

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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1094 C.D. 2020

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**In re: Canvassing Observation**

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**BRIEF OF APPELLANT, Donald J. Trump for President, Inc.**

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## **STATEMENT OF JURISDICTION**

This Court has jurisdiction to review the November 3, 2020 Order of the Court of Common Pleas for Philadelphia County pursuant to 42 Pa. C.S. § 762(a)(4)(i)(C), which grants the Commonwealth Court of Pennsylvania exclusive jurisdiction over appeals from final orders of the Court of Common Pleas in matters involving statutes relating to elections or other election procedures.

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## **ORDER OR OTHER DETERMINATION IN QUESTION**

AND NOW, this 3rd day of November, 2020, in connection with the matter of: petition by Donald J. Trump for President Inc. to allow closer observation of canvassing of ballots, upon consideration of the Oral Petition and Argument and any responses thereto [and] testimony and evidence presented by the witnesses and Argument, IT IS HEREBY ORDERED and DECREED that:

The oral motion to allow closer observation of the canvassing of ballots is DENIED for the following reasons:

The Petitioner's witness provided copious testimony as to his ability to observe the opening and sorting of ballots. His concerns pertained to his inability to observe the writing on the outside of the ballots. Given that observers are directed only to observe and not to audit ballots, we conclude, based on the witness's testimony, that the Board of Elections has complied with the observation requirements under 25 P.S. 3146.8. We, however, would not discourage the Board from considering the implementation of arrangements to allow for an additional corridor for observation along the side of the canvassing

tables if feasible – subject to spatial distancing under COVID-19 and voting privacy requirements.

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## **STATEMENT OF SCOPE AND STANDARD OF REVIEW**

This appeal “requires this Court to engage in statutory interpretation of the Election Code, which, as a question of law, is subject to a de novo standard of review and a plenary scope of review.”

*Banfield v. Cortés*, 110 A.3d 155, 166 (Pa. 2015) (citing *Sch. Dist. of Philadelphia v. Dep’t of Educ.*, 92 A.3d 746, 751 (Pa. 2014)).

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## **STATEMENT OF THE QUESTION INVOLVED**

Does the Pennsylvania Election Code require, under 25 P.S. § 2650 (b); 25 P.S. §3146.8(b) and 25 P.S. §3146.8(g)(2), require the Philadelphia County Board of Elections to provide candidates and their watchers or representatives the opportunity to have meaningful access such that they can observe computation and canvassing of returns and canvassing of official absentee ballots and mail-in ballots?

***Answer of the Court of Common Pleas: No***

***Suggested Answer: Yes***

## **STATEMENT OF THE CASE**

### **I. FORM OF ACTION AND PROCEDURAL HISTORY.**

This is an appeal from the November 3, 2020 Order of the Court of Common Pleas for Philadelphia County denying Appellant's Oral Petition and Argument for appropriate access to the canvass of ballots such that Campaign's watchers and representatives can meaningfully observe the process. In accordance with Pa. R.A.P. 2111(b), a copy of the November 3, 2020 Order is appended hereto in Appendix A ("App. A"). The Trial Court did not issue an Opinion.

Appellant-Plaintiff, Donald J. Trump for President, Inc, initiated this action on November 3, 2020 with an Oral Petition and Argument at Philadelphia Election Court, a courtroom set up in Philadelphia County, and staffed from the opening until the close of the polls with an assigned judge and staff so that candidates, voters and other interested parties can have issues regarding Election Day matters timely heard. The court heard argument from the Appellant as well as the City of Philadelphia and the PA Dems, a political body. The trial court held an in-person hearing while allowing the one witness presented to testify virtually by Zoom. A short while after the proceeding, the trial court issued an order, denying the requested relief. The trial court did not

issue an opinion. Appellant filed a Notice of Appeal to Commonwealth Court on November 4, 2020.

## **II. PRIOR DETERMINATIONS.**

The only prior determination in this matter for which Appellant is seeking this Court's review is the November 3, 2020 Order denying the Oral Motion. *See* App. A.

## **III. NAME OF THE JUDGE WHOSE DETERMINATION IS TO BE REVIEWED.**

The Honorable Stella Tsai of the Philadelphia Court of Common Pleas issued the November 3, 2020 Order sought to be reviewed.

## **IV. STATEMENT OF FACTS.**

### **A. The Parties.**

In Election Court on November 3, 2020, three parties participated in this matter: Appellant, Donald J. Trump for President, Inc. (hereinafter "Campaign"), the City of Philadelphia and Board of Elections and PA Dems.

The Campaign is the principal committee for the reelection campaign of Donald J. Trump, the 45th President of the United States of America (hereinafter, "President Trump"). President Trump is the Republican candidate for the office of the President of the United States

of America in the November 3, 2020 General Election. The Campaign brought this action for itself and on behalf of its candidate, President Trump. President Trump is a “candidate” as that term is defined in Election Code Section 102(a), 25 P.S. § 2602(a). *See Rowland v. Smith*, 83 Pa. D. & C. 99, 101-2 (Pa. Ct. Com. Pl. Dauphin 1952) (“candidate” under the Election Code includes one who is a candidate for nomination for President of the United States). The Campaign is a “political body” as that term is defined in 25 P.S. § 1102. *See In re Canvass of Absentee Ballots of November 4, 2003*, 839 A.2d 451, 457 (Pa. Commw. Ct. 2003) (en banc) (Under Pennsylvania’s Election Code, the status given to political bodies grants them standing regarding watchers “including the right to be present when envelopes containing the official absentee ballots are opened, counted and recorded.”), *rev’d on other grounds*, 843 A.2d 1223 (Pa. 2004); *In re General Election-1985*, 531 A.2d 836, 838 (Pa. Commw. Ct. 1987) (panel decision) (a candidate for office in the election at issue suffers a direct and substantial harm sufficient for standing to contest the manner in which an election will be conducted).<sup>1</sup>

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<sup>1</sup> In accordance with Pa. IOP Cmwlth. Ct. 414(c), because the cited decision in *In re Canvass of Absentee Ballots of November 4, 2003* was issued by this Court en banc, it is binding precedent. The *In re General Election-1985* decision is similarly



Appellee, the City of Philadelphia and Board of Elections, has responsibility for elections in Philadelphia County and one of its principal places of business is located at Philadelphia City Hall, Room 142, 1400 John F. Kennedy Blvd., Philadelphia, PA 19107.

Appellee, PA Dems<sup>2</sup>, is a “political body” as that term is defined in 25 P.S. § 1102. Appellee PA Dems claimed it was “not really taking a position on this motion at all” but presented arguments against those made by the Campaign. (N.T. 13:11-14:21).

## **B. The Facts**

On November 3, 2020, Watchers and Representatives appeared at the Philadelphia Convention Center, on behalf of the Campaign, other Republican Candidates on the ballot, and the Republican National Committee, at approximately 7:00 am to observe the Pre-Canvass of the absentee and mail-in ballots receive by the Board prior to the finalization of the poll books. (N.T. 20: 22-23, 21:4-6)<sup>3</sup>. During the

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binding as it was issued by a three-Judge panel of this Court. *See* Pa. IOP Cmwlth. Ct. 414(c) (“A reported opinion of the Court en banc or panel may be cited as binding precedent.”).

<sup>2</sup> Pa Dems is a nickname for the Pennsylvania Democratic Party.

<sup>3</sup> Transcript attached as B.

hearing of the Trial Court, a witness (“Witness”) who was a Representative of the Campaign testified by Zoom regarding the set-up inside the Philadelphia Convention Center.

At the beginning of the hearing, the Witness advised the Court that he would “be happy to turn the phone around if that would be easier or more descriptive so that you could see.” (N.T. 22: 17-20). However, the City Solicitor objected to “any sort of video tour of the room in that fashion.” (N.T. 23: 2-4). The Court noted that it would “rather just hear a description at this point....” (N.T. 23: 11-13). The Court asked the Witness to use “...feet, meters, whatever you want to use.” (N.T. 23: 18-19). Accordingly, the hearing proceeded with the Witness only describing the facility and he did not use any video or photographic aids.

The room is a very large hall, divided into four discrete sections. (N.T. 21:25, 22:1-5). There is also a space for storage, sorting, processing and receiving ballots. (N.T. 22:1-4). There are many tables set up in a variety of ways, depending on the section. (N.T. 22:10-11). In the first section alone, there are about 35 tables. (N.T. 22:13-15).

He stated that “the closest we can get to the first table in each row is approximately...15 to 18 feet. The one row is more like from the [sic] **25 to 30 feet**. And that's the first in each of those three rows of 15. So...then each table is set off further back from the other. I would say roughly 5, maybe 6 feet from each of them. So they just keep **adding depth distance-wise**.” (N.T. 23:21-24:5). The Witness went on to describe that the closest table to him is about fifteen feet from him and the table that is the furthest away is about **105 feet away**. (N.T. 22:15-25:2). A fence that is approximately waist high separates the Representatives from the tables and the Election Board workers. (N.T. 25:5-10). As there are no floor coverings, the room is very loud with an echo so that Representatives cannot hear anything that is going on at the tables. (N.T. 28:3-7). While the Witness utilized safety precautions, including wearing a mask, using hand sanitizer and practicing social distancing he noted that the Board of Elections workers did not take the same measures, instead standing shoulder to shoulder and leaning over each other. (N.T. 26:10-12)

The Witness went on to describe the activities he was observing, including extraction which is where the ballot envelopes are fed through

a machine to slice them open and remove the material inside. (N.T. 28:12-21). Again, while the Witness was approximately 20 feet from the first desk, there were at least two other desks behind it, that were much further away. (N.T. 28:23-29:6). He specifically noted that “Pretty much we're only able to observe the...first desk in each of the rows. And we're able to essentially see from the first four rows, when they are slicing open the outside envelope, we're able to see them pull something out. And if you're watching closely, you can discern if it is what's referred to here as the "naked ballot," meaning not in a secrecy envelope, sometimes. We're **not able to discern whether, if there is a secrecy envelope, whether the secrecy envelope has any markings on it** because we're simply not close enough to be able to see that. The tables -- the desks that are further back, you're simply able to see people pulling things out of an envelope but **not really able to discern what, if anything, is being pulled out.**” (N.T. 29:22-30:9).

The Witness also noted that he is “**unable to see what is on the backs of the envelope.**” (N.T. 37:13-18). He is also **unable to see whether or not a name or a date is missing or wrong and he is unable to ensure that the declaration on the envelope “had been**

**completed** as we understand the statute to require it to be completed.” (N.T. 37:22-38:11). He also cannot tell if the secrecy envelope has markings on it in violation of the Election Code. (N.T. 38:16-22).

The Witness went onto explain that a worker then transports the ballots to a table behind all of the desks and that the election board workers “do something with [the ballots]. We **can’t see what they do.**” (N.T. 30:21-24). Notably, the Witness testified that he **could not report much information back to the candidate he was representing:**

Question: And you said that you're there on behalf of a candidate, Candidate Trump. What, if anything, are you able to report back to him about whether the Board of Elections' workers are adhering to the procedures as laid out in the statute?

The Witness: Little. We're not able to report -- I'm not able to report back anything as it relates to the review for sufficiency of the declaration on the outside of the ballot, or the envelopes. As it relates to whether naked ballots or marked secrecy envelopes are being pulled, **we can report only what we're able to see on the first row of desks, essentially.** We have attempted to get a

better view by using binoculars. But the process is – the extraction process is moving so fast that it's really impossible to see even using binoculars the desks that are behind the first one in each row. So there's very little that we're able to report back as to whether there's any ability to object for failure to comply with the requirements as we understand. (N.T. 31:18 -32:14).

Upon cross examination, the Witness reiterated many of the same points. When the City Solicitor asked if the Witness could change his vantage point, he replied: “When the ballots are taken back to -- there's a gentleman who is just walking back to the table after the ballots have been – the outer envelopes have been sliced open being taken back. And I -- you **cannot see what's happening just because of distance**. You just -- you know something's going on because the ballot trays go back there and other ballot trays come back out. But we don't know -- we can't see what's going on back there.” (N.T. 34:14-23). The Witness also repeated that while he could stand 15 feet from the first two rows of the envelope review, “[e]verything else is probably closer to the **20 or longer more distant**.” (N.T. 36:10 -13). Despite these

repeated statements that the Witness could not adequately observe, the Trial Court denied the petition.

**V. STATEMENT OF THE ORDER UNDER REVIEW.**

Appellant seeks this Court's review and reversal of the trial court's November 3, 2020 Order denying Appellant's Oral Petition and Argument for appropriate access to the canvass of ballots such that Campaign's watchers and representatives can meaningfully observe the process. *See* App. A.

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## SUMMARY OF ARGUMENT

The Pennsylvania General Assembly understood that sentiment long ago and intertwined the concept of watching with the voting process, enshrining transparency and accountability into the system in which Pennsylvanians choose elected officials. The Pennsylvania Election Code authorizes candidates to have watchers and representatives at the canvass and computation of the vote. However, the Philadelphia Board of Elections configured the tables utilized for the canvass and computation in such a way as to preclude any actual observation of the process, thus interfering in the ability of watchers and representatives of candidates to observe the process, casting a cloud over the ballots processed and the integrity of the vote.



## ARGUMENT

### THE PENNSYLVANIA ELECTION CODE ENTITLES EVERY CANDIDATE TO HAVE WATCHERS AND/OR REPRESENTATIVES PRESENT AT THE COMPUTATION AND CANVASSING OF RETURNS AND THE CANVASSING AND COMPUTATION OF ABSENTEE AND MAIL-IN BALLOTS IN ORDER TO OBSERVE

#### A. The Election Code Prioritizes Transparency

In 1937, the Pennsylvania General Assembly included the concept of “watchers” in the then newly enacted Pennsylvania Election Code, a statutory scheme addressing the administration of elections in the Commonwealth. *See* 25 P.S. §§ 2600, et. seq. Years later, the United States Supreme Court noted: “[S]unlight,” as has so often been observed, “is the most powerful of all disinfectants.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 305 (1964).

The Pennsylvania General Assembly understood that sentiment long ago and intertwined the concept of watching with the voting process, enshrining transparency and accountability into the system in which Pennsylvanians choose elected officials. After all, reasonable people cannot dispute that “openness of the voting process helps

prevent election fraud . . . and various other kinds of electoral evils.”

*PG Publishing Co. v. Aichele*, 705 F.3d 91, 111 (3d Cir. 2013).

The issue at hand involves two sections of the Pennsylvania Election Code, involving a candidate’s right to watchers and representatives at the canvass and computation of votes:

- (1) Section 2650(b) states: Every candidate shall be entitled to be **present** in person or by attorney in fact duly authorized, and to participate in any proceeding before any county board whenever any matters which may affect his candidacy are being heard, including any computation and canvassing of returns of any primary or election or recount of ballots or recanvass of voting machine affecting his candidacy. 25 P.S. § 2650.
- (2) Section 3146.8 provides the right of a candidate to observe the canvassing of absentee ballots and mail-in ballots. The statute states, in pertinent part: “Watchers shall be permitted to be **present** when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded. 25 P.S. § 3146.8(b). That section of the

Election Code also states: “One authorized representative of each candidate in an election and one representative from each political party shall be permitted to **remain in the room** in which the absentee ballots and mail-in ballots are canvassed. 25 P.S. § 3146.8 (g)(2).

**B. Candidates have the right to observe**

This case turns on what it means to be present and remain in the room in the context of a candidate’s rights. The Board of Elections takes a hyper-technical strict textualist method of interpretation of these sections of the Election Code. In the Trial Court, the Board of Elections argued: “We have ensured not only that they're able to remain in the room, but that all of these activities are occurring in a row along this designated area so that there's a clear line of sight to all of them. Every single part of the process, every single stage of the process is fully visible. “ (N.T. 11:13-25).

The Board of Elections seems to be indicating that as long as the watchers and representatives are in the room (whether the room is the size of an office or the size of a football field) that the requirements of the Election Code are met. However, allowing such a narrow

interpretation defies logic and reasonableness. Standing at one end of a room the size of a football field, which coincidentally is about the size of the Philadelphia Convention Center, is a lot different than standing at one end of a room the size of an office. Yet, the Board of Elections chooses to ignore this commonsense concept.

Additionally, the Witness testified that the activity in the Convention Center takes place at rows and rows of tables, some at least 100 feet from where he was permitted to stand. Accordingly, the Board of Elections' statement that the activities occur in a row along a designated area directly conflicts with the testimony.

Mandating a distance that prevents a candidate or his watchers or representative to be truly present actually shrouds the election process in a veil, denying transparency and accountability. By erecting a fence around multiple rows of tables where activity is occurring and mandating a twelve foot distance from the closest table, the Board of Elections has set up a scheme that effectively eliminates the role of a watcher. The Board of Elections' insistence on hyper-literalism ignores the intent to achieve election transparency that the legislature integrated into the text of its voting scheme. *See* 1 Pa. C.S. § 1921(a) &

(c) (“The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly” and “[w]hen the words of a statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters: ... (4) The object to be attained. ...”). We are now at a point where pre-canvassing and canvassing have been going on since Tuesday, November 3, 2020. This means that watchers and representatives have not been able to observe appropriately, raising the specter of tens of thousands of tainted ballots. This casts a cloud over these ballots counted in secrecy.

At the Trial Court level, the Board of Elections persevered on its perception that candidates cannot make challenges during the prec canvass or canvass. (N.T. 12:4-10). It also went on to make the absurd argument that, in enacting the Election Code, the General Assembly never “contemplated the ability to necessarily see any of these things.” (N.T. 12:12-15). This insistence that the General Assembly envisioned an election without the ability for the candidate to actually see the processes that affect his candidacy lacks any sense of rationality.

**c. Challenging is not the issue in the within litigation**

The concept of when challenges are made in the context of the canvass of votes is not at issue in the within matter and is not part of the relief that the Campaign seeks. The Campaign does not dispute that the Supreme Court addressed the issue of authorized representatives observing the canvass and pre-canvass but not challenging ballots. See *In re November 3, 2020 General Election*, No. 149 MM 2020, slip op. at 16-17, 28-29 (Pa. Oct. 23, 2020). The right to challenge and the right to observe are distinct, and 25 P.S. 3146.8 allows authorized representatives to observe. Appellant is not seeking to change the law and have the ability to challenge mail-in ballots during the canvass. Appellant simply wants the right to observe. Despite Appellant never indicating in the proceeding below that he wanted to audit the process, the Trial Court seemingly partially relying on some mistaken notion that Appellant seeks to audit. He does not. He simply seems to be present in the room, concepts which any reasonably person would interpret as the ability to meaningfully observe.

Additionally and perhaps most importantly, when the General Assembly allowed for watchers and representatives, it acknowledged the humanity of the entire process. As described the Witness, the process occurring at the Convention Center involves many different people performing many different activities. Providing candidates with watchers or representatives incorporates oversight into the process so that in the event that mistakes occur, the candidate can consider his options. However, without the meaningful observation, watcher's and representatives cannot properly report information to their candidate and therefore cannot perform their role.

In federal court litigation leading up to the November 3, 2020 election, the issue of watchers came up in a completely different context. In *Trump v. Boockvar*, Judge Nicholas Ranjan of the U.S. District Court for the Western District of Pennsylvania held that Pennsylvania's county residency requirement for poll watchers was constitutional and abstained from opining on whether poll watchers were permitted at county election offices, satellite offices, and ballot return locations. *See Trump v. Boockvar*, No. 2:20-cv-966, slip op. at 43-50, 116-36 (W.D. Pa. Oct. 10, 2020). This decision is irrelevant to the

relief sought by Plaintiff, and the rules governing authorized representatives who observe the pre-canvass and canvass of absentee ballots were only mentioned to contrast them with the rules governing poll watchers. Indeed, Judge Ranjan noted that Secretary of State Kathy Boockvar's guidance on the scope of duties for an authorized representative during canvassing of mail-in ballots had "minimal relevance to the current disputes at issue here." *Id.* at 133, n.23.

#### **d. Watching and elections go hand in hand**

Any interpretation of the Election Code's definition of the term "present" or the term "room" to preclude meaningful observation by watchers and representatives fails the common sense test, and possibly stems from some motive that does not include transparency and accountability. The General Assembly always saw the voting process and watching as existing hand in hand. To dislodge one from the other perverts the Election Code's pattern of assuring that candidates and their representatives can monitor the process. Moreover, it violates the Statutory Construction Act's mandate that statutes must be "liberally construed to effect their objects and to promote justice." 1 Pa. C.S. § 1928(c).



The trial court's rejection of the Campaign's request for transparency undermines the policy reasons supporting the right of watching at any session of the Board of Elections. The Campaign does not request anything out of the ordinary here. Simply put, the watchers and representatives are the eyes and ears of the candidate and if that is the case, that includes the ability to actually see what is happening. Being told to stand so far away that even binoculars were not useful does not encompass the meaning of the word, "present." (N.T. 32:6-14)

All of those actions occurring inside the Philadelphia Convention Center involve a great deal of human contact and, therefore, room for human error. It is that uncertainty that a candidate has the right to guard against by having watchers in his stead. A candidate's right to be present via a watcher or representative and observe the computation and canvassing of the ballots that determine whether he will be elected to the office he is seeking underscores both the seriousness of the issue and the commitment to fairness and transparency enshrined in the Election Code.

## CONCLUSION

From the inception of the Pennsylvania Election Code in 1937, the General Assembly prioritized sunshine in the voting process by enshrining candidates and political parties with the right to have watchers, intertwining the concept into the framework of the statute. The Philadelphia County Board of Elections blocked that sunshine. When watchers and representatives cannot see what is occurring with regard to the computation and canvass of the votes, those actions happen in secrecy. To interpret the Election Code to allow such secrecy casts a black cloud on whether the November 3, 2020 General Election will be free, fair, and transparent.

Accordingly, the decision of the Court of Common Pleas denying Appellant's Oral Petition and Argument should be reversed, and Appellant respectfully requests that this Court enter an order directing the Philadelphia County Board of Elections to allow the watchers and observers of any and all General Election 2020 candidates on the ballot in Philadelphia County, to have reasonable access to the canvass and computation of the ballots such that they can be located no longer than six feet from any table, desk or activity, subject to COVID precautions

of wearing masks and utilizing hand sanitizer so that they can both see and hear all related activities occurring in the Philadelphia Convention Center pursuant to the requirements of the Pennsylvania Election Code. Additionally, Appellant requests that that this Court enter an order directing the Philadelphia County Board of Elections to segregate and preserve all envelopes and other ballot materials already canvassed to provide Appellant with a meaningful opportunity to review to determine if the procedures outlined in the Election Code were properly followed.

Date: November 5, 2020

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing Brief of Appellant complies with the length requirements of Pa. R.A.P. 2135. According to the word count of the word processing system used to prepare this Brief, the brief contains 4943 words, not including the supplementary matter as described in Pa. R.A.P. 2135(b).

Date: November 5, 2020

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FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
IN THE COURT OF COMMON PLEAS FOR PHILADELPHIA COUNTY  
ELECTION COURT- General Election: November 3, 2020

Filed and Attested by the  
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04 NOV 2020 12:36 pm  
S. WULKO

In Re: : ELECTION MATTER  
Canvassing Observation : NOVEMBER TERM, 2020  
: NO. 7003

ORDER

AND NOW, this 3rd day of November, 2020, in connection with the matter of: petition by Donald J. Trump for President Inc. to allow closer observation of canvassing of ballots, upon consideration of the:

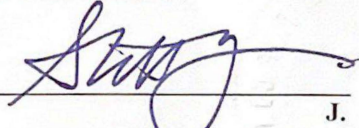
- ☒ oral Petition and Argument and any responses thereto ☐ written Petition and Argument and any responses thereto  
☒ testimony and evidence presented by the witnesses and Argument; or  
☐

IT IS HEREBY ORDERED and DECREED that:

The oral motion to allow closer observation of the canvassing of ballots is DENIED for the following reasons:

The Petitioner's witness provided copious testimony as to his ability to observe the opening and sorting of ballots. His concerns pertained to his inability to observe the writing on the outside of the ballots. Given that observers are directed only to observe and not to audit ballots, we conclude, based on the witness's testimony, that the Board of Elections has complied with the observation requirements under 25 P.S. 3146.8. We, however, would not discourage the Board from considering the implementation of arrangements to allow for an additional corridor for observation along the side of the canvassing tables if feasible – subject to spatial distancing under COVID-19 and voting privacy requirements.

BY THE COURT:

  
J.  
Presiding Election Day Judge

Page 1 of 1

IMPORTANT NOTICE

*This Order is issued by the Judge assigned by the President Judge of the Court of Common Pleas to decide legal issues which may arise in connection with the above Election. Failure to comply with the terms of this order may result in contempt proceedings and the imposition of criminal or civil penalties. Any interested party should consult an attorney, or rules of court, for additional information regarding the impact of this order and how to request appropriate relief.*

Certified copies of this order may be obtained through the Office of Judicial Records, [OJR\\_Civil@courts.phila.gov](mailto:OJR_Civil@courts.phila.gov) upon the payment of the required fee. Notes of testimony of the hearing may be requested through the Court Reporters Office, Land Title Building, 100 S. Broad Street, Second Floor, Philadelphia, PA by completing a Request for Transcript form. See [www.courts.phila.gov/departments/courtreporters](http://www.courts.phila.gov/departments/courtreporters).

The following Parties participated in connection with the above matter:

Name of Party	Name of Attorney
Donald J. Trump for President Inc.	LINDA KORAS, ESQ
City of Philadelphia	SEAN MCGRATH, ESQ
PA Dems	SUSAN LIN, ESQ.

**In The Matter Of:**  
*In re: CANVASSING OBSERVATION*

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*(Motion)*  
*November 3, 2020*

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*John J. Kurz, RMR, CRR, Official Court Reporter*  
*City of Philadelphia*  
*First Judicial District Of Pennsylvania*  
*100 South Broad Street, 2nd Floor*  
*Philadelphia, PA 19110*

Original File 03NOVEMBER-2020-ELECTION COURT-FINISHED.txt

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**(Motion) - November 3, 2020**  
**In re: CANVASSING OBSERVATION**

- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 1

1           **FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**  
2           **COURT OF COMMON PLEAS FOR PHILADELPHIA COUNTY**  
3           **ELECTION COURT**  
4           - - -  
5 In re:                               : Case No. 20110703  
6                                       : ELECTION MATTER  
7 **CANVASSING OBSERVATION**       :  
8                                       : Filed on behalf of:  
9                                       : Donald J. Trump For  
10                                      : President, Inc.  
11           - - -  
12                                      **TUESDAY, NOVEMBER 3, 2020**  
13           - - -  
14                                      - COURTROOM 305 -  
15           **THE JUSTICE JUANITA KIDD STOUT CENTER FOR**  
16           **CRIMINAL JUSTICE**  
17           **1301 Filbert Street**  
18           **Philadelphia, Pennsylvania**  
19           - - -  
20           **B E F O R E: THE HONORABLE STELLA TSAI, J.,**  
21                                      - - -  
22                                      **M O T I O N**  
23           **REPORTED BY:**  
24           **JOHN J. KURZ, RMR, CRR, CRC**  
25           **REGISTERED MERIT REPORTER**  
             **CERTIFIED REALTIME REPORTER**  
             **OFFICIAL COURT REPORTER**

- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 2

1   **A P P E A R A N C E S:**  
2           **CITY OF PHILADELPHIA - LAW DEPARTMENT**  
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             - - -  
             Susan Lin, Esquire, PA Dems, Biden For President  
             Paul Safier, PA Dems, Biden For President  
             Melissa Davis, PA Dems, Biden For President  
             Stephen Kastenberg, PA Dems, Biden For President  
             Mark Morales, Reporter, CNN  
             Lauren Vidas, Director of Government Relations

- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 3

1                                      - I N D E X -  
2   **WITNESSES:**                               DIRECT           CROSS  
3   **JEREMY MERCER**  
4           By Ms. Kerns                               20  
5           By Mr. McGrath                               33  
6  
7  
8  
9  
10  
11  
12                                      E X H I B I T S  
13   NO.   PAGE NO.  
14   (One were marked at this time.)  
15  
16  
17  
18  
19  
20                                      A R G U M E N T  
21   ATTORNEY   PAGE NO.  
22   Ms. Kerns   42  
23   Mr. McGrath   49  
24  
25

- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 4

1                                      **PROCEEDINGS**  
2                                      (9:51 p.m.)  
3                                      (All parties present and  
4   participating in the following proceedings are  
5   wearing masks pursuant to FJD protocol.)  
6                                      **THE TIPSTAFF:** Court is now back in  
7   session. Please cease all private conversation.  
8                                      **THE COURT:** All right. Good evening,  
9   everyone.  
10                                     **MS. KERNS:** Good evening, Your Honor.  
11                                     **MR. McGRATH:** Good evening, Your  
12   Honor.  
13                                     **MS. LIN:** Good evening, Your Honor.  
14                                     **MR. FIELD:** Good evening, Your Honor.  
15                                     **THE COURT:** You may be seated.  
16                                     I understand there is a request from  
17   the Republicans; is that correct?  
18                                     **MS. KERNS:** It's on behalf of the  
19   Donald J. Trump For President, Incorporated.  
20                                     **THE COURT:** Okay. What's the nature  
21   of this request?  
22                                     **MS. KERNS:** My name is Linda Kerns,  
23   K-E-R-N-S, and I represent Donald J. Trump For  
24   President, Incorporated.  
25                                     Under 3146.8, candidates are



**(Motion) - November 3, 2020**  
**In re: CANVASSING OBSERVATION**

<p>- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 5</p> <p>1 permitted to have watchers at the prec canvassing</p> <p>2 canvass, and there's also a separate provision</p> <p>3 under (g)1.1 that authorizes candidates to have</p> <p>4 an authorized representative.</p> <p>5 Mr. Trump has a representative at the</p> <p>6 canvass, and he is waiting in the waiting room</p> <p>7 on Zoom because he plans to testify because we</p> <p>8 want the Court to understand that he does not</p> <p>9 have meaningful access to what is going on at</p> <p>10 the canvass.</p> <p>11 Now that the polls have closed, we've</p> <p>12 moved from prec canvass to canvass. And he's</p> <p>13 going to testify that there's different</p> <p>14 activities going on, extraction, examining</p> <p>15 envelopes for their sufficiency and scanning,</p> <p>16 and he can see less than half of that. And with</p> <p>17 regard to the examination of the envelopes, only</p> <p>18 about 10 percent of that, because he is so far</p> <p>19 away. There are gates up at the canvass that</p> <p>20 keep him quite far away, like in excess of</p> <p>21 12 feet from the first tables, and then there's</p> <p>22 other tables behind that. So he's quite far</p> <p>23 away and cannot meaningfully observe what's</p> <p>24 going on.</p> <p>25 My client brought this lawsuit</p>	<p>- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 7</p> <p>1 MS. KERNS: Additionally, there's</p> <p>2 going to be a lot of provisional ballots coming</p> <p>3 back. So at this point, we really don't have</p> <p>4 sightline or access. And I think we would all</p> <p>5 agree that the right to vote is a fundamental</p> <p>6 right. But that includes not just showing up at</p> <p>7 the polling place and voting but the entire</p> <p>8 process. And that right also includes the right</p> <p>9 to have your vote effectively tabulated. And</p> <p>10 there is now a burden on the candidate who</p> <p>11 cannot observe this tabulations.</p> <p>12 And I understand that no one</p> <p>13 questions that there is an issue with COVID, but</p> <p>14 it appears that the observers are being kept</p> <p>15 well more than 6 feet from what's going on at</p> <p>16 the canvass, and they are all wearing masks and</p> <p>17 taking the proper precautions.</p> <p>18 The statute indicates under 3146.8</p> <p>19 (g)1.1, that an authorized representative of</p> <p>20 each candidate in an election and one</p> <p>21 representative from each political party shall</p> <p>22 be permitted to remain in the room in which the</p> <p>23 absentee ballots and mail-in ballots are</p> <p>24 precanned.</p> <p>25 So I think we have to explore that</p>
<p>- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 6</p> <p>1 earlier today during the prec canvass, but we then</p> <p>2 withdrew it without prejudice. We learned that</p> <p>3 another candidate had sued on similar issues,</p> <p>4 not about Philadelphia County, but about other</p> <p>5 counties. However, that suit has not, as I</p> <p>6 understand it, was not heard today and is not</p> <p>7 scheduled -- is not possibly scheduled until</p> <p>8 tomorrow.</p> <p>9 And what's different now than was</p> <p>10 occurring this morning is that we have now moved</p> <p>11 into the canvass. So there's a lot more</p> <p>12 activity. There's ballot boxes coming back.</p> <p>13 There's materials coming back from the polling</p> <p>14 places. And all day today we've been litigating</p> <p>15 various issues about things going on in polling</p> <p>16 places. I even had one case where there</p> <p>17 definitely was someone -- and I don't think</p> <p>18 there was an agreement -- I don't think that</p> <p>19 anyone disagreed that someone who had received</p> <p>20 an absentee ballot had voted on the machine,</p> <p>21 even though the law indicates that those who</p> <p>22 received an absentee ballot should not be voting</p> <p>23 on the machine. So we know that there are</p> <p>24 irregularities.</p> <p>25 THE COURT: Counsel, slow down.</p>	<p>- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 8</p> <p>1 wording "in the room."</p> <p>2 There's ways to interfere with that.</p> <p>3 For example, would it be a proper reading of the</p> <p>4 statute if the observer was in the room and a</p> <p>5 huge blanket was put up in front of them so they</p> <p>6 couldn't see what was going on? Well, they</p> <p>7 would still be in the room. But let's face it,</p> <p>8 that would not be having an authorized</p> <p>9 representative there in a meaningful way.</p> <p>10 Similarly, this canvass is taking</p> <p>11 place in the Convention Center rather than a</p> <p>12 Board of Elections' office. And the Convention</p> <p>13 Center is a huge space. And if you call that</p> <p>14 one room, well, the observers could be on one</p> <p>15 end and the canvass activities could be on the</p> <p>16 other end, you know, so that they could see that</p> <p>17 there's people there, but not necessarily</p> <p>18 meaningfully understand what's going on. So the</p> <p>19 statute, we believe, intends that the observers</p> <p>20 actually can see what is happening.</p> <p>21 We already know that irregularities</p> <p>22 occurred in polling places today. Well,</p> <p>23 candidates have a right to watch to see whether</p> <p>24 irregularities are occurring when the votes are</p> <p>25 being tabulated and counted and so forth. And,</p>

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**(Motion) - November 3, 2020**  
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<p>- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 9</p> <p>1 for example, we know that there may be an issue 2 where if a ballot comes back and there's no 3 secrecy envelope, that under the Code, that 4 should not be counted. Well, a candidate has a 5 right to stand there and watch and make sure 6 that the Board of Elections' workers aren't 7 making mistakes or counting ballots that they 8 shouldn't.</p> <p>9 So I have my witness. His name is 10 Mr. Jeremy Mercer, and he's ready to testify 11 because he's been there all day, and he can 12 enlighten the Court as to exactly what's going 13 on there.</p> <p>14 <b>THE COURT:</b> Okay. That covers it? 15 <b>MS. KERNS:</b> I think so. 16 <b>THE COURT:</b> Okay. 17 <b>MS. KERNS:</b> I'm trying. I can come 18 up with more if you want me to keep going. 19 <b>THE COURT:</b> Thank you for doing it 20 quickly. Thank you very much. 21 Who's going to speak? 22 <b>MR. McGRATH:</b> Good evening, Your 23 Honor. Sean McGrath on behalf of the City of 24 Philadelphia and Board of Elections. 25 <b>THE COURT:</b> All right. Do you want</p>	<p>- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 11</p> <p>1 morning. Not only that, but ensuring voter 2 privacy is a part of that process. We have 3 envelopes that are being opened, declaration 4 envelopes that are being opened, secrecy 5 envelopes that are being opened, ballots that 6 are being extracted, several different stages 7 where voter privacy needs to be taken into 8 account.</p> <p>9 In addition, there are also 10 legitimate paramount concerns about COVID-19. 11 All of these things have been taken into account 12 to set up the physical space. 13 Now, all of those factors have been 14 balanced with the fact that the Code requires 15 that observers from the campaign, one 16 representative, authorized representative, have 17 the ability to remain in the room. We have 18 ensured not only that they're able to remain in 19 the room, but that all of these activities are 20 occurring in a row along this designated area so 21 that there's a clear line of sight to all of 22 them. Every single part of the process, every 23 single stage of the process is fully visible. 24 There are no obstructions. And I believe we 25 can, you know, explore that obviously with</p>
<p>- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 10</p> <p>1 to respond?</p> <p>2 <b>MR. McGRATH:</b> I would. Thank you. 3 As an initial matter, I'm surprised 4 that this issue is coming up now. I'll note 5 that this motion was made at around 7:45 this 6 morning and then withdrawn by the Trump 7 Campaign. And that was made during the 8 prec canvass when all of these activities were 9 occurring. And it doesn't appear from anything 10 that has been represented by the Trump Campaign 11 that that has changed in any material fashion.</p> <p>12 I know that they have brought up a 13 decision in federal court -- or rather, a case 14 in federal court. I'll note that that motion is 15 scheduled to be heard tomorrow morning, and it 16 has been scheduled for a period of time today. 17 There's no meaningful reason that we've heard as 18 to why this motion needs to be raised now at 19 this late hour.</p> <p>20 That being said, I will say that the 21 physical setup in the Convention Center was done 22 based on a variety of complicated factors. 23 Obviously, of paramount importance, security of 24 350,000 ballots that are now being processed and 25 have been processed since 7 o'clock this</p>	<p>- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 12</p> <p>1 witness testimony.</p> <p>2 <b>THE COURT:</b> Okay. Anything else? 3 (Counsel conferring.) 4 <b>MR. McGRATH:</b> The other important 5 point I'll point out or would like to explain to 6 the Court is that recently, the Pennsylvania 7 Supreme Court has made clear that based on the 8 amendments to the Code by Act 12, that there are 9 no challenges during the prec canvass or canvass 10 anymore that are allowed under the Code.</p> <p>11 And so the initial purpose before Act 12 12 was passed was that these names were read 13 aloud. They were never -- there was never -- 14 the Code never contemplated the ability to 15 necessarily see any of these things. And 16 indeed, these recent amendments indicate that 17 the Act was changed to ensure the smooth and 18 efficient processing of the prec canvass.</p> <p>19 Oh, and the very last thing I'd like 20 to add is that there was a recent decision in 21 the Nevada federal court that considered the 22 exact -- almost the exact same issue and made it 23 clear that observers are there to observe. They 24 are not there to audit the prec canvass. 25 It was, excuse me, state court.</p>

**(Motion) - November 3, 2020**  
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<p>- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 13</p> <p>1           <b>THE COURT:</b> Okay. Did you say it was 2 a federal decision? 3           <b>MR. McGRATH:</b> Excuse me. It was a 4 state court decision in Nevada. 5           <b>THE COURT:</b> State court decision, 6 okay. 7           All right. I think we'll hear 8 testimony from the witness. 9           <b>MS. LIN:</b> Your Honor, if I may. 10          <b>THE COURT:</b> Sure. 11          <b>MS. LIN:</b> Good evening. Susan Lin on 12 behalf of the PA Dems. 13          Your Honor, we're not really taking a 14 position on this motion at all, but I do feel 15 the need to correct some things that were stated 16 on the record. 17          Ms. Kerns did refer to irregularities 18 throughout the day that she said appeared in 19 court. I would like to point out that there was 20 a single incident that appeared -- that was 21 presented in court of a person who had received 22 a mail-in ballot voting on the machine. And 23 that situation was corrected by Judge Clemons. 24          Outside of that, there has not been 25 any incidents that have been presented in court</p>	<p>- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 15</p> <p>1 email address. I can email it to you. 2           <b>THE COURT:</b> Wait. My judicial 3 assistant can assist you with that. 4           <b>MS. DAVIS:</b> Okay. 5           <b>THE COURT:</b> What's the citation, if 6 you can just give it to me? 7           <b>MS. LIN:</b> Court's indulgence, please. 8           <b>THE COURT:</b> Sure. 9           (Counsel conferring.) 10          <b>MS. DAVIS:</b> Your Honor, my name is 11 Melissa Hazel Davis for the Pennsylvania Dems. 12 The name of the case is Fred Kraus, K-R-A-U-S, 13 an individual registered to vote, and it was 14 brought by Donald J. Trump For President versus 15 Barbara -- and I cannot pronounce the last 16 name -- C-E-G-A-V-S-K-E, Case No. 20-oc-00142. 17 And I will email it to you right now. 18          <b>THE COURT:</b> Okay. Great. Thank you. 19 All right. Any other comments from 20 that side of the bench? 21 No? Okay. 22 All right. Thank you. 23          <b>MS. KERNS:</b> Your Honor, I just want 24 to be clear that the Trump Campaign -- that 25 lawsuit that I referenced in Montgomery County,</p>
<p>- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 14</p> <p>1 of a person who had received a mail-in ballot 2 voting on a machine without following the proper 3 procedures that are in place to allow people who 4 have received mail-in ballots to vote on 5 machines, assuming they follow those procedures. 6          The other thing that I feel like we 7 should inform the Court of is the statute itself 8 cited by Ms. Kerns does not have the word 9 "meaningful" in it. There is no phrase 10 "meaningful -- meaningfully observe," the 11 opportunity to "meaningful observe." Those 12 words do not appear in the statute. The statute 13 refers to the right to remain in the room and 14 that observers are permitted to be present. 15 That is the kind of language used in the 16 statute. 17          And I would urge the Court to read 18 that Nevada state court case. We don't really 19 have a statute. We have a copy of it that we 20 might be able to get to the Court if the Court 21 wants, but I do think that it is on point. 22          <b>THE COURT:</b> I would appreciate it, if 23 you can get the cite. 24          <b>MS. LIN:</b> All right. 25          <b>MS. DAVIS:</b> We can email it with your</p>	<p>- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 16</p> <p>1 the Trump Campaign did not bring that lawsuit. 2 Apparently a candidate out there brought it, but 3 because it was addressing similar issues, I -- 4          <b>THE COURT:</b> Understand. So let's 5 present your witness. 6          <b>MS. KERNS:</b> Okay. 7          <b>COURT OFFICER:</b> Judge, may I admit 8 him into the Zoom call? 9          <b>THE COURT:</b> Yes, you may. 10          (Whereupon the witness appeared on 11 screen via Zoom videoconferencing.) 12          <b>THE COURT:</b> Could you state your name 13 for the record, please. 14          (No response.) 15          <b>THE TIPSTAFF:</b> Sir, can you please 16 state your name and spell your last name for the 17 record. 18          <b>THE WITNESS:</b> I'm sorry, are you 19 talking to me? 20          <b>THE TIPSTAFF:</b> Yes. 21          <b>THE WITNESS:</b> Oh. Jeremy Mercer. 22 First name is J-E-R-E-M-Y. Last name is Mercer, 23 M-E-R-C-E-R. 24          <b>THE TIPSTAFF:</b> Do you solemnly swear 25 or affirm the testimony you're about to give</p>

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**(Motion) - November 3, 2020**  
**In re: CANVASSING OBSERVATION**

<p>- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 17</p> <p>1 this Court in the issue now trying will be the 2 truth, the whole truth, and nothing but the 3 truth, so help you God? 4 <b>THE WITNESS:</b> I do. 5 - - - 6 ...JEREMY MERCER, (appearing via Zoom 7 videoconference), after having been first duly 8 sworn, was examined and testified as follows: 9 - - - 10 <b>THE COURT:</b> Thank you. Welcome. 11 <b>THE WITNESS:</b> Thank you. 12 <b>THE COURT:</b> So I'm Judge Tsai, and 13 you are participating in this hearing by Zoom, 14 and I want to go over some matters with you, 15 okay, before we start. 16 First, can you see me? 17 <b>THE WITNESS:</b> I'm -- well, I can see 18 the head of someone who looks like she's sitting 19 in a judge's chair. 20 <b>THE COURT:</b> Well, that would be me. 21 <b>THE WITNESS:</b> If that's you speaking, 22 I'm sorry. 23 <b>THE COURT:</b> Okay. That's fine. With 24 glasses. Okay. 25 All right. So you're testifying</p>	<p>- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 19</p> <p>1 <b>THE COURT:</b> All right. Welcome back. 2 <b>THE WITNESS:</b> Thank you. Sorry about 3 that. 4 <b>THE COURT:</b> These things do happen. 5 So I want you to understand that 6 you're testifying as if you're testifying from 7 the witness box here today. So this is a formal 8 proceeding; you understand that? 9 <b>THE WITNESS:</b> I do. 10 <b>THE COURT:</b> Okay. And that means 11 that you can't refer to notes unless we go 12 through some certain procedures before you do 13 so. And that you can't be assisted by -- you 14 cannot refer to notes unless we say you can do 15 so, okay. 16 <b>THE WITNESS:</b> Understood. 17 <b>THE COURT:</b> And also that if there's 18 anybody with you, that they cannot assist you 19 with your testimony; do you understand that? 20 <b>THE WITNESS:</b> There is no one with 21 me, but understood. 22 <b>THE COURT:</b> Okay. That makes it 23 easier. 24 All right. And if you do have to 25 refer to a document, understand that there's a</p>
<p>- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 18</p> <p>1 today by video conference; you understand that, 2 correct? 3 <b>THE WITNESS:</b> I'm sorry, Your Honor. 4 I'm having trouble -- 5 <b>THE COURT:</b> Yeah. I think it's 6 difficult with the mask. Let me just try this 7 again. 8 All right. So the most important 9 thing is, can you hear me? 10 <b>THE WITNESS:</b> Yes, I can. I'm sorry. 11 I'm putting in the other earpiece as well, to 12 make that hopefully a little bit better. 13 <b>THE COURT:</b> That's good. 14 Oh, did we lose him? 15 <b>COURT OFFICER:</b> I think he 16 accidentally hung up on us. 17 <b>THE COURT:</b> He hung up on us, okay. 18 I won't hold that against him. 19 (Laughter.) 20 <b>THE COURT:</b> All right. He'll call 21 back. 22 <b>MS. KERNS:</b> He says he got cut off. 23 (Witness reappeared on screen.) 24 <b>COURT OFFICER:</b> There he is. He's 25 back now.</p>	<p>- JEREMY MERCER (DIRECT) - Page 20</p> <p>1 procedure that we need to follow and we need to 2 address it that way. And that lawyers may have 3 occasion to object, so I'm going to ask you to 4 pause if you hear an objection so that we can 5 resolve it before you continue testifying. Do 6 you understand that? 7 <b>THE WITNESS:</b> Understood, Your Honor. 8 <b>THE COURT:</b> Okay. Great. 9 I think we'll do our best. We will 10 do our best to speak slowly so you can 11 understand us. And I hope we can all get it 12 done. 13 All right. So, Ms. Kerns, your 14 witness. 15 - - - 16 <b>DIRECT EXAMINATION</b> 17 - - - 18 <b>BY MS. KERNS:</b> 19 <b>Q. Good evening, Mr. Mercer.</b> 20 <b>A. Good evening.</b> 21 <b>Q. Could you tell us where you are?</b> 22 <b>A. I am in Hall F at the Philadelphia Convention</b> 23 <b>Center.</b> 24 <b>Q. And why are you there?</b> 25 <b>A. I'm one of the representatives designated by</b></p>

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1 the Trump Campaign and/or some of the Republican  
2 candidates on the ballot to observe the prec canvass.  
3 **Q. And how long have you been there today?**  
4 A. I got into the hall shortly before 7:00 a.m.  
5 this morning. And I have been there in the hall or  
6 in the lobby to the hall all day.  
7 **Q. And can you tell us what you're doing?**  
8 A. I am walking back and forth the width of the  
9 hall from the very -- looking at the various  
10 stations and watching the ballot envelopes going  
11 from beginning of process all the way through the  
12 scanning of the ballots that are in the envelopes.  
13 I've also been interacting with Mr. Blumenthal  
14 whenever necessary to address --  
15 **Q. I think you mean Bluestein.**  
16 A. I'm sorry, Bluestein. I apologize. Bluestein,  
17 whenever any issues come up that need to be  
18 addressed.  
19 **Q. And can you describe what the setup is there?**  
20 A. Ummm, we are in a very, very large room. I'm  
21 on -- I'm on a -- I'm sorry. Someone was coming up  
22 to me and I was trying to wave them off, Your Honor.  
23 **THE COURT:** Okay.  
24 **THE WITNESS:** It's in -- it's in a  
25 very, very large hall. And it is divided

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1 width-wise into about four discreet sections for  
2 the four discreet processes to about half way  
3 back. And then beyond that is storage of  
4 ballots, sorting and processing and receiving  
5 facilities for those ballots.  
6 **BY MS. KERNS:**  
7 **Q. And are tables set up?**  
8 A. At various parts along the way, yes.  
9 **Q. And --**  
10 A. Depending upon the section, they are set up  
11 differently.  
12 **Q. And about how many tables, if you know?**  
13 A. Just in the first section, there are two --  
14 four -- eight -- ten -- twelve -- about 35 tables in  
15 the first section alone.  
16 **Q. And about how many -- I'm sorry. Go ahead.**  
17 A. I would just say, I'd be happy to turn the  
18 phone around if that would be easier or more  
19 descriptive so that you could see. I'm standing in  
20 front of the first section right now.  
21 **MR. FIELD:** Your Honor, I'd just note  
22 for the Court that photography and any video  
23 recording is limited to a very specific area of  
24 the room to ensure that we don't run into any  
25 issues with voter privacy or ballot secrecy.

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1 And certainly, I have no objection to the  
2 witness testifying to things here, but I would  
3 have an objection to any sort of video tour of  
4 the room in that fashion.  
5 **THE COURT:** All right. I think  
6 that -- Counsel, do you have a concern about  
7 that? How would you respond to that?  
8 **MS. KERNS:** Well, I don't -- I don't  
9 know where he's standing relative to where the  
10 press is standing.  
11 **THE COURT:** All right. I think I'd  
12 rather just hear a description at this point so  
13 that we don't --  
14 **THE WITNESS:** Okay.  
15 **THE COURT:** Because once we get --  
16 let's just do it that way.  
17 **THE WITNESS:** Okay.  
18 **THE COURT:** So give me, you know,  
19 feet, meters, whatever you want to use.  
20 **THE WITNESS:** The very first section,  
21 Your Honor, there are three rows of about 15  
22 tables deep. And the closest that we can get to  
23 the first table in each row is approximately, I  
24 would say, 15 to 18 feet. The one row is more  
25 like from the 25 to 30 feet. And that's the

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1 first in each of those three rows of 15. So  
2 you're able to -- and then each table is set off  
3 further back from the other. I would say  
4 roughly 5, maybe 6 feet from each of them. So  
5 they just keep adding depth distance-wise.  
6 **THE COURT:** Okay. So you can view  
7 them from where you're sitting or standing, and  
8 that's where you are, right, right in front of  
9 them, those tables?  
10 **THE WITNESS:** I'm standing in front  
11 of them right now, Your Honor, yes.  
12 **THE COURT:** Okay. All right. You  
13 can -- you may continue.  
14 **BY MS. KERNS:**  
15 **Q. So the closest table to you is how many feet**  
16 **from you?**  
17 A. Approximately, I would say, 15 feet.  
18 **Q. And the table that's the furthest away, how**  
19 **many feet away are you?**  
20 A. Ummm, you're going to ask me to do math.  
21 **Q. If you can approximate.**  
22 A. Fifteen times six, plus another 15 feet.  
23 Whatever that worked out to be. I don't --  
24 **Q. I think that's 105.**  
25 **So you would say six lengths of 15,**

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<p>- JEREMY MERCER (DIRECT) - Page 25</p> <p>1 plus another one?</p> <p>2 A. That's correct.</p> <p>3 Q. And is there a barrier or anything preventing</p> <p>4 you from getting closer?</p> <p>5 A. There is. There is -- it's about waist high.</p> <p>6 There seems to be like crowd control fences is what</p> <p>7 I refer to them. They're interlocking left to</p> <p>8 right, and they're slotted about a foot. I can get</p> <p>9 my foot kind of between the pickets of them, so to</p> <p>10 speak. They're metal.</p> <p>11 Q. And can you compare for me the distance you are</p> <p>12 from the closest Election Board worker to you as</p> <p>13 opposed to the distance the Election Board workers</p> <p>14 are from each other?</p> <p>15 A. It's at least -- when they are seated at the</p> <p>16 table, they are approximately 6 feet apart at most.</p> <p>17 We are at least 15 to 18 feet from the nearest</p> <p>18 person.</p> <p>19 Now, there are times when the</p> <p>20 election workers are right next to each other, and</p> <p>21 they fall over their -- when they call over their</p> <p>22 supervisors or when they're talking to each other.</p> <p>23 But when they're seated at big tables for this</p> <p>24 envelope review section, they appear to be about</p> <p>25 6 feet apart.</p>	<p>- JEREMY MERCER (DIRECT) - Page 27</p> <p>1 that I am more than 6 feet away from other people.</p> <p>2 Q. Okay. So let's talk about the -- Mr. Mercer.</p> <p>3 A. I'm sorry.</p> <p>4 THE COURT: We're good. Okay.</p> <p>5 Proceed, please.</p> <p>6 BY MS. KERNS:</p> <p>7 Q. Let's talk about the activities that you're</p> <p>8 observing. Can you describe them?</p> <p>9 A. In the first section, we have been told that --</p> <p>10 well, I've seen workers take ballot envelopes out of</p> <p>11 one tray and look at the back of them and either</p> <p>12 place them in a different tray or place them back in</p> <p>13 a tray from which they were pulled.</p> <p>14 Q. Can you --</p> <p>15 A. They appear to be looking at the back of the</p> <p>16 ballot envelope where the declaration is located.</p> <p>17 But from where I am, from where we are limited to</p> <p>18 standing, we're not able to see what's on the back</p> <p>19 of that envelope.</p> <p>20 Q. Can you hear what is happening?</p> <p>21 A. No. It is -- I'm sorry. I had to change</p> <p>22 earplugs because my earphones are dying.</p> <p>23 Are you able to hear me still?</p> <p>24 Q. Yes.</p> <p>25 THE COURT: We can.</p>
<p>- JEREMY MERCER (DIRECT) - Page 26</p> <p>1 Q. So what's the closest that you've seen an</p> <p>2 Election Board worker be to another Election Board</p> <p>3 worker?</p> <p>4 A. I'm sorry. I didn't hear the end of that</p> <p>5 question.</p> <p>6 Q. I'm sorry.</p> <p>7 What is the closest you've seen one</p> <p>8 Election Board worker be to another Election Board</p> <p>9 worker?</p> <p>10 A. Standing shoulder to shoulder, leaning over</p> <p>11 one's shoulder. That's as close as I've seen them.</p> <p>12 Q. Now, you're wearing a mask, I can see. Have</p> <p>13 you had that on all day?</p> <p>14 A. Except for when I have been taking a drink of</p> <p>15 water or, you know, eating a sandwich, yes.</p> <p>16 Q. And how about other -- are you taking any other</p> <p>17 precautionary measures with regard to protecting</p> <p>18 yourself from potential exposure to any virus or</p> <p>19 germs?</p> <p>20 A. I've got hand sanitizer that I've been using.</p> <p>21 I've been washing my hands in the restroom. When I</p> <p>22 have been meeting other people, I have been using</p> <p>23 the elbow bump as opposed to a handshake. I've been</p> <p>24 attempting to maintain distance from other people.</p> <p>25 When I have been drinking or eating, I have moved so</p>	<p>- JEREMY MERCER (DIRECT) - Page 28</p> <p>1 THE WITNESS: I'm sorry. Let me put</p> <p>2 my other earphone in.</p> <p>3 No, we're not able to hear what's</p> <p>4 being said. It's very loud in here. There are</p> <p>5 a good number of people with equipment that are</p> <p>6 running. Plus, it's a very open space with no</p> <p>7 carpeting and it echos very badly.</p> <p>8 BY MS. KERNS:</p> <p>9 Q. All right. Other than as you described it -- I</p> <p>10 think you described it as examination of the</p> <p>11 envelopes, what other activities are you observing?</p> <p>12 A. At this section of the process, that's it. But</p> <p>13 at the next stage, what has been denominated the</p> <p>14 "extraction stage," that's where the ballot</p> <p>15 envelopes are being fed through machines to slice</p> <p>16 them open so that what's inside the outer envelope</p> <p>17 can be removed, and then another set of what appear</p> <p>18 to be the same or very similar machines so that the</p> <p>19 inner secrecy envelopes then can be sliced open so</p> <p>20 that what's inside those can be removed. That's the</p> <p>21 next stage of the process.</p> <p>22 Q. And how close are you to that process?</p> <p>23 A. I would say approximately 20 feet -- 18 to</p> <p>24 22 feet from that is as close as we can get to the</p> <p>25 first desk. And there are one -- two -- three --</p>

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<p>- JEREMY MERCER (DIRECT) - Page 29</p> <p>1 four -- seven rows of three desks each. So we can 2 only go to the first one. The closest one is 3 about -- sorry. The closest one is approximately 20 4 to 22 feet. 18, 22 feet, somewhere in that range. 5 And then the two behind it, they appear to be 5 to 6 6 feet between them. So they progress further back. 7 <b>Q. And are there -- can you see the ballots that</b> 8 <b>are being -- can you see the -- are you close enough</b> 9 <b>to see the process and see which ballots are</b> 10 <b>being -- are you close -- I apologize. Sorry. Long</b> 11 <b>day.</b> 12 <b>Are you close enough to the process</b> 13 <b>to see what is happening with each of the ballots</b> 14 <b>when they're sliced open and whether or not the</b> 15 <b>material inside has a secrecy envelope or not?</b> 16 <b>MR. McGRATH:</b> Your Honor, objection; 17 leading. 18 <b>THE COURT:</b> Fair enough. Sustained. 19 <b>BY MS. KERNS:</b> 20 <b>Q. With regard to the opening of the ballots by</b> 21 <b>the machine, what are you able to observe?</b> 22 A. Pretty much we're only able to observe the 23 first row in each -- I'm sorry, the first desk in 24 each of the rows. And we're able to essentially see 25 from the first four rows, when they are slicing open</p>	<p>- JEREMY MERCER (DIRECT) - Page 31</p> <p>1 three rows of desks to slice open the secrecy 2 envelope and look at the ballots. 3 <b>Q. And how far away are you from that process?</b> 4 A. The same exact distance as the desks where they 5 were slicing open externally. So approximately 18 6 to 22 feet, somewhere in that range. 7 <b>Q. And what other activities are you observing?</b> 8 A. Again, we can see the ballot come through -- 9 I'm sorry, not the ballot, the envelope come through 10 the machine. And we can see people pulling 11 something out of the secrecy envelope, placing that 12 in a stack, and then when they're finished with 13 their tray, they put those back in the yellow tray. 14 And they raise their hand, workers come and pick up 15 that tray and take it, again, back behind those 16 desks to stage -- to move to the next area within 17 the hall there. 18 <b>Q. And you said that you're there on behalf of a</b> 19 <b>candidate, Candidate Trump. What, if anything, are</b> 20 <b>you able to report back to him about whether the</b> 21 <b>Board of Elections' workers are adhering to the</b> 22 <b>procedures as laid out in the statute?</b> 23 A. Little. We're not able to report -- I'm not 24 able to report back anything as it relates to the 25 review for sufficiency of the declaration on the</p>
<p>- JEREMY MERCER (DIRECT) - Page 30</p> <p>1 the outside envelope, we're able to see them pull 2 something out. And if you're watching closely, you 3 can discern if it is what's referred to here as the 4 "naked ballot," meaning not in a secrecy envelope, 5 sometimes. 6 We're not able to discern whether, if 7 there is a secrecy envelope, whether the secrecy 8 envelope has any markings on it because we're simply 9 not close enough to be able to see that. 10 <b>Q. And --</b> 11 A. The tables -- the desks that are further back, 12 you're simply able to see people pulling things out 13 of an envelope but not really able to discern what, 14 if anything, is being pulled out. 15 <b>Q. And what other processes are you observing?</b> 16 A. When the -- when each of these desks finishes 17 their tray of ballots that have been sliced open, 18 the ballots are then -- if there are ones that from 19 what we've been able to see are the naked ballots, 20 they're put in a tray along with the opened or the 21 unopened secrecy envelopes. Those are then taken by 22 a worker back to a table behind all of those desks, 23 and they do something with them. We can't see what 24 they do. And then a tray comes to the next three 25 rows of desks, in the yellow tray now, for those</p>	<p>- JEREMY MERCER (DIRECT) - Page 32</p> <p>1 outside of the ballot, or the envelopes. 2 As it relates to whether naked 3 ballots or marked secrecy envelopes are being 4 pulled, we can report only what we're able to see on 5 the first row of desks, essentially. 6 We have attempted to get a better 7 view by using binoculars. But the process is -- the 8 extraction process is moving so fast that it's 9 really impossible to see even using binoculars the 10 desks that are behind the first one in each row. So 11 there's very little that we're able to report back 12 as to whether there's any ability to object for 13 failure to comply with the requirements as we 14 understand. 15 <b>Q. And because you're standing there, could you</b> 16 <b>tell us what you believe would assist you -- or what</b> 17 <b>would need to change to assist you in being able to</b> 18 <b>observe what's going on?</b> 19 A. Well, definitely allowing us to get closer to 20 the desks would allow us to have a better view. 21 We'd at least be able to more than likely see what's 22 happening at the first desk in each row, possibly 23 the second desk in each row, and the extraction 24 process. 25 As it relates to the envelope review</p>

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<p>- JEREMY MERCER (CROSS) - Page 33</p> <p>1 or reviewing the sufficiency of the declaration, 2 moving us closer to the first table in each row, but 3 also allowing us to look, to go down the sides. 4 There's an extensive amount of room on the side of 5 the left most row and on the right most row that 6 would allow us to get within 6 feet and not -- not 7 impinge on the workers' space. That would at least 8 allow us to be able to see perhaps the act of the 9 ballot review -- or, I'm sorry, the envelope review 10 process. 11 <b>Q. Okay.</b> 12 <b>MS. KERNS:</b> I have nothing further. 13 <b>THE COURT:</b> Thank you. 14 All right. Counsel. 15 - - - 16 <b>CROSS-EXAMINATION</b> 17 - - - 18 <b>BY MR. McGRATH:</b> 19 <b>Q. Hi. Good evening, Mr. Mercer.</b> 20 A. Hi. 21 <b>Q. Can you hear me?</b> 22 A. I can. 23 <b>Q. My name is Sean McGrath. I'm an attorney for</b> 24 <b>the City.</b> 25 A. Hi, there.</p>	<p>- JEREMY MERCER (CROSS) - Page 35</p> <p>1 A. I'm sorry. One second. A security guard just 2 approached me. 3 <b>Q. Okay.</b> 4 <b>(Pause.)</b> 5 <b>THE WITNESS:</b> Okay. Sorry about 6 that, Your Honor. 7 <b>THE COURT:</b> That's all right. 8 You may proceed, Counsel. 9 <b>MR. McGRATH:</b> Okay. 10 <b>BY MR. McGRATH:</b> 11 <b>Q. In the times that you've been there, have Board</b> 12 <b>workers passed between your observation location and</b> 13 <b>the tables?</b> 14 A. I'm sorry, have workers passed between where we 15 are and the tables? 16 <b>Q. Yes.</b> 17 A. When they're walking in to go back to the back 18 to put in for their shift or when they're walking 19 out to go on a break, but not on a regular basis, 20 not as part of the routine transiting of the ballots 21 from one station to the next. 22 <b>Q. But workers are using that to walk through,</b> 23 <b>correct?</b> 24 A. Occasionally a worker will walk through to come 25 back to use the restroom, or a worker will just walk</p>
<p>- JEREMY MERCER (CROSS) - Page 34</p> <p>1 <b>Q. Hi.</b> 2 <b>So, in terms of the layout that</b> 3 <b>you've been describing, is there anything that has</b> 4 <b>obstructed your line of sight to these different</b> 5 <b>processes?</b> 6 A. Uhhh, there are some easels with signs for the 7 various sections. I mean, you can move around them. 8 Like, I'm standing in front of the extraction right 9 now. Where I'm standing, I can see all but one row 10 based on the sign. But if I move, then I can see 11 that row, but it blocks another. 12 <b>Q. Are there parts of the process that you are</b> 13 <b>unable to see if you change your vantage point?</b> 14 A. There are. When the ballots are taken back 15 to -- there's a gentleman who is just walking back 16 to the table after the ballots have been -- the 17 outer envelopes have been sliced open being taken 18 back. And I -- you cannot see what's happening just 19 because of distance. You just -- you know 20 something's going on because the ballot trays go 21 back there and other ballot trays come back out. 22 But we don't know -- we can't see what's going on 23 back there. 24 <b>Q. Have any -- during your period of time</b> 25 <b>observing, have any --</b></p>	<p>- JEREMY MERCER (CROSS) - Page 36</p> <p>1 in in street clothes without a vest on, so I'm 2 assuming is coming in for a shift. But other than 3 that, no. 4 <b>Q. You said -- I believe you testified that</b> 5 <b>there's approximately 15 to 20 feet, depending on</b> 6 <b>what stage you're looking at, between your vantage</b> 7 <b>point and that process; is that correct?</b> 8 A. From the -- 9 <b>Q. The front of that process.</b> 10 A. The first table or first desk, it's -- the 15 11 is on two of the rows of the envelope review. 12 Everything else is probably closer to the 20 or 13 longer more distant. 14 <b>Q. Would it be fair to say if somebody was walking</b> 15 <b>through the middle of that space, that there would</b> 16 <b>be between around 7 to 8 feet between them and the</b> 17 <b>fence on either side?</b> 18 A. Uhhh, most of them tend to walk along the 19 fence. So they're closer to the fence when they're 20 walking and then kind of at an angle to cut the 21 corner. I'm not sure if I am answering your 22 question. I... 23 <b>Q. Could you describe approximately -- I believe</b> 24 <b>you testified you've been there since 7:00 a.m. I</b> 25 <b>imagine that that's not -- you haven't been there</b></p>



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<p>- JEREMY MERCER (CROSS) - Page 37</p> <p>1 the whole time continuously; is that correct?</p> <p>2 A. I'm sorry. I missed part of what you said.</p> <p>3 Q. Have you observed this -- the prec canvass during</p> <p>4 in periods of time or chunks of time or have you</p> <p>5 been there since 7:00 a.m. nonstop?</p> <p>6 A. I have been here since before 7:00. I have had</p> <p>7 to step out into the lobby area of the building to</p> <p>8 address issues with getting additional</p> <p>9 representatives in, talking with the credentialing</p> <p>10 folks out there. And I've had to go use the</p> <p>11 restroom. But I've not left the building. I have</p> <p>12 been here observing the process all day.</p> <p>13 Q. And I believe you testified that at the first</p> <p>14 stage, that you are able to see workers looking at</p> <p>15 the back of envelopes; is that correct?</p> <p>16 A. We're able to see that they are looking at the</p> <p>17 back of the envelope, but not able to see what's on</p> <p>18 the back of the envelope. That's correct.</p> <p>19 Q. If you were able to be closer, what is it that</p> <p>20 you would want to see that you haven't been able to</p> <p>21 see?</p> <p>22 A. It's my understanding that the backs of the</p> <p>23 envelopes, the declaration is to be filled out,</p> <p>24 dated, signed, and name of the elector printed,</p> <p>25 address printed. And it's my understanding that</p>	<p>- JEREMY MERCER (CROSS) - Page 39</p> <p>1 Q. Correct.</p> <p>2 A. Yes.</p> <p>3 (Counsel conferring.)</p> <p>4 BY MR. McGRATH:</p> <p>5 Q. I just have a few more questions.</p> <p>6 First, could you explain where you --</p> <p>7 where you work; what your employment is?</p> <p>8 A. I'm sorry? I'm sorry, where I what?</p> <p>9 Q. What your employment is.</p> <p>10 A. I am a lawyer with the law firm of Porter,</p> <p>11 Wright, Morris &amp; Arthur. My office is based in</p> <p>12 Pittsburgh. My office is in Pittsburgh,</p> <p>13 Pennsylvania.</p> <p>14 Q. And you have represented the Trump Campaign in</p> <p>15 litigation during this election cycle, correct?</p> <p>16 A. That's correct.</p> <p>17 Q. And is it correct that you have deposed</p> <p>18 Jonathan Marks at the Department of State on some of</p> <p>19 these issues?</p> <p>20 MS. KERNS: Objection; relevance.</p> <p>21 THE COURT: I'm going to allow it.</p> <p>22 Overruled.</p> <p>23 THE WITNESS: I'm sorry, Your Honor,</p> <p>24 I didn't hear your ruling.</p> <p>25 THE COURT: I said "overruled." You</p>
<p>- JEREMY MERCER (CROSS) - Page 38</p> <p>1 that information is required in order for the ballot</p> <p>2 to be determined to be sufficient. And if it's not,</p> <p>3 it may allow for an objection to that processing of</p> <p>4 that ballot.</p> <p>5 We'd like to be able to see whether</p> <p>6 there are objections that could or should be made to</p> <p>7 ballots; that perhaps the name is not on there, the</p> <p>8 date is missing or wrong. Just essentially ensuring</p> <p>9 that the declaration had been completed as we</p> <p>10 understand the statute to require it to be</p> <p>11 completed.</p> <p>12 Q. At the extraction stage, what you described as</p> <p>13 the extraction stage, yes or no, were you able to</p> <p>14 see what is extracted from the envelope in the first</p> <p>15 row?</p> <p>16 A. In the first row, the first desk in each row,</p> <p>17 we're able to generally see if it is a naked ballot</p> <p>18 versus a secrecy envelope, yes. But we're not able</p> <p>19 to see if the secrecy envelope has any markings on</p> <p>20 it that, again, as we understand the statute, would</p> <p>21 require that those ballots -- those envelopes be set</p> <p>22 aside.</p> <p>23 Q. Are you able to freely walk along this area to</p> <p>24 observe?</p> <p>25 A. On our side of the crowd control fence?</p>	<p>- IN RE: CANVASSING OBSERVATION - Page 40</p> <p>1 may testify -- you may address the -- answer the</p> <p>2 question.</p> <p>3 THE WITNESS: That is incorrect. I</p> <p>4 have not deposed Jonathan Marks.</p> <p>5 BY MR. McGRATH:</p> <p>6 Q. Did you depose anyone in that litigation?</p> <p>7 A. I did not take any depositions in that case,</p> <p>8 no.</p> <p>9 MR. McGRATH: I have nothing further,</p> <p>10 Your Honor.</p> <p>11 THE COURT: Okay. Thank you.</p> <p>12 I think we have other parties being</p> <p>13 represented.</p> <p>14 Did you have any questions?</p> <p>15 MS. LIN: No questions. Thank you.</p> <p>16 THE COURT: Thank you.</p> <p>17 Ms. Kerns, do you have any redirect?</p> <p>18 MS. KERNS: Can I just have one</p> <p>19 moment, Your Honor?</p> <p>20 THE COURT: Okay. Yeah. Take</p> <p>21 your -- I want to say take your time, but just</p> <p>22 be as efficient as you can.</p> <p>23 (Counsel conferring.)</p> <p>24 MS. KERNS: No, Your Honor.</p> <p>25 THE COURT: Okay. All right.</p>

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<p>1 Proceed to closing, or do you have someone 2 else -- actually, we can let the witness go. 3 I think, Mr. Mercer, your testimony 4 is complete, so you're dismissed. Your 5 testimony is complete. So thank you very much 6 for your time. 7 <b>THE WITNESS:</b> Okay. Thank you, Your 8 Honor. 9 <b>THE COURT:</b> All right. 10 (Witness disconnected from the Zoom 11 call.) 12 <b>THE COURT:</b> Take care. 13 All right. You may proceed. 14 <b>MS. KERNS:</b> Yes, Your Honor. 15 3146.8 of the Pennsylvania Election 16 Code allows -- 17 <b>THE COURT:</b> Just wait one second, 18 before you complete. 19 I just realized, do you have any -- 20 you have only one witness, right? 21 <b>MS. KERNS:</b> Yes. 22 <b>THE COURT:</b> Okay. Do you have any 23 witnesses? I apologize. 24 <b>MR. McGRATH:</b> Your Honor, we're ready 25 to proceed to closing.</p>	<p>1 for a candidate to know what's happening at the 2 count of votes because if the observer sees that 3 the Election Code is not being followed, the 4 procedures aren't being followed, like, for 5 example, the witness spoke about the naked 6 ballot issue where the Election Code indicates 7 that if the ballot does not have the secrecy 8 envelope, it shouldn't be counted, or if the 9 ballot has marks on the secrecy envelope that 10 would identify either the voter or who they are 11 voting for, that it should not be counted. But 12 Mr. Mercer is precluded from really knowing what 13 is happening because he's too far away. So he 14 cannot adequately report back to the candidate 15 what he is observing, which precludes the 16 candidate from taking any action if he needed 17 to. 18 Now, my friends on the other side are 19 going to say, well, you're not allowed to object 20 to what's going on at the canvass. But I would 21 disagree with that because if we saw 22 wholesale -- wholesale, basically, defiance of 23 the Election Code, for example, not processing 24 the ballots correctly, the candidate would have 25 to consider his options with regard to, you</p>
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<p>1 <b>THE COURT:</b> Okay. 2 <b>MR. McGRATH:</b> Unless -- 3 <b>MS. LIN:</b> No witnesses. Thank you. 4 <b>THE COURT:</b> Okay. Thank you. 5 <b>MS. KERNS:</b> One second, Your Honor. 6 <b>THE COURT:</b> Sure. 7 (Counsel conferring.) 8 <b>MS. KERNS:</b> Okay. 9 <b>THE COURT:</b> Ready to proceed? 10 <b>MS. KERNS:</b> Yes. 11 <b>THE COURT:</b> All right. Let's go. 12 Thanks. 13 <b>MS. KERNS:</b> 3146.8 of the Election 14 Code allows candidates to be present at the 15 canvassing of the ballots. And to the extent 16 the candidate is unavailable, obviously a 17 candidate can't be at all the canvasses, and 18 there's only one candidate, that candidate can 19 have watchers or representatives to watch the 20 process. 21 And you heard the testimony of the 22 witness. He's there on behalf of Mr. Trump, and 23 he cannot see what is going on. So he cannot 24 tell the candidate who he's representing what is 25 happening at the canvass. And it's important</p>	<p>1 know, possibly filing a lawsuit to stop the 2 process or something along the lines of 3 compelling the Election Board to follow the 4 Code. 5 The Code allows the watchers and 6 representatives there. I mean, they're not 7 there to be potted plants. They're there to be 8 the eyes and the ears of the candidate. And 9 Mr. Mercer testified that he can't get close to 10 almost all of the process, and there's a lot of 11 things going on that he can't see. 12 We've heard a lot about the COVID 13 restrictions, but if Mr. Mercer and other 14 representatives like him are required to follow 15 the COVID restrictions, it doesn't sound like 16 the Election Board workers themselves are 17 following the COVID restrictions. 18 So apparently what's happening there 19 is that the Election Board workers can 20 occasionally be shoulder to shoulder and can be, 21 you know, 6 feet apart or sometimes less, but 22 the observers have to be, for whatever reason, 23 at least 12 feet apart from the action and 24 sometimes more. 25 And there's -- you know, everyone has</p>

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<p>1 heard the CDC guidance, you know, 6 feet of</p> <p>2 social distancing and masks, frequent hand</p> <p>3 washing and hand sanitizer, and Mr. Mercer has</p> <p>4 testified that he's done all that. So it</p> <p>5 appears that it's not -- that there's one</p> <p>6 standard for what's going on with the Election</p> <p>7 Board workers with regard to the COVID</p> <p>8 restrictions and then there's another standard</p> <p>9 for what's going on with the observers.</p> <p>10 Additionally, Pennsylvania is a</p> <p>11 commonwealth with 67 counties. And if</p> <p>12 Philadelphia is precluding a candidate from</p> <p>13 having a meaningful observation of what is</p> <p>14 occurring, then that's an equal protection</p> <p>15 argument. That means that the voters in, say,</p> <p>16 Erie County, where the room is much smaller and</p> <p>17 you can actually have meaningful observation on</p> <p>18 behalf of the candidate, or Lackawanna County or</p> <p>19 Lancaster County or Allegheny County, if they</p> <p>20 have more meaningful observation, then that's</p> <p>21 not fair because that means the process is</p> <p>22 different in all of the counties.</p> <p>23 And remember, Judge, that, as I</p> <p>24 started off with, we all agree here that voting</p> <p>25 is a fundamental right. It's one of our most</p>	<p>1 gets more complicated, because today we were</p> <p>2 counting -- or they were counting, excuse me,</p> <p>3 mail-in ballots and absentee ballots.</p> <p>4 Well, this canvass is going to</p> <p>5 become, you know, counting things that come in</p> <p>6 from the ballot boxes that were out today and</p> <p>7 provisional ballots and ballots from the -- that</p> <p>8 were -- excuse me, the materials from the</p> <p>9 polling places. And if the candidate can't know</p> <p>10 that this is happening in a uniform fashion, in</p> <p>11 adhering to the Election Code, that is simply</p> <p>12 not fair, and that is not a free and fair</p> <p>13 election.</p> <p>14 My friend on the other side indicated</p> <p>15 that there was one example of a single incident</p> <p>16 of a mail-in ballot today. But I don't think</p> <p>17 that's an accurate representation of what</p> <p>18 occurred either today in this room or the room</p> <p>19 next door or in the city of Philadelphia. There</p> <p>20 was multiple, multiple, multiple issues of poll</p> <p>21 watchers not being allowed in polling places or</p> <p>22 being kicked out.</p> <p>23 There was multiple issues of, you</p> <p>24 know, voter intimidation or improper things</p> <p>25 happening in polling places. And you know why,</p>
- IN RE: CANVASSING OBSERVATION - Page 46	- IN RE: CANVASSING OBSERVATION - Page 48
<p>1 precious rights. But voting encompasses the</p> <p>2 entire process. And it includes the right to</p> <p>3 properly tabulate and count the votes. And it</p> <p>4 includes the right for a candidate who invests</p> <p>5 so much in the process of running for office,</p> <p>6 whether you're running for the top office or</p> <p>7 whether you're running for one of the row</p> <p>8 officers on the ballot or the General Assembly,</p> <p>9 local General Assembly races, they put so much</p> <p>10 into it, and they have a right to -- and the</p> <p>11 General Assembly, indeed, gave them that right</p> <p>12 to have someone there watching the process for</p> <p>13 them.</p> <p>14 We are not asking to defy COVID</p> <p>15 restrictions and stand shoulder to shoulder.</p> <p>16 We're not asking to take off our masks. We're</p> <p>17 not asking to not wash our hands. We're not</p> <p>18 asking at all to interfere in the process. All</p> <p>19 we're asking is if there's things going on at</p> <p>20 the canvass, then representatives who are there</p> <p>21 on behalf of candidates should be able to</p> <p>22 meaningfully report back to their candidates</p> <p>23 what is going on. And that is simply -- simply</p> <p>24 not happening.</p> <p>25 And this process is getting -- it</p>	<p>1 Judge? Because humans are not perfect. I'm not</p> <p>2 perfect. And I would guess that no one in this</p> <p>3 room is perfect. And that means that the people</p> <p>4 at the Convention Center aren't perfect either.</p> <p>5 And I think the General Assembly knew that. And</p> <p>6 that is why they put in the statute that let's</p> <p>7 give a little bit of oversight.</p> <p>8 And I think it would be ridiculous to</p> <p>9 expect the General Assembly to write a statute</p> <p>10 that says watchers are permitted, but, by the</p> <p>11 way, don't put a cloth in front of them so they</p> <p>12 can't see, and don't put them in Madison Square</p> <p>13 Garden where the watchers are on one side and</p> <p>14 what's happening is on the other side. I don't</p> <p>15 think that anyone who writes statutes would</p> <p>16 expect that. I don't think anyone who reads</p> <p>17 statutes would expect a statute to say that.</p> <p>18 This is really a commonsense issue.</p> <p>19 There are watchers and there are</p> <p>20 representatives. And if they are going to</p> <p>21 report back to their candidate, they should be</p> <p>22 able to do so. And it was clear from</p> <p>23 Mr. Mercer's testimony that he can't report</p> <p>24 back. So he cannot be a proper representative.</p> <p>25 And my friends on the other sides are</p>

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<p>- IN RE: CANVASSING OBSERVATION - Page 49</p> <p>1 talking about a Nevada case, but this is the 2 Commonwealth of Pennsylvania. And I am asking 3 you, Judge, to assist us in compelling the Board 4 of Elections to follow this section of the 5 Election Code so that our watchers or my 6 client's watchers and my client's 7 representatives can meaningfully -- can 8 actually, actually, see the process, can be in 9 the room, can observe, and can be there and know 10 what is going on. 11 <b>THE COURT:</b> Thank you. 12 Counsel. 13 <b>MR. McGRATH:</b> Your Honor, I'd like to 14 focus on the law here in the Commonwealth of 15 Pennsylvania. 16 The Trump Campaign has said multiple 17 times -- used the language "meaningful access." 18 If we look at the plain language of the law, it 19 states that authorized representatives of the 20 campaigns and political parties may remain in 21 the room for the prec canvass and canvasses 22 occurring. 23 "Meaningful access" does not appear 24 in that subsection. It does not appear in the 25 section of the Election Code.</p>	<p>- IN RE: CANVASSING OBSERVATION - Page 51</p> <p>1 As a result, the Pennsylvania Supreme 2 Court made clear that any challenge made during 3 the prec canvass that used to be in the Code no 4 longer exists. These are exactly the type of 5 challenges that the Trump Campaign is now trying 6 to bring. 7 Further, as evidenced by this 8 testimony that we just heard, it's clear that 9 the witness here was able to observe everything 10 that was occurring during the prec canvass. He 11 described every single stage in detail. He 12 described what is happening at every single 13 stage in detail. 14 Simply put: Everything that the 15 Trump Campaign wants to be able to do with this 16 information has been precluded by the 17 Pennsylvania Supreme Court. 18 What the campaign is asking for is 19 rearranging an ongoing processing of 350,000 20 ballots 13 hours after it started, in the 21 middle, just before an overnight canvass. 22 What the campaign seeks to do, 23 importantly, has no basis in law, and in light 24 of the facts that are raised, is completely 25 unreasonable. The Board has balanced the</p>
<p>- IN RE: CANVASSING OBSERVATION - Page 50</p> <p>1 The fact that this plain language 2 becomes even clearer if you look at the recent 3 state Supreme Court decision In Re: November 3, 4 2020 General Election. There, the Supreme Court 5 of Pennsylvania made a decision and a holding 6 that is extremely relevant to the issue here. 7 There they said that -- or excuse me, the 8 Supreme Court held that then, in 2020, the 9 Legislature eliminated time of canvassing 10 challenges entirely, emphasized, from Section 11 3146.8 subsection (g)3. Amending that statute 12 to eliminate the challenging grounds procedures 13 and amending that section to eliminate the 14 proviso that representatives shall be permitted 15 to challenge any absentee elector or mail-in 16 elector. 17 The court went on to say: 18 Presumably, in expanding voting by mail, the 19 Legislature sought to streamline the process for 20 canvassing such ballots perhaps to avoid 21 undermining the expansion effort by eliminating 22 the prospect of voters, including a potentially 23 large number of new mail-in voters, will be 24 brought before the Board or the courts to answer 25 third-party challenges.</p>	<p>- IN RE: CANVASSING OBSERVATION - Page 52</p> <p>1 critical issues of privacy, secrecy, safety with 2 that of the ability to observe. For those 3 reasons, we respectfully submit that the 4 petition should be denied. 5 <b>THE COURT:</b> Okay. Do you have any 6 reply? 7 <b>MS. KERNS:</b> Well, I just -- 8 <b>THE COURT:</b> Wait. I believe counsel 9 wishes to address this. 10 All right. Ms. Lin. 11 <b>MS. LIN:</b> Thank you, Your Honor. 12 While we're not taking any position 13 on this issue, I would point out that it seems 14 like what Ms. Kerns is asking for or what Mr. 15 Mercer is asking for is basically the best seat 16 in the house. It seems that he wishes to be 17 able to look over the shoulder of the workers, 18 to be able to read exactly what they are 19 reading. And frankly, the statute does not 20 permit that for him. He's not permitted to 21 conduct an audit under the statute. If you look 22 at the language of the statute, he's permitted 23 to be in the room. He's permitted to be 24 present. 25 Thank you.</p>

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<p>- IN RE: CANVASSING OBSERVATION - Page 53</p> <p>1           <b>THE COURT:</b> Okay. Thank you. 2           All right. Ms. Kerns. 3           <b>MS. KERNS:</b> Yes, Your Honor. I would 4 just like to note that I have not, while we were 5 sitting here, said that we wanted to make a 6 specific challenge to any particular voter. I 7 think that the other side is saying that we are 8 here seeking the right to challenge. That's not 9 what we're seeking. We're seeking the right to 10 see what is going on. 11           So whether or not there could be 12 challenges to individual voters, that appears to 13 be a question for another motion that doesn't 14 appear to be before us right at this second, 15 because I never mentioned challenging any 16 individual voter or ballot, and neither did 17 Mr. Mercer. So that appears not to be relevant 18 to this particular question. 19           In addition, although I was told that 20 they -- that I think it was called -- I think 21 they're called the PA Dems were not taking a 22 position, it appears that they did take a 23 position. And the summary that I just heard 24 from the PA Dems; that Mr. Mercer wants the best 25 seat in the house, to look over the shoulder and</p>	<p>- IN RE: CANVASSING OBSERVATION - Page 55</p> <p>1           anyone there can have meaningful access. 2           I realize what time of the day it is, 3 but that's -- I don't see how that's relevant to 4 this process. It doesn't say that we relax 5 things if it's a little late. There's nothing 6 in there about that, if we're strictly reading 7 the Code. 8           And, you know, I will note that on 9 behalf of the Trump Campaign, we asked for 10 information as to what this process was going to 11 look like, and we were not told that. So we 12 didn't know any of this until today. So -- 13           <b>THE COURT:</b> What are you referring 14 to, the "this"? We didn't know any of this, 15 what do you mean? 16           <b>MS. KERNS:</b> Oh, what he's saying he 17 observed today, like that wasn't released ahead 18 of time. Like how many tables or that there 19 would be a gate or how far away they would be, 20 or -- none of that was really released in 21 detail. 22           <b>THE COURT:</b> Okay. 23           <b>MS. KERNS:</b> That's just what I meant; 24 that this was something that we just learned 25 today and so we're acting on today.</p>
<p>- IN RE: CANVASSING OBSERVATION - Page 54</p> <p>1           read an audit, I did not hear him say that. He 2 just said that he wanted to be able to see, and 3 he's too far away. He's at least 12 feet, 12 to 4 16 feet away from the closest table. And I 5 think he said six to seven times that from the 6 furthest table. Nowhere did he say he wants the 7 best seat in the house. Nowhere did he say he 8 wants privileges that another observer is not 9 getting. Nowhere did he say he wanted to get 10 any closer than 6 feet. He never even said 11 that. He never said he wanted to look over the 12 shoulder. 13           He did mention how Board workers 14 apparently are not -- are not consistently 15 social distancing and adhering to COVID 16 restrictions. But nowhere did he say that he 17 wants to do that, or that he wants to audit the 18 process. 19           He simply -- he simply wants to see 20 on behalf of his candidate. And we believe that 21 the Election Code and fairness and transparency 22 and democracy would demand that he and the other 23 observers like him and the observers for any 24 other candidate, whether it's the Democratic 25 candidate or the Green or the Libertarian party,</p>	<p>- IN RE: CANVASSING OBSERVATION - Page 56</p> <p>1           <b>THE COURT:</b> Okay. I do need to speak 2 with the law clerk before we close. 3           - - - 4           (Whereupon an off-the-record 5 discussion was held.) 6           - - - 7           <b>THE COURT:</b> Okay. I'm not prepared 8 at this very moment to decide. I need to take 9 this under advisement at least for a few 10 minutes, because I feel there's a lot to 11 consider. And I want to read the case law, too, 12 that has been mentioned. 13           I need to talk to my staff about how 14 we go from here because it is a little late, and 15 they're here a lot longer than they're supposed 16 to be. 17           All right. So with that. 18           <b>THE TIPSTAFF:</b> The Court will take a 19 short recess till the call of the crier. 20           - - - 21           (Whereupon a recess was taken.) 22           - - - 23           <b>THE TIPSTAFF:</b> This Court is back in 24 session. 25           <b>THE COURT:</b> Thank you, everyone. You</p>

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1 may be seated.  
2 I've had an opportunity to consider  
3 the testimony and also the law in this matter,  
4 and I want to start with a statement.  
5 The Petitioner's witness provided  
6 copious testimony as to his ability to observe  
7 the opening and sorting of ballots. His concern  
8 pertained to his inability to observe the  
9 writing on the outside of the ballots and  
10 similar issues.  
11 Given that observers are directed  
12 only to observe and not to audit ballots, we  
13 conclude, based on the witness's testimony, the  
14 Board of Elections has complied with the  
15 observation requirements under 25 P.S. 3146.8,  
16 and therefore, we are denying the oral motion to  
17 allow closer observation of the canvassing of  
18 ballots.  
19 We, however, would not discourage the  
20 Board from considering implementation  
21 arrangements to allow for an additional court  
22 order for observation along the side of the  
23 canvassing tables, if feasible, and only if  
24 feasible. This is not mandatory. This is just  
25 a suggestion. Subject to spatial distancing

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1 under COVID-19 regulations and voting privacy  
2 requirements, if feasible.  
3 So that is my order. Thank you very  
4 much. Have a good night.  
5 **MR. FIELD:** Thank you, Your Honor.  
6 **MS. KERNS:** Thank you, Your Honor.  
7 **MS. LIN:** Thank you, Your Honor.  
8 **MR. McGRATH:** Thank you, Your Honor.  
9 **THE TIPSTAFF:** This Court is now  
10 adjourned.  
11 - - -  
12 (Court adjourned at 11:43 p.m.)  
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C E R T I F I C A T I O N

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2  
3 I hereby certify that the proceedings  
4 and evidence are contained fully and accurately  
5 in the notes taken by me on the trial of the  
6 above cause, and that this copy is a correct  
7 transcript of the same.  
8 I further certify that I am not a  
9 relative or employee of any attorney or counsel  
10 employed in this case.  
11  
12  
13  
14 

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<b>A</b>	43:14	10:9;14:12;25:24; 27:15;28:17;29:5; 49:23,24;53:14	<b>away (11)</b> 5:19,20,23;24:18,19; 27:1;31:3;43:13;54:3, 4;55:19	31:15;32:10
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