@pacourts.us. Briefs may also be filed in person in the Prothonotary's Office with advance notice by appointment by calling 717-255-1650.
4. Briefs shall address the merits of the above-captioned appeals and the jurisdiction of this Court to hear these appeals, which jurisdiction is challenged by the Philadelphia Board of Elections in its motion to transfer. The parties shall

address, *inter alia*, *Dayhoff v. Weaver*, 808 A.2d 1002, 1006, n.7 (Pa. Cmwlth. 2002), and *In re Reading School Board Election*, 634 A.2d 170 (Pa. 1993).

5. Appellant is excused from filing a Reproduced Record.

6. These appeals shall be argued Thursday, November 19, 2020, at 10:00 a.m. via WebEx.

7. Proposed Intervenor, Nicole Ziccarelli, may file an *amicus curiae* brief and may participate in the oral argument at the discretion of the presiding judge.

8. In addition to transmitting and mailing copies of this order to counsel of record and any *pro se* party, the Prothonotary is directed to transmit and mail a copy to the Office of Judicial Records - Civil Division of the Court of Common Pleas of Philadelphia County and to Judge James Crumlish of that Court.

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Certified from the Record

NOV 16 2020

And Order Exit

EXHIBIT 5

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In re: Canvass of Absentee and Mail-In
Ballots of November 3, 2020 General
Election

No. 1136 C.D. 2020

Appeal of: Donald J. Trump for
President, Inc.

ORDER

AND NOW, this _____ day of November, 2020, upon
consideration of the Application to Intervene filed by Nicole Zicarelli, and any
responses thereto, it is hereby ORDERED that Nicole Zicarelli is granted leave to
intervene in this action.

_____, J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In re: Canvass of Absentee and Mail-In
Ballots of November 3, 2020 General
Election

No. 1136 C.D. 2020

Appeal of: Donald J. Trump for
President, Inc.

APPLICATION FOR LEAVE TO INTERVENE

Proposed Intervenor Nicole Zicarelli (“Zicarelli”), candidate for the Senate of Pennsylvania from the 45th Senatorial District, hereby seeks leave to intervene in this action pursuant to Pennsylvania Rules of Civil Procedure 2327-2329, and in support thereof, avers as follows:

INTRODUCTION

1. Zicarelli is the Republican candidate for Senate from the 45th Senatorial District, which encompasses parts of Allegheny and Westmoreland Counties.
2. Zicarelli has filed an action in the Allegheny Court of Common Pleas against the Allegheny County Board of Electors (the “Board”) appealing the Board’s decision to count 2,349 mail-in ballots that contain a signed—but

undated—declaration. *See In Re: 2,349 Ballots in the 2020 General Election*, No. GD 20-11654 (Allegheny Co. C.C.P.).

3. As set forth in more detail below, Zicarelli's currently pending action in the Allegheny Court of Common Pleas involves the same issue that is involved in this action—the validity under the Election Code of mail-in ballots that contain a signed—but undated—declaration.

4. Zicarelli seeks relief in the action in the Allegheny Court of Common Pleas invalidating the 2,349 mail-in ballots because they contain a signed—but undated—declaration.

5. Accordingly, Zicarelli respectfully seeks to intervene in this action in order to protect her interest in her critical rights under the Election Code.

6. In particular, Zicarelli seeks to protect her interest in invalidating mail-in ballots that violate the requirements of the Election Code because they contain a signed—but undated—declaration.

FACTS

A. Factual Background

7. 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.

8. 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.

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

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

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

- 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

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

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)

12. 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).

13. 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.”

14. 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).

15. 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.

16. In Allegheny County, an estimated 350,000 mail-in ballots were received by the Board, including the 2,349 being disputed by Ziccarelli that contain a signed—but undated—declaration (the “Disputed Ballots”).

17. 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.

18. 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.

19. 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.

20. On November 12, 2020, Ziccarelli appealed the Board’s decision by filing a petition for review with the Allegheny Court of Common Pleas. *See In Re: 2,349 Ballots in the 2020 General Election*, No. GD 20-11654 (Allegheny Co. C.C.P.) (A copy of Ziccarelli’s Petition for Review is annexed hereto as Exh. A.)

² <https://www.alleghenycounty.us/elections/board-of-elections.aspx>

21. The Allegheny County Court of Common Pleas has scheduled a hearing on Zicarelli's petition for review on November 17, 2020.

22. Zicarelli seeks to have the Allegheny County Court of Common Pleas invalidate the Disputed Ballots because they violate the Election Code.

B. Grounds for Appeal

23. Zicarelli's appeal of the Board's decision concerning the Disputed Ballots to the Allegheny Court of Common Pleas is based on the arguments set forth below.

1. 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.

24. 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).

25. 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 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).

26. 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)).

27. 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.”

28. 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.

29. 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.

30. 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.

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

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

32. 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.”).

33. 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.

34. 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.

35. 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.

36. 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.

37. 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.

38. 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.

39. 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.

40. 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.

41. 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.

42. 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.

43. 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.”).

44. 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).

45. 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.

46. 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.

47. 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.

48. 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.

49. 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.”).

50. 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.”).

51. 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.

52. 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))).

53. In short, 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.

BASIS FOR INTERVENTION

54. Rule 2327 provides, in relevant part, as follows:

At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if

(4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Pa. R.C.P 2327.

55. Rule 2329 further provides that an application for intervention may be refused if:

- (1) The claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action;
- (2) The interest of the petitioner is already adequately represented; or
- (3) The petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.

Pa. R.C.P 2329.

56. “Considering Rules 2327 and 2329 together, the effect of Rule 2329 is that if the petitioner is a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary, unless one of the grounds for refusal under Rule 2329 is present. . . . [T]he court is given the discretion to allow or to refuse intervention only where the petitioner falls within one of the classes enumerated in Rule 2327 and only where one of the grounds under Rule 2329 is present which authorizes the refusal of intervention.” *See Larock v. Sugarloaf Township Zoning Hearing Board*, 740 A.2d 308, 313 (Pa. Commw. 1999) (italics in original).

57. Zicarelli is within the classes enumerated in Rule 2327.

58. Specifically, any ruling in this action that address the requirement in the Election Code that declarations on mail-in ballots be dated will effect Zicarelli’s legally enforceable interest under the Election Code.

59. Indeed, this is the exact issue at the core of the appeal of the Board's decision that Zicarelli has filed with the Allegheny Court of Common Pleas.

60. In addition, none of the grounds under Rule 2329 is present which authorizes the refusal of intervention.

61. First, Zicarelli's purpose in intervening is in subordination to, and in recognition of, the propriety of this action. Indeed, Zicarelli seeks to ensure that the Court is fully informed of the identical issue in the pending action she has filed and that this Court hears all parties with a direct interest in the critical issue of whether, under the Election Code, a declaration on a mail-in ballot must be dated for the ballot to be valid.

62. Second, Zicarelli's interests are not adequately represented. This is so because Zicarelli is running for a different elected office than Petitioner, and faces a substantially smaller margin, at this point, to win that office. Therefore, Petitioner may be willing to make concessions that Zicarelli cannot.

63. Furthermore, Zicarelli has not delayed in making her application for intervention, as Petitioners only just filed this action on November 14, 2020 and the Court has not yet issued any decisions in it. Consequently, Zicarelli's intervention will not unduly delay, embarrass or prejudice the trial or adjudication of the parties' right.

64. Pursuant to Pennsylvania Rule of Civil Procedure 2328(a), Ziccarelli adopts by reference the pleadings filed by Petitioner in Court of Common Pleas of Philadelphia in the above-captioned matter.

65. If the Court determines that Ziccarelli should submit any other pleading, Ziccarelli will promptly supplement this Application with the same.

WHEREFORE, Ziccarelli respectfully requests that this Court issue an Order granting her leave to intervene in this action.

Respectfully submitted,

Dated: November 15, 2020

/s/ Matthew H. Haverstick
Matthew H. Haverstick (No. 85072)
Shohin H. Vance (No. 323551)
Samantha G. Zimmer (No. 325650)
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VERIFICATION

I, Matthew H. Haverstick hereby swear or affirm that I am counsel of record for Proposed Intervenor Nicole Zicarelli, that the verification of said Applicant could not be obtained within the time allowed for filing this Application, and that the facts contained in the attached Application 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 15, 2020

/s/ Matthew H. Haverstick
Matthew H. Haverstick

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 15, 2020

/s/ Matthew H. Haverstick
Matthew H. Haverstick (No. 85072)
Shohin H. Vance (No. 323551)
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Attorneys for Petitioner

CERTIFICATE OF SERVICE

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

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Philadelphia, PA 19103

Kathleen Marie Kotula
Pennsylvania Department of State, Bureau of Commissions, Elections and Legislation
306 North Office Building
Harrisburg, PA 17120

Dated: November 15, 2020

/s/ Matthew H. Haverstick
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EXHIBIT A

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Supreme Court of Pennsylvania

Court of Common Pleas Civil Cover Sheet

Allegheny

County

For Prothonotary Use Only:

Docket No:

TIME STAMP

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:
Nicole Zicarelli

Lead Defendant's Name:
Allegheny County Board of Elections

Are money damages requested? ☐ Yes ☒ No
Dollar Amount Requested: ☐ within arbitration limits
(check one) ☐ 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 LIABILITY

- ☐ 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:

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

COVER SHEET

| | |
|---|--|
| <p>Plaintiff(s) Nicole Ziccarelli</p> <hr/> <p style="text-align: center;">Vs</p> <p>Defendant(s) Allegheny County Board of Elections</p> | |
| | Case Number : <div style="border: 1px solid black; width: 60px; height: 25px; display: inline-block;"></div> - <div style="border: 1px solid black; width: 60px; height: 25px; display: inline-block;"></div> - <div style="border: 1px solid black; width: 150px; height: 25px; display: inline-block;"></div> |
| | Type of pleading: Petition - Civil Appeal Board of Elections |
| | Code and Classification : _____ |
| | Filed on behalf of Nicole Ziccarelli |
| | (Name of the filing party) |
| | <input checked="" type="checkbox"/> Counsel of Record <input type="checkbox"/> Individual, If Pro Se |
| Name, Address and Telephone Number : Matthew H. Haverstick Kleinbard LLC 1717 Arch Street, 5th Fl. Philadelphia, PA 19103 (215) 568-2000 | |
| 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, 2020, upon consideration of the Petition For Review In The Nature Of A Statutory Appeal filed by Nicole Zicarelli, 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.

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

FACTS AND PROCEDURAL 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.

GROUND 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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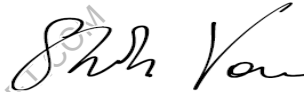
Attorneys for Petitioner

VERIFICATION

I, Shohin H. Vance hereby swear or affirm that I am counsel of record for Petitioner Nicole Zicarelli 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

A handwritten signature in black ink, appearing to read "Shohin H. Vance", written over a horizontal line.

Shohin H. Vance

RETRIEVED FROM DEMOCRACYDOCS.COM

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.

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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:

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County Solicitor – Allegheny County
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Canvass of Absentee and Mail-In : 1136 CD 2020
Ballots of November 3, 2020 General :
Election :

Appeal of: Donald J. Trump for President, Inc.

PROOF OF SERVICE

I hereby certify that this 15th day of November, 2020, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

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Appellee Lisa Deeley
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Appellee Philadelphia County Board of Elections

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

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