

IN THE
Supreme Court of the United States

DONALD J. TRUMP FOR PRESIDENT, INC.,

Petitioner,

v.

KATHY BOOCKVAR, SECRETARY OF THE COMMONWEALTH
OF PENNSYLVANIA, *et al.*,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Article II of the Constitution provides that “Each State shall appoint [electors for President and Vice President] *in such Manner as the Legislature thereof may direct.*” U.S. Const. art. II, § 1, cl. 2 (emphasis added). That power is “plenary,” and the statutory provisions enacted by the legislature in the furtherance of that constitutionally-assigned duty may not be ignored by state election officials or changed by state courts. *Bush v. Gore* (“*Bush II*”), 531 U.S. 98, 104-05 (2000).

Yet, during the 2020 presidential election, that is what the Pennsylvania Supreme Court did in four cases – three at issue in this Petition, and one already before the Court. Statutory requirements were eliminated regarding signature verification, the right of campaigns to challenge invalid mail ballots, mandates that mail voters fill in, date, and sign mail ballot declarations, and even the right of campaigns to observe the mail ballot canvassing process in a meaningful way.

Collectively, these three decisions resulted in counting approximately 2.6 million mail ballots in violation of the law as enacted by the Pennsylvania Legislature. According to public reports, without these protections, the resulting disqualification rate of invalid ballots was anemic—meaning over 110,000 invalid ballots were illegally counted—more than enough to have affected the outcome of the election, where the margin between the two principal candidates for President currently stands at 80,558. The questions presented are therefore:

1. Whether the Pennsylvania Supreme Court’s alteration or suspension of state

election law through its three decisions before and after the November 2020 general election usurped the Pennsylvania Legislature’s plenary authority to “direct [the] Manner” for appointing electors for President and Vice-President, in violation of Article II, Section 1, Clause 2 of the U.S. Constitution?

2. Whether the Pennsylvania Supreme Court’s three decisions usurping the Pennsylvania Legislature’s plenary authority to “direct [the] Manner” for appointing presidential electors, by changing the law, including eviscerating protections against mail ballot fraud, violated the Due Process Clause of the Constitution, and whether Pennsylvania applying the new rules promulgated by the Court during the election in only select counties where mail ballots heavily favored one candidate over the other violated the Equal Protection Clause of the Constitution?
3. Whether this Court has the power to provide a meaningful remedy to Petitioner in advance of the January 6, 2021 Joint Session of Congress, at which electoral votes will be opened and counted, or before the January 20, 2021 inauguration date specified by the Constitution?

PARTIES TO THE PROCEEDINGS

- I. Pennsylvania Supreme Court: *In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, Nos. 31 EAP 2020, 32 EAP 2020, 33 EAP 2020, 34 EAP 2020, 35 EAP 2020, 29 WAP 2020 (November 23, 2020), reported at 2020 Pa. LEXIS 5989, 2020 WL 6875017**

Petitioner: Donald J. Trump for President, Inc., Appellant

Respondents:

Elizabeth J. Elkin, Philadelphia County Board of Elections; Democratic National Committee; Philadelphia County Board of Elections; Omar Sabir; Al Schmidt; Lisa Deely; Bureau of Commissions, Elections and Legislation; DNC Services Corp./ Democratic National Committee; Democratic Party; and James Brewster, Appellees.

- II. Pennsylvania Supreme Court: *In re Canvassing Observation*, No. 30 EAP 2020 (November 17, 2020), reported at 2020 Pa. LEXIS 5879, 2020 WL 6737895**

Petitioner: Donald J. Trump for President, Inc., Appellee

Respondents:

Philadelphia County Board of Elections, Appellant
Pennsylvania Democratic Party, Appellee

- III. Pennsylvania Supreme Court: *In re November 3, 2020 Gen. Election*, No. 149 MM 2020 (October 23, 2020), reported at 240 A.3d 591**

Petitioner: Donald J. Trump for President, Inc., Appellee

Respondents:

National Republican Congressional Committee, Appellee
Republican National Committee, Appellee
Republican Party of Pennsylvania, Appellee

Kathy Boockvar, Secretary of the Commonwealth of Pennsylvania, Petitioner

Bucks County Board of Elections, Chester County Board of Elections, Montgomery

County Board of Elections, Philadelphia County Board of Elections, Luzerne County Board of Elections, Clearfield County Board of Elections, Northampton County Board of Elections, Crawford County Board of Elections, Lehigh County Board of Elections, Armstrong County Board of Elections, Bradford County Board of Elections, Clarion County Board of Elections, Tioga County Board of Elections, Clarion County Board of Elections, Susquehanna County Board of Elections, Greene County Board of Elections, Delaware County Board of Elections, Lancaster County Board of Elections, Cumberland County Board of Elections, Allegheny County Board of Elections, Franklin County Board of Elections, Perry County Board of Elections, Sullivan County Board of Elections, Wyoming County Board of Elections, Adams County Board of Elections, Westmoreland County Board of Elections, Warren County Board of Elections, Potter County Board of Elections, Lackawanna County Board of Elections, Centre County Board of Elections, Columbia County Board of Elections, Blair County Board of Elections, Bedford County Board of Elections, Dauphin County Board of Elections, Fayette County Board of Elections, Huntingdon County Board of Elections, Indiana County Board of Elections, Lawrence County Board of Elections, Lebanon County Board of Elections, Montour County Board of Elections, Northumberland County Board of Elections, Venango County Board of Elections, York County Board of Elections, Armstrong County Board of Elections, Berks County Board of Elections, Elk County Board of Elections, Butler County Board of Elections, Respondents

Pennsylvania State Democratic Party, Dwight Evans, Respondent Pennsylvania Alliance for Retired Americans, Respondent League of Women Voters of Pennsylvania, NAACP Pennsylvania State Conference, Common Cause Pennsylvania, Respondents.

RULE 29.6 STATEMENT

Petitioner, Donald J. Trump for President, Inc., is the official campaign committee for Donald J. Trump, President of the United States and candidate for re-election to the office of President. Petitioner has no parent corporation, and no publicly held company owns 10% or more of its stock.

RELATED CASES

- A. *In re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, Nos. 31 EAP 2020, 32 EAP 2020, 33 EAP 2020, 34 EAP 2020, 35 EAP 2020, 29 WAP 2020, Supreme Court of Pennsylvania. Judgment entered November 23, 2020.
1. *In re: 2,349 Ballots in the 2020 General Election*, No. 1162 CD 2020, Commonwealth Court of Pennsylvania. Judgment entered November 19, 2020.
 - a. *Zicarelli v. Allegheny County Board of Elections*, No. GD 20-011654, Court of Common Pleas of Allegheny County. Judgment entered November 18, 2020.
 2. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 1136 CD 2020, Commonwealth Court of Pennsylvania. Judgment not entered: on November 18, 2020 the Supreme Court of Pennsylvania exercised extraordinary jurisdiction over the case.
 - a. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, No. 201100878, Court of Common Pleas of Philadelphia. Judgment entered November 13, 2020.
 3. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 1137 CD 2020, Commonwealth Court of Pennsylvania. Judgment not entered: on November 18, 2020 the Supreme Court of Pennsylvania exercised extraordinary jurisdiction over the case.

- a. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, No. 201100877, Court of Common Pleas of Philadelphia. Judgment entered November 13, 2020.
4. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 1138 CD 2020, Commonwealth Court of Pennsylvania. Judgment not entered: on November 18, 2020 the Supreme Court of Pennsylvania exercised extraordinary jurisdiction over the case.
 - a. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, No. 201100876, Court of Common Pleas of Philadelphia. Judgment entered November 13, 2020.
5. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 1139 CD 2020, Commonwealth Court of Pennsylvania. Judgment not entered: on November 18, 2020 the Supreme Court of Pennsylvania exercised extraordinary jurisdiction over the case.
 - a. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, No. 201100875, Court of Common Pleas of Philadelphia. Judgment entered November 13, 2020.
6. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 1140 CD 2020, Commonwealth Court of Pennsylvania. Judgment not entered: on November 18, 2020 the Supreme Court of Pennsylvania exercised extraordinary jurisdiction over the case.
 - a. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, No. 201100874, Court of Common Pleas of Philadelphia. Judgment entered November 13, 2020.
- B. *In re: Canvassing Observation*, No. 30 EAP 2020, Supreme Court of Pennsylvania. Judgment entered November 17, 2020.
 1. *In re: Canvassing Observation*, No. 1094 CD 2020, Commonwealth Court of Pennsylvania. Judgment entered November 5, 2020.
 - a. *In re: Canvassing Observation, Appeal of Donald J. Trump for President, Inc.*, No. 201107003, Court of Common Pleas of Philadelphia. Judgment Entered November 4, 2020.

C. *In re: November 3, 2020 General Election*, No. 149 MM 2020, Supreme Court of Pennsylvania. Judgment entered October 23, 2020.

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Petitioner Donald J. Trump for President, Inc., respectfully petitions for a writ of certiorari to review the judgments of the Pennsylvania Supreme Court.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania in *In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, Nos. 31 EAP 2020, 32 EAP 2020, 33 EAP 2020, 34 EAP 2020, 35 EAP 2020, 29 WAP 2020, dated November 23, 2020, is reported at 2020 Pa. LEXIS 5989, 2020 WL 6875017, and reprinted in Petitioner's Appendix ("Pet. App.") A.

The opinion of the Supreme Court of Pennsylvania in *In re Canvassing Observation*, No. 30 EAP 2020, dated November 17, 2020, is reported at 2020 Pa. LEXIS 5879, 2020 WL 6737895, and reprinted in Pet. App. B.

The opinion of the Supreme Court of Pennsylvania in *In re November 3, 2020 Gen. Election*, No. 149 MM 2020, dated October 23, 2020, is reported at 240 A.3d 591, and reprinted in Pet. App. C.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Pennsylvania in *In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election* was entered on November 23, 2020 (Pet. App. A).

The decision of the Supreme Court of Pennsylvania in *In re Canvassing Observation* was entered on November 17, 2020 (Pet. App. B).

The decision of the Supreme Court of Pennsylvania in *In re November 3, 2020*

Gen. Election was entered on October 23, 2020 (Pet. App. C).

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). All three decisions are final judgments by the highest court of the Commonwealth of Pennsylvania and, as demonstrated *infra*, Petitioner raised the federal questions presented in this case in the Court below, either expressly or by challenging the alteration of election statutes enacted by the Pennsylvania legislature in the exercise of its power to determine the “manner” of choosing presidential electors, which “presents a federal constitutional question.” *Bush II*, 531 U.S. at 113.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II, Section 1, Clause 2 of the United States Constitution provides: “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”

The Fourteenth Amendment of the Constitution, Section 1 provides, in relevant part: “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The relevant provisions of the United States Code and Title 25 of the Pennsylvania Statutes and Consolidated Pennsylvania Statutes, as set forth in the attached Appendix (Pet. App. K), are:

1. 3 USC § 2

2. 3 USC § 5
3. 3 USC § 15
4. 28 U.S.C. § 1257(a)
5. PA. Const. Art VII §14
6. 25 P.S. § 2650
7. 25 P.S. § 3146.1
8. 25 P.S. § 3146.2
9. 25 P.S. § 3146.6
10. 25 P.S. § 3146.8
11. 25 P.S. § 3150.11
12. 25 P.S. § 3150.16

STATEMENT OF THE CASE

In key jurisdictions across the country, state and local election officials and courts altered or ignored state election laws,¹ in violation of the federal Constitution’s Article II assignment to State Legislatures of the plenary authority over the “manner” of choosing electors, including in a related case from Pennsylvania currently before the Court. *See, e.g., Republican Party v. Boockvar*, 208 L.Ed.2d 266, 267, 2020 U.S. LEXIS 5188, 2020 WL 6304626 (2020) (Statement of Alito, J., joined by Thomas and Gorsuch, JJ.) (“[T]he constitutionality of the [Pennsylvania] Supreme Court’s

¹ *See State of Tex. v. Commonwealth of Pa., et. al*, No. 22O155 (S.Ct., filed Dec. 8, 2020), in which the State of Texas identified numerous provisions of state law that were altered or ignored in four key states—the Commonwealth of Pennsylvania and the States of Georgia, Michigan, and Wisconsin. This Court denied Texas’s Motion for Leave to File an Original Action for lack of standing. *Id.* (Dec. 11, 2020). The standing of Petitioner is not in question in this case.

decision [in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. Sep. 17, 2020)] ... has national importance, and there is a strong likelihood that the State Supreme Court decision violates the Federal Constitution.”).² This case presents in stark relief several of the violations that occurred in Pennsylvania. Together, those violations alone affected more ballots than the current margin of difference between the two principal candidates for President in Pennsylvania.

I. Mail Voting and the Importance of Anti-Fraud Provisions³

After the presidential election controversy in Florida in 2000, a bipartisan commission, headed by former Democrat President Jimmy Carter and former Republican Secretary of State James Baker, found that mail ballots are “the largest source of potential voter fraud.” BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005) (hereinafter, “Carter-Baker Report”).⁴ Pennsylvania’s Legislature, which has the “plenary” power

² A summary of disputes arising out of six key swing states was recently published by Peter Navarro, Director of the Office of Trade and Manufacturing Policy, in his personal capacity. See “The Immaculate Deception: Six Key Dimensions of Election Irregularities” (Dec. 17, 2020), available at: https://www.scribd.com/document/488534556/The-Immaculate-Deception-12-15-20-1#from_embed.

³ In Pennsylvania, voters return mail ballots in envelopes which contain a declaration for signing, addressing, and dating on the back. The ballot itself is contained in an inner “secrecy” envelope. If the mail ballot is approved during canvassing beginning on Election Day, the outside envelope is opened. If the ballot is not contained in a sealed inner envelope, *i.e.* a “naked” ballot, or the inner envelope has markings indicating the identity of the voter, it is rejected. Otherwise, the inner envelope is mixed with other inner envelopes which are then opened and counted. This procedure protects the secrecy of the vote. See 25 P.S. §§ 3146.6(a), 3146.8, 3150.16(a). At the same time, if the mail ballots cannot be challenged until after the outside envelope is opened, and inner envelope mixed, opened, and counted, a post-election challenge cannot match the mail ballot with its vote.

⁴ At: <https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf>.

under Article II of the U.S. Constitution to determine the manner for choosing Pennsylvania's presidential electors, *see* Art. II, § 1, cl. 2; *McPherson v. Blecker*, 146 U.S. at 25; *Bush II*, 531 U.S. at 98, as well as the Pennsylvania Constitution itself, has long limited mail voting. Until this year, only voters who could establish cause were eligible to apply for mail (absentee) ballots, Pa. Const. Art. 7, § 14; 25 P.S. § 3146.1,⁵ and they were subject to strict signature verification and voter identification requirements, as well as requirements that political parties and candidates be able to observe the entire process for validation and canvassing of absentee ballots and, where necessary, challenge their validity. *See, e.g.*, 25 P.S. §§ 3146.2 (2012), 3146.2b (2012), 3146.8 (2012); *see also In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1234 (Pa. 2004) (“so-called technicalities of the Election Code are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed – particularly where ... they are designed to reduce fraud.”).⁶

In October 2019, the Legislature decided to allow no-excuse mail balloting by any eligible voter in the state,⁷ 25 P.S. § 3150.11(b), but it retained the strict

⁵ Pennsylvania's Election Code now permits voters to vote absentee as “[q]ualified absentee electors” (25 P.S. § 3146.1), or by mail as “[q]ualified mail-in electors” (*id.* § 3150.11).

⁶ The Pennsylvania Legislature's concerns about election fraud are well founded based on a history of misconduct in Philadelphia, both in mail voting and voting at the polls. *See, e.g., Marks v. Stinson*, 1994 U.S. Dist. LEXIS 5273 (E.D. Pa. April 26, 1994) (certifying state Senate candidate as the winner and removing his opponent from office based on massive absentee ballot and other election fraud by Democratic candidate and election officials which changed the result of the election); indictment of Michael (Ozzie) Myers, U.S. Department of Justice Press Release dated July 23, 2020, “Former Congressman Charged with Ballot Stuffing, Bribery, and Obstruction,” available at: <https://www.justice.gov/opa/pr/former-congressman-charged-ballot-stuffing-bribery-and-obstruction>.

⁷ Whether the Legislature had the authority to allow no-excuse mail ballots under the State

signature verification, voter identification, and observation and challenge requirements. *See, e.g.*, Sections 1302.2, 1306, 1308, “Act 77,” 2019 Pa. Legis. Serv. Act 2019-77 2019 Pa. ALS 77; 2019 Pa. Laws 77; 2019 Pa. SB 421 (approved Oct. 31, 2019). Those requirements were in place, and complied with, in the delayed June 2020 primary election.⁸ But each of them was dispensed with for the general election, not by the Legislature (as required by Article II), but by state and local elections officials, either unilaterally or in conjunction with the state’s elected Supreme Court.

II. Pennsylvania Election Officials and Courts Weakened or Entirely Disregarded Key Anti-Fraud Provisions of Pennsylvania Election Law

A. November 3, 2020 Gen. Election Ratified the Secretary of the Commonwealth’s Dispensing with Statutory Signature Verification Requirements for Mail Ballots, and *Sua Sponte* Eliminated the Statutory Right to Challenge Them During Canvassing on Election Day

In early August 2020, the League of Women Voters filed suit against the Secretary of the Commonwealth, Kathy Boockvar, alleging that in implementing the signature verification requirements contained in state law, the Secretary had failed to develop a plan for providing notice and an opportunity to cure for mail voters whose

Constitution is the subject of another case pending before this Court. *See Kelly v. Commonwealth of Penn.* (No. 20-810).

⁸ In the June 2020 primary election, where there were no significantly contested races, and thus, no mail ballots challenged on election day, signature defects alone resulted in “over 26,500 absentee and mail-in ballots [being] rejected in Pennsylvania,” or “1.8% of the total absentee and mail-in ballots cast statewide.” Complaint (Docket No. 1), ¶¶ 2, 54, *League of Women Voters v. Boockvar*, No. 2:20-cv-03850-PBT (E.D. Pa. Aug. 7, 2020) (*citing* Caitlin Huey-Burns & Adam Brewster, “Why some mail-in ballots are rejected and how to make sure your vote counts,” CBS News (Aug. 4, 2020), <https://www.cbsnews.com/news/why-mail-in-ballot-rejected-voting-counts/>).

ballots were disqualified because the signature did not match the registration signature on file, which the League contended violated federal constitutional guarantees of due process and equal protection. *See* Complaint (Docket No. 1), ¶¶ 60-68, 78-82, *League of Women Voters v. Boockvar*, No. 2:20-cv-03850-PBT (E.D. Pa. Aug. 7, 2020). The League did not contend that Pennsylvania state law did not allow for signature verification. Instead of responding to the notice and cure allegations, however, Secretary Boockvar took it upon herself to inform county registrars that state law did not require, and did not even permit, mail ballots to be rejected when the signature did not match the registration signature on file.⁹ The League then voluntarily dismissed its suit. *Id.* (Docket Nos. 39, 40).

Apparently recognizing that her actions contravened the long-standing recognition and practice that state law allowed signature verification of mail ballots during canvassing beginning on Election Day, the Secretary then asked the Pennsylvania Supreme Court to ratify her decision to dispense with the signature verification requirements, via an extraordinary petition for “King’s Bench jurisdiction.” The partisan-elected Supreme Court obliged, holding on October 23, 2020—just 11 days before the November 3, 2020 general election—that signature verification was not permitted under 25 P.S. §3146.8(g)(3) despite its language that

⁹ *See* Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes, 9/11/2020 (“Boockvar 9/11/20 Guidance”), <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20MailIn%20Ballot%20Return%20Envelopes.pdf>; Guidance Concerning Civilian Absentee and Mail-in Ballot Procedures, 9/28/2020 (“Boockvar 9/28/20 Guidance”), <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/DOS%20Guidance%20Civilian%20Absentee%20and%20Mail-In%20Ballot%20Procedures.pdf>.

the signature on the declarations on the outside envelopes of mail ballots be “sufficient.” The leaders in the Pennsylvania Legislature—both House and Senate—vehemently disagreed, *see* Legislators’ Br., fn. 16, *infra*. But the Court denied their motion to intervene and only allowed them to submit amicus briefs.

Although the Secretary had not even alleged in her petition for “King’s Bench jurisdiction” that statutory provisions allowing for the challenge of non-conforming absentee ballots were somehow void, the Pennsylvania Supreme Court nonetheless declared *sua sponte* that those provisions were also of no effect. Pet. App. C, at 29 fn. 25 (*citing* 25 P.S. §§ 3146.8(f), (g)(5)). This, despite the Court’s acknowledgement that state law continued to provide for challenges to the mail ballots themselves during canvassing by posting a \$10 per ballot bond, and referenced procedures for resolving such challenges, *including* mail-in ballots which had only been authorized in 2019:

(f) Any person challenging an application for an absentee ballot, *an absentee ballot*, an application for a mail-in ballot *or a mail-in ballot for any of the reasons provided in this act* shall deposit the sum of ten dollars (\$10.00) in cash with the county board, which sum shall only be refunded if the challenge is sustained or if the challenge is withdrawn within five (5) days after the primary or election. If the challenge is dismissed by any lawful order then the deposit shall be forfeited. The county board shall deposit all deposit money in the general fund of the county.

25 P.S. §§ 3146.8(f) (emphasis added). Instead of recognizing that these statutory provisions undermined its odd interpretation of § 3146.8(g)(3), which plainly allows consideration of the authenticity of signatures on mail ballots, the Court dispensed with the unambiguous language in the statutes as “overlooked remnants of a prior, now eliminated, process.” Pet. App. C, at 29 n. 24. As a result, mail ballots are

opened, mixed, and counted beginning on Election Day without any right to challenge the authenticity of the signatures.

Petitioner raised these issues of federal constitutional law in the court below. Petitioner argued that Secretary Boockvar's alteration of statutory requirements adopted by the Legislature for use in federal elections "creates a federal constitutional question under the Elections and Electors Clauses." Petitioner and Republican Intervenors' Supp. Br., p. 4 (*citing* Ans. at 23-24). It also argued that adopting the Secretary's position would "fail to consider 'the extent to which the [Pennsylvania] Constitution could, consistent with [the Elections Clause], 'circumscribe the legislative power.'" *Id.* at 17 (*quoting* *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 77 (2000) ("*Bush I*") (per curiam)). As it fully set out in its answer to the Secretary's Petition:

[T]he U.S. Constitution also places crucial and inviolate prohibitions on judicial rewriting of the Election Code. The Elections Clause directs that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed by the Legislature thereof," subject to directives of Congress. U.S. CONST. art. I, § 4, cl. 1 (emphasis added). Likewise, the Electors Clause directs that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," electors for President and Vice President. U.S. CONST. art. II, § 1, cl. 2.

The Electors Clause in particular "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment of electors. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). "Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance." *Bush v. Gore*, 531 U.S. at 112-13 (Rehnquist, J., concurring). "A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question," including when such departure is carried out by the state judiciary. *Id.* at 113. "[W]ith respect to a Presidential election," state

courts must be “mindful of the legislature’s role under Article II in choosing the manner of appointing electors.” *Id.* at 114. For this reason as well, the Court may not deviate from Act 77’s plain text or rewrite the Election Code.

Ans. at 23-24.

Petitioner also argued that the Secretary’s novel construction of state election law, which would invalidate in-person votes due to signature mismatch but not mail votes, “would raise significant constitutional issues” under the Equal Protection and Due Process Clauses. *Id.* at 13 (*citing Bush II*, 531 U.S. at 104-05 (per curiam); *see also* Ans. at 3, 30 (elaborating on the Due Process and Equal Protection violations that would occur if the Secretary’s construction were adopted)).

B. *Canvassing Observation* Eviscerated the Campaigns’ Statutory Right to Meaningfully Observe Canvassing of Mail Ballots

Building on its holding that state law did not permit signature verification or permit challenges of mail ballots during the canvassing process beginning on Election Day, the Pennsylvania Supreme Court held in the second case at issue that the requirements of state law mandating that campaign representatives be allowed “to be present” and “to remain in the room” during the canvassing process – 25 P.S. §§ 3146.8(b), 3146.8(g)(1.1) – did not actually require “meaningful” observation. *Canvassing Observation*, Pet. App. B, at 17-19. Overruling the Commonwealth Court, the Supreme Court held that mere presence at one end of a “room” as large as the Philadelphia Convention Center was sufficient, even when that resulted in the statutorily-authorized observers being as far as 100 feet away from some of the canvassing tables. Petitioner challenged the interpretation of these statutory

provisions before the Pennsylvania Supreme Court. *See Canvassing Observation*, Initial Brief of Appellee Donald J. Trump for President, Inc., filed Nov. 13, 2020, at 18-20. Petitioner’s challenge to the interpretation of these state laws constitutes a federal question when presidential elections are at issue. *See Bush II*, 531 U.S. at 113 (“A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question”) (Rehnquist, C.J., concurring); *see also Case of Electoral Coll.*, 8 F. Cas. 427, 432–33 (C.C.D.S.C. 1876) (“When the legislature of a state, in obedience to [Article II, § 1], has by law directed the manner of appointment of the electors, that law has its authority solely from the Constitution of the United States. It is a law passed in pursuance of the Constitution.”).

C. *Canvass of Absentee and Mail-In Ballots* Eviscerated the Requirement that Mail Voters “Fill Out” the Declaration, Which Has Long Included the Voter’s Current Address and Date

Concluding its trifecta of altering existing requirements for casting mail ballots, the Pennsylvania Supreme Court then determined that the statutory requirement that mail voters “*shall* then fill out, date, and sign” the declaration on the outer envelope, 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added), was not mandatory. *Canvass of Absentee and Mail-In Ballots* (Pet. App. A), at 19-20, 34. Although the declaration had long included a place for mail voters to date, sign, and confirm their address—an important requirement to ensure continued eligibility to vote—the Court held that the phrase, “fill out,” was ambiguous and therefore could

not apply to the address requirement.¹⁰ *Id.*, at 14-25.¹¹ Similarly, the Court held that the requirement that mail voters “*shall ... date*” the declaration was not mandatory because, in the Court’s view, it served no purpose. The notion that absentee ballots dated *before* they were even sent to the voter would provide evidence that the ballot had been fraudulently cast apparently escaped the Court’s attention. In addition, given the Pennsylvania Supreme Court’s decision in *November 3, 2020 Gen. Election* extending the date by which mail ballots may be received to 5 p.m. on the Friday following the election, the date requirement ensures that the ballot was not filled out after Election Day.

Ironically, in the guidance issued on September 11, 2020, Secretary Boockvar recognized and directed that “the county board of elections *shall* examine the Voter’s Declaration on the outer envelope of each returned ballot and compare the information on the outer envelope, *i.e., the voter’s name and address*, with information

¹⁰ Under Pennsylvania law, a voter may vote in an election after moving by completing a form. *See, e.g.,* 25 P.C.S. §§ 1323, 1328, 1901, 1902; *see also Public Interest Legal Found. v. Boockvar*, No. 1:20-cv-1905, 2020 U.S. Dist. LEXIS 193577, at *3 n.2 (M.D. Pa. Oct. 20, 2020) (when voters fail to confirm their continued residence and are deemed inactive, they “can still vote on Election Day, but they must sign an affirmation that they still live at the address currently on file with the board of elections.”). The address requirement allows election officials to determine whether the voter still resides at the address to which the mail ballot is issued. In addition, requiring the person filling out the ballot to hand-write the address is an impediment to fraud.

¹¹ The Court also dispensed with the “address” requirement by noting it had been added to the Declaration by the Secretary pursuant to authority delegated from the Legislature, not by the Legislature itself. *Canvass of Absentee & Mail-In Ballots* (Pet. App. A), at 23-27 (*citing In re Nov. 3, 2020 Gen. Election*, (Pet. App. C), at 27; 25 P.S. §§ 3146.6(a)(3), 3150.16(a.1)). It had been a part of the absentee ballot declaration for a very long time, however, so the post-election change to this long-standing election requirement is itself problematic, quite apart from any Article II violation. *See Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006).

contained in” the above-referenced voter files. Boockvar 9/11/20 Guidance, at 3. Then, a few weeks later, she issued an additional guidance, specifically directing that “A ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted.” Boockvar 9/28/20 Guidance, at 5. Because most Pennsylvania counties completed their canvassing of mail ballots in accord with the statutory requirements, as confirmed by Secretary Boockvar’s guidances, the Pennsylvania Supreme Court’s *post-election* alteration of those statutory requirements, which affected two large (and heavily Democrat) counties still canvassing their mail ballots, namely, Philadelphia and Allegheny, was therefore not just an Article II violation, but an Equal Protection violation as well.¹²

In its brief on appeal in the Commonwealth Court of Appeals, Petitioner challenged the erroneous interpretation given by the Philadelphia County Board of Elections and the Court of Common Pleas to Pennsylvania’s statutory requirement that a mail voter “fill out, date, and sign” the Declaration. *See Canvass of Absentee & Mail-In Ballots*, Petitioner’s Brief of Nov. 18, 2020 (Case No. 1136 C.D. 2020), at 26-32. Petitioner also argued in that brief that the courts “cannot ignore the clear mandates of the election code.” *Id.* at 32 (the Article II issue). It argued at length

¹² Two other Democrat-controlled counties – Bucks and Montgomery – also “did not follow” Secretary Boockvar’s guidance and counted mail ballots that were not filled out in full. *See Canvass of Absentee & Mail-in Ballots* (Pet. App. A), at 33, n.6 (citing *In re Canvass of Absentee and/or Mail-in Ballots of Nov. 3, 2020 Gen. Election, Petition of Donald J. Trump for President, Inc.*, No. 2020-05786-35 (Bucks Cty. Ct. Com. Pl. Nov. 19, 2020)); *Donald J. Trump for President, Inc. v. Montgomery Cnty. Bd. of Elections*, No. 2020-18680 (Nov. 13, 2020)).

that treating the “shall” in the statutory “fill out, date and sign” provision as directory rather than mandatory “raises serious equal protection concerns.” *Id.* at 29-30. That brief was then brought forward to the Pennsylvania Supreme Court when that Court accepted review. *See* Order of Nov. 18, 2020 (Case No. 93 EM 2020). In addition to the Equal Protection issue raised in the brief, Petitioner’s challenge to the erroneous interpretation of these state laws constitutes a federal question when presidential elections are at issue. *See Bush II*, 531 U.S. at 113 (“A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.”) (Rehnquist, C.J., concurring); *see also Case of Electoral Coll.*, 8 F. Cas. 427, 432–33 (C.C.D.S.C. 1876) (“When the legislature of a state, in obedience to [Article II, § 1], has by law directed the manner of appointment of the electors, that law has its authority solely from the constitution of the United States. It is a law passed in pursuance of the Constitution.”).

D. Other Article II Violations

Petitioners do not mean to suggest that these were the only actions taken in Pennsylvania which violated Article II. In addition to the three Pennsylvania Supreme Court cases at issue, as well as the *Boockvar* case already pending before this Court, other Pennsylvania courts have changed the rules of the 2020 presidential, contrary to the dictates of the Legislature. By way of example, the Pennsylvania Commonwealth Court conceded that Pennsylvania’s “directive [to securely seal the ballot secrecy envelope] is mandatory such that an elector’s noncompliance results in a ballot that is not valid is supported by the statutory

language and [the Pennsylvania Supreme Court’s decision in] *Boockvar*,” but chose to “give prospective application” to a “strict interpretation” of the law Election Code due to the “tremendous challenges presented by the massive expansion of mail-in voting” for the 2020 election. *In re Canvass of Absentee and/or Mail-in Ballots of Nov. 3 General Election*, No. 1191 C.D. 2020 (Commw. Ct. Nov. 25, 2020), at 13-14. Unlike the multiple cases where it granted extraordinary review to Secretary Boockvar, the Pennsylvania Supreme Court denied Petitioner’s application for review in this case. *See* Order of December 8, 2020 (Case No. 676 MAL 2020).

III. The 2020 Pennsylvania Election Results

According to the 2020 election returns, President Trump received 2,731,230 votes on election day, 595,538 votes by mail ballots and 50,874 votes by provisional ballot, for a total of **3,377,642** votes. Former Vice President Biden received 1,409,341 votes on election day, 1,995,691 votes by mail ballot and 53,168 votes by provisional ballot, for a total of **3,458,200** votes. The difference is **80,558** votes.¹³

In the 2018 General Election, when election officials were permitted to review, and candidates and parties were permitted to challenge absentee ballots, an average of 4.5% of the ballots were disallowed across Pennsylvania, with an even higher percentage, generally between 4.3 and 8.0 percent, in larger Democrat controlled counties (such as Montgomery and Philadelphia).¹⁴ In contrast, in the 2020 general

¹³ *See* <https://www.electionreturns.pa.gov/#>. The total votes listed on that site do not precisely match the sum of the three vote categories.

¹⁴ *See* <https://dig.abclocal.go.com/ccg/interactives/mail-ballots-rejected-map/index.html>.

election with over 2.6 million persons voting by mail – almost all for the first time – when neither election officials or candidates were permitted to review or contest the signatures, address, and date during the canvassing of mail ballots for the first time in Pennsylvania’s history, less than 0.28% percent were disqualified according to public sources, 1/16th the rate from the 2018 election.¹⁵ That disparity alone involves more ballots than the current margin of votes between the two candidates.

REASONS FOR GRANTING THE WRIT

I. By Eviscerating Election Law Enacted By the Pennsylvania Legislature Pursuant to Authority Derived from Article II of the Federal Constitution, the Pennsylvania Supreme Court Has Decided an Important Federal Question in a Way that Conflicts with Decisions of this Court

This Court has long held that Article II of the Constitution gives to the *Legislatures* of the States the exclusive power to determine the manner of choosing presidential electors. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). That power is “plenary.” *Bush II*, 531 U.S. at 104; *McPherson*, 146 U.S. at 25.

During the early part of our nation’s history (and, in one instance, all the way up through the election of 1860), most state legislatures simply chose electors themselves. *See McPherson*, 146 U.S. at 29-32. Florida’s Legislature assigned itself the power of choosing electors in 1868, and Colorado’s Constitution did the same in 1876 upon that State’s admission to statehood. *Id.* at 33. Although all 50 state legislatures have now chosen popular vote as the “manner” of choosing electors, *see*

¹⁵ See https://ballotpedia.org/Election_results,_2020:_Analysis_of_rejected_ballots.

Bush II, 531 U.S. at 104 (“History has now favored the voter”), that popular vote must be conducted “as the legislature has prescribed.” *Id.*

State legislatures do not act “solely under the authority given [them] by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.” *Bush I*, 531 U.S. at 76. The function of state legislature in carrying out a federal function derived from the U.S. Constitution “transcends any limitations sought to be imposed by the people of a State.” *Leser v. Garnett*, 258 U.S. 130, 137 (1922). “The appointment of ... electors is ... placed absolutely and wholly with the legislatures of the several States.” *McPherson*, 146 U.S. at 34-35; *see also Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

A. The Three Decisions Violated Article II By Changing the Law During the Election.

The exercise of the fundamental right to vote for presidential electors in the 2020 general election in Pennsylvania did not occur “as the legislature ha[d] prescribed.” As described above, non-legislative officials, oftentimes at the instigation of partisan third parties, ignored or significantly altered and thereby violated state election law, including, most troublingly, laws enacted to minimize the risk of fraud in mail voting and thereby protect the integrity of the election process. The decisions of the Pennsylvania Supreme Court, an elected body, also raised serious concerns whether these were partisan attempts to assist the Democratic candidate whose campaign strategy of utilizing mail ballots was well publicized, in comparison to President’s Trump’s well-known strategy to encourage in-person voting.

First, November 3, 2020 Gen. Election (Pet. App. C) changed the law to prohibit signature verification on mail-ballot declarations and eliminated the statutory right for parties and campaigns to challenge mail ballots during canvassing beginning on Election Day.

Second, Canvassing Observation (Pet. App. B) eliminated the campaigns' statutory right to meaningfully observe canvassing of mail ballots beginning on Election Day.

Third, Canvass of Absentee & Mail-In Ballots (Pet. App. A) eliminated or modified statutory requirements for signing, addressing, and dating mail ballot declarations.

In sum, the three Pennsylvania Supreme Court decisions at issue are contrary to established precedent of this Court. Moreover, the enormity of potential election consequences necessitates this Court granting the petition for writ of certiorari.

B. This Court Should Independently Examine Pennsylvania's Election Laws, Which The Pennsylvania Supreme Court Erroneously and Dramatically Changed During the Presidential Election

Pennsylvania is apparently of the view that the manner for choosing electors established by the state legislature is conditional, subject to alteration by “interpretation” by election officials in the executive branch or by the judiciary. The Secretary erroneously noted in her Application that “[t]he U.S. Constitution assigns to the states primary responsibility for determining the manner of selecting Presidential electors ... and [the Pennsylvania Supreme Court] is the ultimate

expositor of state law.” *November 3, 2020 Gen. Election*, Secretary’s Application for Invocation of King’s Bench filed Oct. 4, 2020, at 14.

Contrary to the Secretary’s claim, the Constitution does not assign the power to “the states,” of course, but rather to the “Legislature” of the State. U.S. Const. Art. II, § 1, cl. 2. And because an election law enacted for the choosing of presidential electors “has its sole authority from the constitution of the United States,” *Case of Electoral Coll.*, 8 F. Cas. at 432, neither is it true that the state’s Supreme Court is the ultimate expositor of that law. By relying on the erroneous interpretations of state law in the judgments at issue here, Pennsylvania thus advanced the position that non-legislative officials—executive (both statewide and local) and judicial—had the authority to alter the state’s election law, and conceded that they had in fact done so. That, too, is contrary to this Court’s precedents.

To be sure, “[a]s a general rule, this Court defers to a state court’s interpretation of a state statute.” *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000) (“*Bush I*”); see also *Bush v. Gore* [*Bush II*], 531 U.S. at 113 (Rehnquist, C.J., concurring). “In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law.” *Bush II*, *supra*, at 112. “But in the case of a law enacted by a state legislature applicable ... to the election of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.” *Bush I*, 531 U.S. at 76. As Chief Justice Rehnquist noted, selecting the manner of choosing presidential

electors is an “exceptional cas[e] in which the Constitution imposes a duty or confers a power on a particular branch of a State’s government,” namely, the *Legislature* of the State. *Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring). In such a case, “the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.” *Id.*

Thus, “[i]n order to determine whether a state court has infringed upon the legislature’s authority, [this Court] necessarily must examine the law of the State as it existed prior to the action of the court.” *Id.* at 114. This is therefore one of the “areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law.” *Id.* (citing *Mullaney v. Wilbur*, 421 U.S. 684 (1975), *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and *Bowie v. City of Columbia*, 378 U.S. 347 (1964)).

Each decision at issue in this petition involved a substantial departure from prior caselaw and the mandates of unambiguous statutes adopted by the *Legislature* of the State. *November 3, 2020 Gen. Election* eviscerated statutory language that county election boards “*shall* examine the declaration on the [outer] envelope of each [mail] ballot ... and *shall* compare the information thereon”—which includes the voter’s signature—to the relevant mail voter files in order to determine whether the declaration is “sufficient.” 25 P.S. § 3146.8(g)(3) (emphasis added). It also eliminated the statutory right provided by 25 P.S. § 3146.8(f) for campaigns to challenge mail ballots beginning on Election Day. *Canvassing Observation* inexplicably held that statutory requirements allowing campaign representatives and watchers to the

“present” and “to remain in the room” during the canvassing process, 25 P.S. §§ 3146.8(b), 3146.8(g)(1.1), in order to be able to verify that the process was being conducted according to law did not actually require “meaningful” observation. And *Canvass of Absentee and Mail-In Ballots* strangely held that “shall” means “may” and eliminated long-standing requirements that mail ballots be signed with addresses and dates. Two of the three decisions were subject to cogent dissents. The leaders of both the Pennsylvania House of Representatives and the Senate, vehemently disagreed with the Pennsylvania Supreme Court’s “interpretation” of state law.¹⁶

Because these statutes were enacted by the Legislature for use in *federal* elections, review by this Court to ensure a proper interpretation of the law would “not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*.” *Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring). “To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate [the Court’s] responsibility to enforce the

¹⁶ See, e.g., *November 3, 2020 Gen. Election*, Brief of proposed-Intervenors, Joseph B. Scarnati III, Pennsylvania Senate President Pro Tempore, and Jake Corman, Senate Majority Leader, filed Oct. 7, 2020, at 3-6 (Secretary Boockvar “seeks to disrupt Pennsylvania’s clear and unambiguously crafted procedures for determining and challenging the validity of an absentee or mail-in ballot and/or application” and “asks th[e] Court to rewrite existing law ...”); *Canvassing Observation*, Brief of proposed-Intervenor Appellees Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and House Majority Leader Kerry Benninghoff, filed Nov. 13, 2020, at 4, 8-10 (“The General Assembly plainly did not craft detailed watcher and candidate access provisions only for those representatives to be shuttled so far away from the operations of the canvassing process that they have no meaningful opportunity to observe the process” as “[s]uch an absurd result would be in clear violation of the Election Code and the Pennsylvania Rules of Statutory Construction.”).

explicit requirements of Article II.” *Id.* at 115. This Court should therefore grant the writ in order to fulfill its responsibility to enforce Article II.

II. This Court Should Re-Affirm That Federal Courts Have The Power To Remedy Violations of Article II.

This Court adjudicates cases arising under the Constitution and laws of the United States, of course. It does not decide elections. That is the role of voters who cast lawful ballots. But the Constitution does contain rules that are obligatory on all agents of government—including those who conduct elections. Under Article II, the “manner” set out by the Legislature via the statutes it has adopted are part of those constitutional rules.

It is therefore well within this Court’s authority to re-affirm by declaratory and injunctive relief that only the state legislature has the power to adopt a statutory scheme for choosing presidential electors; that alterations to that scheme by non-legislative officials in the state are both illegal and unconstitutional; and that election results affected in a way greater than the margin between candidates cannot be validly certified. At that point, a couple of avenues for resolution present themselves.

First, applying long-standing burden-shifting doctrine, state election officials or federal district courts could recertify the existing results if, and only if, they can establish the validity of a sufficient number of the mail ballots to sustain the existing certification. *See, e.g., Warf v. Bd. of Elections*, 619 F.3d 553, 561-62 (6th Cir. 2010) (“once the contestant has made a showing of irregularity, ... contestee must then come forward with evidence of substantial compliance with balloting procedures”); *Wilkes-*

Barre Election Appeals, 1967 Pa. Dist. & Cnty. Dec. LEXIS 9, *16 (Pa.Com.Pl. Luz. Cnty. Dec. 27, 1967) (concluding that where “challenger has presented a prima facie case to substantiate his challenge [to absentee ballot,] ... the burden of proof shifted to the voter to establish her position.”).

Second, alternatively, the matter can be remanded to allow the State Legislature to consider whether the violations of its state law yielded a significant enough number of illegally-cast votes to have altered the results of the election. If they did, the Legislature has it within its power under Article II to certify the slate of electors that obtained the majority of *lawfully* cast ballots and submit that certification to the President of the Senate prior to January 6, 2021, the date set by statute for the meeting of the Joint Session of Congress to count electoral votes. *See McPherson*, 146 U.S. at 25 (“Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, *there is no doubt of the right of the legislature to resume the power at any time*, for it can neither be taken away nor abdicated”) (emphasis added, quoting with approval Senate Rep. 1st Sess. 43d Cong. No. 395). This power is also recognized by federal law, which provides that “[w]hensoever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.” 3 U.S.C. § 2.

Only by pursuing such a course will the public’s faith in the election process be restored, and only then will voters on either side of the intensely partisan divide be

able to find solace in a result that was obtained after a fair electoral fight, where every *legal* vote was counted but where those votes were not diluted or negated by the casting and counting of *illegal* votes.

III. The Pennsylvania Court Decisions Create a Mail Ballot Statutory Scheme That Is So Porous That It Gave Rise To Due Process and Equal Protection Violations That Should Be Reviewed by this Court.

A. Due Process Was Violated By The Three Pennsylvania Supreme Court Decisions

When election practices reach “the point of patent and fundamental unfairness,” the integrity of the election itself violates substantive due process. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978). *See also Roe v. Alabama*, 43 F.3d 574, 580-81 (11th Cir. 1995) (“retroactive change in the election that [would] effectively ‘stuff the ballot box,’ implicat[es] fundamental fairness”). Further, a “fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Matthews v. Eldridge*, 424 U.S. 319, 333 (1975) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). *See also Lachance v. Erickson*, 522 U.S. 262, 266 (1998) (“The core of due process is the right to notice and a meaningful opportunity to be heard.”). The absence of meaningful safeguards in an election violates the Due Process Clause.

Specifically, the three Pennsylvania Supreme Court decisions taken together (a) prohibit signature verification by the boards of elections, (b) remove the requirement that voters address and date mail ballots, and (c) deny candidates the statutory rights to challenge whether signatures on mail ballots are genuine,

meaningfully observe the canvassing by which mail are processed, and enforce the requirements that mail ballot declarations are properly signed, addressed, and dated before they are opened, mixed, and counted. In short, the three decisions eliminated all “meaningful safeguards” designed to protect against fraud in the mail ballot process. Once the mail ballots are opened, mixed, and counted, no post-election challenge can match a defective ballot to its vote. The toothpaste is forever out of the tube. Changing longstanding rules in the middle and after a presidential election violates due process.

B. The Equal Protection Clause Was Violated By Different Voting Standards Being Used In Different Counties

The Equal Protection Clause of the United States Constitution prohibits the use of different standards in the treatment and tabulation of ballots within a state. “Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush II*, 531 U.S. at 104-05 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)). “It must be remembered that ‘the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.’” *Bush II*, 531 U.S. at 105 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

As set forth above, state and local officials and the judiciary applied different voting standards in different counties in Pennsylvania in the general election of November 3, 2020 in violation of the Equal Protection Clause. Specifically, while many counties (controlled by Republicans and supportive of President Trump)

enforced the standards promulgated by Secretary Boockvar before the election and carefully reviewed mail ballot declarations, key Democratic counties – Philadelphia and Allegheny – at issue in *Canvassing of Absentee and Mail-in Ballots* did not. This resulted in mail ballot voters being treated differently depending on the county in which they resided, and mail ballots for President Trump and his opponent being treated differently depending on the counties in which they were canvassed, violating Equal Protection in two ways. See *Marks v. Stinson, supra*. (election officials favoring one candidate over the other violated equal protection.)

IV. The Court's Intercession Is Necessary To Uphold The Rule of Law And To Put the Country at Ease, To The Extent Possible in these Tumultuous Times

“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Even the appearance of fraud in a close election is poisonous to democratic principles: “Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); see also *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 189 (2008) (States have an interest in preventing voter fraud and ensuring voter confidence). Few things contribute more to the appearance of fraud than partisan election officials altering statutory requirements designed to protect against fraud. Equally concerning is the appearance that Pennsylvania’s elected Supreme Court may have engaged in partisan decision-making designed to favor the Democratic presidential candidate over the Republican.

Our country is deeply divided in ways that it arguably has not been seen since the election of 1860. There is a high level of distrust between the opposing sides, compounded by the fact that, in the election just held, election officials in key swing states, for apparently partisan advantage, failed to conduct their state elections in compliance with state election law. Indeed, a poll taken shortly after the election by the reputable Rasmussen polling firm indicated that 47% of all Americans (including 75% of Republicans and 30% of Democrats), believed that it was “likely” or “very likely” the election was stolen from the current incumbent President.

The fact that nearly half of the country believes the election was stolen should come as no surprise. President Trump prevailed on nearly every historical indicator of success in presidential elections. For example, he won both Florida and Ohio; only one candidate in history—Republican or Democrat—has ever lost the election after winning both States. And he won these traditional swing states by large margins—Ohio by 8 percentage points and 475,660 votes; Florida by 3.4 percentage points and 371,686 votes. He won 18 of the country’s 19 so-called “bellwether” counties—counties whose vote, historically, almost always goes for the candidate who wins the election. Initial analysis indicates that he won 26 percent of non-white voters, the highest percentage for any Republican candidate since 1960. A large percentage of the American people know or at least strongly believe that something is deeply amiss.

When election officials conduct elections in a manner that violates state election law and thereby contravenes the Constitution of the United States, grave harm is done not just to the candidates on the ballot but to the citizenry’s faith in the

election process itself. Partisan judicial decisions add to this harm. Compliance with state election law is no mere procedural requirement. For without compliance with the rule of law, elections are subject to the very real prospect that fraud could occur in the election. Altering or suspending state laws designed to minimize the risk of fraud in the casting of mail ballots, as occurred in this case, only exacerbates that concern.

The decision by Pennsylvania election officials, ratified by the Pennsylvania Supreme Court, to prevent meaningful access by election observers, is equally troubling, not only domestically, but internationally as well. Indeed, meaningful access by observers is one of the factors relied on by both the United Nations¹⁷ and our own State Department¹⁸ in determining whether foreign elections are conducted in a free and fair manner. By failing to follow the rule of law, Pennsylvania's election officials and its Supreme Court put our nation's belief in elected self-government at risk, and undercut our credibility on the world stage.

¹⁷ The United Nations Declaration of Principles for International Election Observation (endorsed by, among others, the Organization of American States, of which the United States is a member) acknowledges the importance of "political contestants" being "allowed to monitor all processes related to elections and observe procedures, including among other things the functioning of electronic and other electoral technologies inside polling stations, counting centers and other electoral facilities, as well as the transport of ballots and other sensitive materials." DECLARATION OF PRINCIPLES FOR INTERNATIONAL ELECTION OBSERVATION, Principal 14, p. 5 (Oct. 27, 2005). Available at: https://www.ndi.org/sites/default/files/1923_declaration_102705_0.pdf.

¹⁸ The United States State Department has also found that "prohibition of local independent observers at polling stations" is one of the factors demonstrating that elections are "not free and fair." Michael Pompeo, "Press Statement: Presidential Elections in Belarus" (Aug. 10, 2020). Available at: <https://www.state.gov/presidential-elections-in-belarus/>.

Our constitutional republic has endured for nearly two and a half centuries based on the consent of the governed. That consent is grounded in the confidence of our people in the legitimacy of our institutions of government. But that legitimacy can only be sustained if the elections through which the sovereign people determine the direction of their government are free and fair. Fortunately, the Framers of our Constitution built a remedy for such concerns into the system, namely, an independent federal judiciary, free of the passions of politics, which can review dispassionately even intense controversies such as those swirling around this election. It is therefore the most solemn duty of this Court to objectively review the facts and legal issues presented by the Petitioner in this historic case, render judgment upon the unconstitutional actions that occurred in Pennsylvania, and restore the confidence of all Americans that the rule of law will be upheld today and that our elections in the future will be secure.

V. The Issues Addressed by this Petition Are Not Moot

Respondents may contend that these cases are moot because Pennsylvania's certified electors already met on December 14, 2020, cast their votes for President, and transmitted those votes to the President of the Senate, as specified by federal law. *See* 3 U.S.C. §§ 7, 11. But in Pennsylvania (as well as in six other states), two different slates of electors met, cast votes, and transmitted those votes to the President of the Senate. *See* Ivan Pentchoukov, "Electors in 7 States Cast Dueling

Votes for Trump,” The Epoch Times (Dec. 15, 2020).¹⁹

Though rare, such a thing has happened twice before in our nation’s history when election challenges such as this were still underway on the date Congress had designated for electors to meet and vote. In 1960, Hawaii’s Governor had certified Vice President Richard Nixon as the winner of that state’s electors. Those electors met on the designated day and cast their votes. But because challenges to the results of the election were still pending, the electors pledged to Senator John Kennedy also met and cast their votes. When it was subsequently determined that Senator Kennedy had won the election, those electoral votes were the ones counted during the joint session of Congress in January 1961.²⁰

The election of 1876 likewise yielded multiple slates of electors from several states, namely, Florida, Louisiana, Oregon, and South Carolina. The legal challenges that swirled around that election dispute were only deemed moot once a commission established by Congress determined that Rutherford B. Hayes had prevailed, and then only after he was inaugurated on March 4, 1877.²¹ This case will therefore not be moot at least until January 20, 2021—the day the Constitution now sets as inauguration day.

¹⁹ Available at: https://www.theepochtimes.com/mkt_app/electors-in-7-states-cast-dueling-votes-for-trump_3620059.html.

²⁰ Jack M. Balkin, BUSH V. GORE AND THE BOUNDARY BETWEEN LAW AND POLITICS, 110 Yale L.J. 1407, 1421 n. 55 (2001).

²¹ See generally, William H. Rehnquist, Centennial Crisis: The Disputed Election of 1786 (Vintage 2005).

None of the other election dates, such as the so-called December 8, 2020 “safe harbor” date established by 3 U.S.C. § 5 or even the January 6, 2021 date for the joint session of Congress established by 3 U.S.C. § 15, are constitutionally required.²² Indeed, if this Court vacated a State’s appointment of presidential electors has having been illegally certified because of illegal and unconstitutional conduct by election officials, those electoral votes would not be counted in the joint session of Congress on January 6, 2021.

Even the swearing in of the next President on January 20, 2021, will not moot this case because review could outlast the selection of the next President under “the ‘capable of repetition, yet evading review’ doctrine,” which applies “in the context of election cases ... when there are ‘as applied’ challenges as well as in the more typical case involving only facial attacks.” *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 463 (2007) (internal quotations omitted); accord *Norman v. Reed*, 502 U.S. 279, 287-88 (1992). The legal issues presented by this petition, namely, whether the alteration of state election laws by non-legislative officials in the states is unconstitutional, will likely recur in future elections—including in the presidential election in 2024, in which Petitioner is constitutionally eligible to run. Mootness is therefore not, and

²² Specifically, nothing in Pennsylvania law suggests that the Legislature had adopted a scheme designed to comport with 3 U.S.C. § 5 “safe harbor” provision. Section 3456 provides no deadline for concluding an election contest challenging a presidential election. 25 P.S. § 3456. Section 3159 provides no deadline for the Secretary of the Commonwealth to “certify and file” election returns. 25 P.S. § 3159. Further, Section 3166, which governs “Presidential electors,” provides no deadline for the Secretary to “receiv[e] and comput[e] the returns of the election of presidential electors,” and “lay them before the Governor.” 25 P.S. § 3166.

will not become, an issue.

CONCLUSION

In October 2019, the Legislature of the Commonwealth of Pennsylvania allowed for no-excuse mail voting for every eligible voter in the state, but it kept in place long-standing validation and observer requirements to protect against fraud in the casting and canvassing of mail ballots, which are “the largest source of potential voter fraud.” Carter-Baker Report, *supra*. Pennsylvania election officials, in conjunction with the Pennsylvania Supreme Court, altered or dispensed with those significant “meaningful safeguards” in the recent General Election. Because that election included the choice of presidential electors, the alterations to statutory requirements contravened Article II, Section 1 of the Constitution, which assesses plenary power to the *Legislature* to determine the manner of choosing electors.

The effect of these illegal and unconstitutional changes to state election law affected enough ballots to alter the results of the election. Certiorari is warranted so that this Court can reaffirm its prior Article II holdings that only the *Legislature* of a state can alter election laws utilized in the choice of presidential electors, and to provide redress for the breaches of that constitutional requirement that occurred in these cases.

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APPENDIX A

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**[J-118A-2020, J-118B-2020, J-118C-2020, J-118D-2020, J-118E-2020 and J-118F-2020]
IN THE SUPREME COURT OF PENNSYLVANIA**

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION	: No. 31 EAP 2020 : : : : : SUBMITTED: November 18, 2020
APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	: : :
IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION	: No. 32 EAP 2020 : : : : : SUBMITTED: November 18, 2020
APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	: : :
IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION	: No. 33 EAP 2020 : : : : : SUBMITTED: November 18, 2020
APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	: : :
IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION	: No. 34 EAP 2020 : : : : : SUBMITTED: November 18, 2020
APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	: : :
IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION	: No. 35 EAP 2020 : : : : : SUBMITTED: November 18, 2020

APPEAL OF: DONALD J. TRUMP FOR
PRESIDENT, INC.

IN RE: 2,349 BALLOTS IN THE 2020
GENERAL ELECTION

APPEAL OF: ALLEGHENY COUNTY
BOARD OF ELECTIONS

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No. 29 WAP 2020

Appeal from the Order of the
Commonwealth Court entered
November 19, 2020 at No. 1162 CD
2020, reversing the Order of the
Court of Common Pleas of Allegheny
County entered November 18, 2020
at No. GD 20-011654 and remanding

SUBMITTED: November 20, 2020

*Justice Donohue announces the judgment of the Court,
joined by Justices Baer, Todd and Wecht, and files an
opinion joined by Justices Baer and Todd*

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

JUSTICE DONOHUE

DECIDED: November 23, 2020

These appeals present the question of whether the Election Code requires a county board of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or a date, where no fraud or irregularity has been alleged. Pursuant to our longstanding jurisprudence, central to the disposition of these appeals is whether the information is made mandatory by the Election Code or whether the inclusion of the information is directory, i.e., a directive from the Legislature that should be followed but the failure to provide the information does not result in invalidation of the ballot.

We are guided by well-established interpretive principles including that where the language of a statute is unambiguous, the language shall be controlling. 1 Pa.C.S. §

1921(b). In the case of ambiguity, we look to ascertain the legislative intent, and in election cases, we adhere to the overarching principle that the Election Code should be liberally construed so as to not deprive, inter alia, electors of their right to elect a candidate of their choice. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020). Stated more fully:

Election laws will be strictly enforced to prevent fraud, but ordinarily will be construed liberally in favor of the right to vote. All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor. Where the elective franchise is regulated by statute, the regulation should, when and where possible, be so construed as to insure rather than defeat the exercise of the right of suffrage. Technicalities should not be used to make the right of the voter insecure. No construction of a statute should be indulged that would disfranchise any voter if the law is reasonably susceptible of any other meaning.

Appeal of James, 105 A.2d 64, 65-66 (Pa. 1954).

Guided by these principles and for the reasons discussed at length in this opinion, we conclude that the Election Code does not require boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or date, where no fraud or irregularity has been alleged.

* * *

In connection with five of these consolidated appeals, Petitioner Donald J. Trump for President, Inc. (the "Campaign") challenges the decision of the Philadelphia County Board of Elections (the "Philadelphia Board") to count 8,329 absentee and mail-in ballots. The Campaign does not contest that these ballots were all timely received by the Philadelphia Board prior to 8:00 p.m. on November 3, 2020 (election day); that they were cast and signed by qualified electors; and that there is no evidence of fraud associated

with their casting. The Campaign instead contends that these votes should not be counted because the voters who submitted them failed to handwrite their name, street address or the date (or some combination of the three) on the ballot-return outer envelope. The Philadelphia County Court of Common Pleas, per the Honorable James Crumlish, upheld the Philadelphia Board's decision to count the ballots, ruling that the Election Code does not mandate the disqualification of ballots for a failure to include the challenged information, stressing that the inclusion or exclusion of this information does not prevent or promote fraud. The Campaign pursued an appeal to the Commonwealth Court. This Court granted the Philadelphia Board's application to exercise our extraordinary jurisdiction, 42 Pa. C.S. § 726, over these cases then pending in the Commonwealth Court.

At or around the same time that the matters were being litigated in Philadelphia, across the state in Allegheny County, Nicole Zicarelli, a candidate for the Pennsylvania Senate in the 45th Senatorial District (Allegheny-Westmoreland counties) challenged the November 10, 2020 decision of the Allegheny County Board of Elections (the "Allegheny County Board") to canvass 2,349 mail-in ballots that contained a signed – but undated – declaration. Again, all of the outer envelopes were signed, they are conceded to be timely and there are no allegations of fraud or illegality. On November 18, 2020, the Court of Common Pleas of Allegheny County, per the Honorable Joseph James, upheld the decision of the Allegheny County Board to count the ballots. *Zicarelli v. Allegheny County Board of Elections*, No. GD-20-011654 (Allegheny Cty. Ct. Com. Pl.). Zicarelli filed an appeal to the Commonwealth Court and an application in this Court requesting that we exercise extraordinary jurisdiction over her appeal. During the pendency of the

request to this Court, on November 19, 2020, a three-judge panel of the Commonwealth Court, with one judge dissenting, reversed the common pleas court decision.

On November 20, 2020, the Allegheny County Board filed an emergency petition for allowance of appeal, which we granted, limited to whether the ballots contained in undated outer envelopes should be invalidated. We stayed the order of the Commonwealth Court pending the outcome of this appeal and consolidated it with the Philadelphia Board cases.

In these appeals, we are called upon to interpret several provisions of the Election Code. We set them forth at the outset since they guide the resolution of these appeals.

Section 3146.6(a) provides as follows with respect to absentee ballots:

(a) Except as provided in paragraphs (2) and (3), at any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election, the elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. **The elector shall then fill out, date and sign the declaration printed on such envelope.** Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3146.6(a) (emphasis added).

Section 3150.16(a) sets forth the procedure for the submission of a mail-in ballot:

(a) General rule.--At any time after receiving an official mail-in ballot, but on or before eight o'clock P.M. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible

pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. **The elector shall then fill out, date and sign the declaration printed on such envelope.** Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3150.16(a) (emphasis added).

Sections 3146.4 and 3150.14(b) delegate to the Secretary of the Commonwealth the responsibility to prescribe the form of the elector's declaration on the outer envelope used to mail the absentee and mail-in ballots:

§ 3146.4. Envelopes for official absentee ballots

The county boards of election shall provide two additional envelopes for each official absentee ballot of such size and shape as shall be prescribed by the Secretary of the Commonwealth, in order to permit the placing of one within the other and both within the mailing envelope. On the smaller of the two envelopes to be enclosed in the mailing envelope shall be printed, stamped or endorsed the words "Official Election Ballot," and nothing else. **On the larger of the two envelopes, to be enclosed within the mailing envelope, shall be printed the form of the declaration of the elector, and the name and address of the county board of election of the proper county.** The larger envelope shall also contain information indicating the local election district of the absentee voter. **Said form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain among other things a statement of the electors qualifications, together with a statement that such elector has not already voted in such primary or election.** The mailing envelope addressed to the elector shall contain the two envelopes, the official absentee ballot, lists of candidates, when authorized by section 1303 subsection (b) of this act, the uniform instructions in form and substance as

prescribed by the Secretary of the Commonwealth and nothing else.

25 P.S. § 3146.4 (emphasis added).

§ 3150.14. Envelopes for official mail-in ballots

* * *

(b) Form of declaration and envelope.--**The form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain, among other things, a statement of the elector's qualifications, together with a statement that the elector has not already voted in the primary or election.**

25 P.S. § 3150.14(b) (emphasis added).

The pre-canvassing or canvassing of absentee and mail-in ballots proceed in accordance with the dictates of 25 P.S. § 3146.8(g)(3), as follows:

§ 3146.8. Canvassing of official absentee ballots and mail-in ballots

When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), **the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File" verifies his right to vote,** the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3) (emphasis added).

Pursuant to the authority granted in § 3150.14(b), the Secretary of the Commonwealth developed the following declaration used in connection with the 2020 General Election:

I hereby declare that I am qualified to vote from the below stated address at this election; that I have not already voted in this election; and I further declare that I marked my ballot in secret. I am qualified to vote the enclosed ballot. I understand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand I may only vote by provisional ballot at my polling place, unless I surrender my balloting materials, to be voided, to the judge of elections at my polling place.

[BAR CODE]

Voter, sign or mark here/Votante firme o margue aqui

X_____

Date of signing (MM/DD/YYYY)/Fechade firme (MM/DD/YYYY)

Voter, print name/Votante, nombre en letra de impreta

Voter, address (street)/Votante, dirreccion (calle)

[LABEL – Voters' name and address]

In addition, the Secretary issued guidance to the county boards of elections with respect to the examination of ballot return envelopes. First, on September 11, 2020, she issued the following guidance:

3. EXAMINATION OF DECLARATION ON BALLOT RETURN ENVELOPES:

The county board of elections is responsible for approving ballots to be counted during pre-canvassing.

To promote consistency across the 67 counties, the county boards of elections should follow the following steps when processing returned absentee and mail-in ballots.

After setting aside ballots of elector's who died prior to the opening of the polls, the county board of elections shall examine the Voter's Declaration on the outer envelope of each returned ballot and compare the information on the outer envelope, i.e., the voter's name and address, with the information contained in the "Registered Absentee and Mail-in Voters File, the absentee voter's list and/or the Military Veterans' and Emergency Civilians Absentee Voters File."

If the Voter's Declaration on the return envelope is blank, that ballot return envelope must be set aside and not counted. If the board determines that a ballot should not be counted, the final ballot disposition should be noted in SURE. The ballot return status (Resp Type) should be noted using the appropriate drop-down selection.

If the Voter's Declaration on the return envelope is signed and the county board is satisfied that the declaration is sufficient, the mail-in or absentee ballot should be approved for canvassing unless challenged in accordance with the Pennsylvania Election Code.

Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes, 9/11/2020, at 3. On September 28, 2020, the Secretary offered additional guidance on the treatment of ballot return envelopes:

With regard to the outer ballot-return envelope:

A ballot-return envelope with a declaration that is filled out, dated, and signed by an elector who was approved to receive an absentee or mail-in ballot is sufficient and counties should continue to pre-canvass and canvass these ballots.

A ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted. Ballot-return envelopes must be opened in such a manner as not to destroy the declarations executed thereon.

All ballot-return envelopes containing executed declarations must be retained for a period of two years in accordance with the Election Code.

* * *

Pre-canvass and Canvass Procedures

At the pre-canvass or canvass, as the case may be, the county board of elections should:

- Segregate the unopened ballots of voters whose applications were challenged by the challenge deadline (5:00 PM on the Friday before the election).
 - These ballots must be placed in a secure, sealed container until the board of elections holds a formal hearing on the challenged ballots.
 - Ballot applications can only be challenged on the basis that the applicant is not qualified to vote.
- Set aside the ballot of any voter who was deceased before election day.
- Set aside any ballots without a filled out, dated and signed declaration envelope.
- Set aside any ballots without the secrecy envelope and any ballots in a secrecy envelope that include text, mark, or symbol which reveals the identity of the voter, the voter's political affiliation (party), or the voter's candidate preference.

The Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis.

No challenges may be made to mail-in or absentee ballot applications after 5:00 pm on the Friday before the election.

No challenges may be made to mail-in and absentee ballots at any time based on signature analysis.

NOTE: For more information about the examination of return envelopes, please refer to the Department's September 11, 2020 *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes*.

Guidance Concerning Civilian Absentee and Mail-in Ballot Procedures, 9/28/2020, at 5, 8-9.

I. FACTUAL AND PROCEDURAL BACKGROUND

Pursuant to the General Assembly's passage of Act 77 of 2019, voters in Pennsylvania may cast their ballots in elections by absentee or no-excuse mail-in ballots. To do so, they must submit applications to county boards of elections, and in connection therewith must provide the address at which they are registered to vote. They must also sign a declaration affirming, among other things, that they are "eligible to vote by mail-in [or absentee] ballot at the forthcoming primary or election," and that "all of the information" supplied in the mail-in or absentee ballot application is "true and correct." 25 P.S. §§ 3150.12, 3146.2. Upon receipt of the application, the county board of elections must confirm the elector's qualifications and verify that the elector's address on the application matches the elector's registration. Upon the county board of elections' approval of the application, the elector is provided with a ballot, an inner "secrecy envelope" into which the ballot is to be placed, and an outer envelope into which the secrecy envelope is to be placed and returned to the board. The outer envelope has pre-printed on it (1) a voter's declaration, (2) a label containing the voter's name and address, and (3) a unique nine-digit bar code that links the outer envelope to the voter's registration file contained in the Statewide Uniform Registry of Electors ("SURE") system. After receiving the outer envelope, the board of elections stamps the date of receipt on it and then scans the unique nine-digit bar code, which links the voter's ballot to his or her registration file.

The pre-canvassing or canvassing of absentee and mail-in ballots then proceeds in accordance with the dictates of 25 P.S. § 3146.8(g)(3):

When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File" verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3).

Pursuant to this section, on November 9, 2020, the Philadelphia Board met to determine whether ballots separated into nine categories were "sufficient" to be pre-canvassed or canvassed. It concluded that four categories were not sufficient to be pre-canvassed or canvassed: (1) 472 ballots where the outer envelope lacked a signature and any other handwritten information; (2) 225 ballots where the outer envelope was not signed by the voter; (3) 112 ballots where the individual who completed the declaration appeared to be different from the individual who had been assigned the ballot; and (4) 4,027 ballots that were not submitted in a secrecy envelope.

In contrast, the Philadelphia Board approved as sufficient to be pre-canvassed or canvassed the ballots in five categories: (1) 1,211 ballots that lacked a handwritten date, address, and printed name on the back of the outer envelope (but were signed); (2) 1,259 ballots that lacked only a handwritten date on the back of the outer envelope (but were signed and contained a handwritten name and address); (3) 533 ballots that lack only a

handwritten name on the back of the outer envelope (but were signed and dated and contained a handwritten address); (4) 860 ballots that lack only a handwritten address on the back of the outer envelope (but were signed and dated and contained a handwritten name); (5) 4,466 ballots that lack only a handwritten name and address on the back of the outer envelope (but were signed and dated).

On November 10, 2020, the Campaign filed five pleadings entitled “Notice of Appeal via Petition for Review of Decision by the Philadelphia County Board of Elections,” one for each of the five categories referenced above that the Philadelphia Board approved as sufficient to be pre-canvassed or canvassed. In each petition for review, the Campaign alleged that this Court, in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), declared that absentee and mail-in ballots cast in violation of the Election Code’s mandatory requirements are void and cannot be counted. Petition for Review, 11/10/2020, ¶ 14. The Campaign further alleged that failures to include hand-written names, addresses and dates constituted violations of mandatory obligations under Sections 3146.6(a) and/or 3150.16(a) of the Election Code. *Id.* at 15-16. Accordingly, the Campaign alleged that the Board’s decisions with respect to the absentee and mail-in ballots in the above-referenced five categories were based on a clear error of law and must be reversed. *Id.* at 32.

On November 13, 2020, Judge Crumlish held oral argument on the issues raised in the Petition for Review. In response to questions from Judge Crumlish, counsel for the Campaign agreed that the Petition for Review was “not proceeding based on allegations of fraud or misconduct.” Transcript, 11/13/2020, at 13-14. She further agreed that the Campaign was not challenging the eligibility of the 8,329 voters in question and did not

contest either that all of the ballots at issue were signed by the voters or that they had been timely received by the Board. *Id.* at 30-31, 37. Instead, she indicated that the Campaign was “alleging that the ballots were not filled out correctly.” *Id.* at 14. Counsel for the DNC¹ argued that the failures to handwrite names, addresses and dates “are, at most, minor technical irregularities that the Supreme Court of Pennsylvania has repeatedly said do not warrant disenfranchisement.” *Id.* at 14. Counsel for the Philadelphia Board added that the Election Code includes no provision requiring “absolute technical perfection” when filling out the declaration on the outer envelope containing an absentee or mail-in ballot. *Id.* at 38.

Later that same day, Judge Crumlish entered five orders affirming the Philadelphia Board’s decision to count the contested ballots. In his orders, Judge Crumlish noted that while the declaration contained a specific directive to the voter to sign the declaration, it made no mention of filling out the date or other information. Trial Court Orders, 11/13/2020, ¶ 2. He further found that while the Election Code provides that while the voter shall “fill out” and date the declaration, the term “‘fill out’ is not a defined term and is ambiguous.” *Id.* at ¶ 4. He indicated that the outer envelope already contains a pre-printed statement of the voter’s name and address, and that “[n]either a date nor the elector’s filling out of the printed name or of the address are requirements necessary to prevent fraud.” *Id.* at ¶ 5-6. Concluding that “[t]he Election Code directs the Court of Common Pleas in considering appeals from the County Board of Elections to make such

¹ DNA Services Corp./Democratic National Committee (hereinafter “DNC”) intervened in the proceedings before the trial court.

decree as right and justice may require[.]” *id.* at ¶ 8 (quoting 25 P.S. § 3157), Judge Crumlish upheld the decision of the Philadelphia Board.

The Campaign filed appeals from Judge Crumlish’s orders in the Commonwealth Court on November 14, 2020, and the next day the Commonwealth Court issued an order consolidating the five appeals and setting an expedited briefing schedule. On November 17, 2020, the Philadelphia Board filed an application with this Court to exercise its extraordinary jurisdiction, 42 Pa.C.S. § 726, over the consolidated appeals, which we granted by order dated November 18, 2020.

In our order granting the Philadelphia Board’s application for the exercise of extraordinary jurisdiction, we stated the issue to be decided as follows:

Does the Election Code require county boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed their ballot’s outer envelopes but did not handwrite their name, their address, and/or a date, where no fraud or irregularity has been alleged?

On November 10, 2020, the Allegheny County Board decided to canvass 2,349 mail-in ballots that contained a signed but undated declaration. Zicarelli challenged the decision in an appeal to the court of common pleas ultimately heard and decided by the Honorable Joseph James. It was not disputed that all 2,349 voters signed and printed their name and address on the outer envelopes and returned the ballots to the Allegheny County Board on time. Each of the ballots was processed in the Statewide Uniform Registry of Electors (“SURE”) system and was time-stamped when it was delivered to the Allegheny County Board on or before November 3, 2020. At a hearing, via Microsoft Teams, on November 17, 2020, the Democratic Party and James Brewster (Zicarelli’s opponent in the 45th Senatorial District race) moved to intervene, which motion was

granted. At the hearing, Ziccarelli stated that she was not claiming voter fraud regarding the challenged ballots.

In an opinion and order dated November 18, 2020, Judge James affirmed the Allegheny County Board's decision to count the ballots. He concluded that the date provision in Section 3150.16(a) is directory, not mandatory, and that "ballots containing mere minor irregularities should only be stricken for compelling reasons," citing *Shambach v. Shambach*, 845 A.2d 793, 798 (Pa. 2004). Noting that the ballots were processed in the SURE system and time-stamped when delivered to the Allegheny County Board, he found that the technical omission of the handwritten date on a ballot was a minor technical defect and did not render the ballot deficient.

Ziccarelli immediately appealed Judge James' decision to the Commonwealth Court and contemporaneously filed an application to this Court requesting our exercise of extraordinary jurisdiction, noting that the issue presented was accepted by this Court as part of the Philadelphia Board appeals. While the application was pending, the Commonwealth Court ordered expedited briefing and on November 19, 2020, issued an opinion and order reversing the Court of Common Pleas of Allegheny County and remanded. *In Re: 2,349 Ballots in the 2020 General Election; Appeal of: Nicole Ziccarelli*, ___ A.3d ___, 1162 C.D. 2020 (Commw. Ct. 2020). Ziccarelli then withdrew her application for extraordinary jurisdiction.

On November 20, 2020, this Court granted the Allegheny County Board's Petition for Allowance of Appeal limited to the question of whether the ballots contained in undated but signed outer envelopes should be invalidated. The opinion of the Commonwealth

Court will be discussed, as necessary, in the analysis that follows. The order was stayed pending our disposition of these consolidated cases.

The pertinent scope and standard of review follow: the Court of Common Pleas' decision is reviewed on appeal "to determine whether the findings are supported by competent evidence and to correct any conclusions of law erroneously made." *In re Reading Sch. Bd. of Election*, 634 A.2d 170, 171–72 (Pa. 1993). The Court of Common Pleas, in turn, could reverse the Philadelphia Board's decision only for an abuse of discretion or error of law. *See Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952). As the issue involves the proper interpretation of the Election Code, it presents a question of law and our standard of review is de novo and our scope of review is plenary. *See, e.g., Banfield v. Cortés*, 110 A.3d 155, 166 (Pa. 2015).

II. ARGUMENTS OF THE PARTIES

Although more fully developed in our analysis set forth later in this opinion, we here briefly summarize the arguments of the parties and intervenors.

The Campaign argues that the General Assembly set forth in the Election Code the requirements for how a qualified elector can cast a valid absentee or mail-in ballot. Campaign's Brief at 22. One of those requirements is for each elector to "fill out, date, and sign" the declaration on the Outside Envelope. *Id.* (citing 25 P.S. §§ 3146.6(a) and 3150.16(a)). According to the Campaign, this Court has repeatedly ruled that the requirements of the sections of Election Code relevant here impose mandatory obligations, and that ballots cast in contravention of these requirements are void and cannot be counted. *Id.* at 23. As a result, the Campaign insists that the trial court erred

in affirming the Board's decision to count the 8,329 non-conforming absentee and mail-in ballots. *Id.*

The Philadelphia Board, conversely, contends that the Election Code does not require the Philadelphia Board to set aside timely-filed ballots by qualified electors that are merely missing handwritten names, street addresses, and/or dates on the signed voter declaration. Philadelphia Board's Brief at 12. Contrary to the Campaign's contention that the provisions of the Election Code at issue here impose exclusively mandatory requirements, the Philadelphia Board argues that Pennsylvania courts have long held that minor errors or omissions should not result in disenfranchisement, particularly in cases where the errors or omissions do not implicate the board's ability to ascertain the voter's right to vote or the secrecy or sanctity of the ballot. *Id.* Here, the Philadelphia Board notes that the Campaign does not allege that the voters at issue here were not qualified to vote and have not asserted that any fraud or other impropriety has occurred. *Id.* As such, it concludes that it acted properly and within its discretion in determining that these omissions were not a basis for setting aside those ballots. *Id.*

The DNC largely concurs with the Philadelphia Board's arguments, indicating that there is no statutory requirement that voters print their full name or address on the outer envelopes and that adding a date to the envelope serves no compelling purpose. DNC's Brief at 9-10.

Zicarelli argues further that, in regard to outer envelopes not containing a voter-supplied date, this Court's opinion in *In Re: Nov. 3, 2020 General Election*, No. 149 MM 2020, 2020 WL 6252803 (Pa. Oct. 23, 2020) definitively speaks to the mandatory nature of the date requirement and, without much extrapolation, requires that such ballots not be

counted. The Allegheny County Board agrees with its Philadelphia counterpart. It counters Zicarelli's reliance on *In Re Nov. 3, 2020 General Election* by noting that Zicarelli's challenge to the ballots for lack of a date is based on the premise that the date is essential to the validity of the signature. Allegheny County Board points out this is the precise type of challenge that was disavowed in the case upon which Zicarelli relies.

III. ANALYSIS

We begin by recognizing from the outset that it is the “longstanding and overriding policy in this Commonwealth to protect the elective franchise.” *Shambach v. Birkhart*, 845 A.2d 793, 798 (Pa. 2004). “The Election Code must be liberally construed so as not to deprive ... the voters of their right to elect a candidate of their choice.” *Ross Nomination Petition*, 190 A.2d 719, 719 (Pa. 1963). It is therefore a well-settled principle of Pennsylvania election law that “[e]very rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.” *Appeal of Norwood*, 116 A.2d 552, 554–55 (Pa. 1955). It is likewise settled that imbedded in the Election Code is the General Assembly's intent to protect voter privacy in her candidate choice based on Article VII, Section 4 of the Pennsylvania Constitution and to prevent fraud and to otherwise ensure the integrity of the voting process.

We agree with the Campaign's observation that in Sections 3146.6(a) and 3150.16(a), the General Assembly set forth the requirements for how a qualified elector may cast a valid absentee or mail-in ballot. Campaign's Brief at 22. We further agree that these sections of the Election Code specifically provide that each voter “shall fill out, date, and sign” the declaration on the outside envelope. *Id.* We do not agree with the Campaign's contention, however, that because the General Assembly used the word

“shall” in this context, it is of necessity that the directive is a mandatory one, such that a failure to comply with any part of it requires a board of elections to declare the ballot void and that it cannot be counted. It has long been part of the jurisprudence of this Commonwealth that the use of “shall” in a statute is not always indicative of a mandatory directive; in some instances, it is to be interpreted as merely directory. See, e.g., *Commonwealth v. Baker*, 690 A.2d 164, 167 (Pa. 1997) (citing *Fishkin v. Hi-Acres, Inc.*, 341 A.2d 95 (Pa. 1975)); see also *Commonwealth ex rel. Bell v. Powell*, 94 A. 746, 748 (Pa. 1915) (quoting *Bladen v. Philadelphia*, 60 Pa. 464, 466 (1869) (“It would not perhaps be easy to lay down any general rule as to when the provisions of a statute are merely directory, and when mandatory and imperative.”)). The Campaign’s reliance on this Court’s recent decision in *Pa. Democratic Party v. Broockvar*, 238 A.3d 345 (Pa. 2020) for the proposition it asserts is misplaced.

In *Pa. Democratic Party*, we held that the requirement in Section 3150.16(a) that a mail-in voter place his or her ballot in the inner secrecy envelope was a mandatory requirement and thus a voter’s failure to comply rendered the ballot void. *Pa. Democratic Party*, 238 A.3d at 380. In concluding that the use of the secrecy envelope was a mandatory, rather than a discretionary directive, we reviewed our prior decisions on the distinction between mandatory and discretionary provisions in the Election Code, including *Shambach v. Bickhart*, 845 A.2d 793 (Pa. 2004), *In re Luzerne County Return Board, Appeal of Elmer B. Weiskerger*, 290 A.2d 108 (Pa. 1972), and *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, Appeal of John Pierce*, 843 A.2d 1223 (Pa. 2004).

In *Shambach*, the Court declined to invalidate a write-in vote cast for a candidate who was named on the ballot, in direct violation of the Election Code's instruction that a voter could only write in a person's name if the name of said individual was "not already printed on the ballot for that office." *Shambach*, 845 A.2d at 795. In reaching that conclusion, the Court observed that "[m]arking a ballot is an imprecise process, the focus of which is upon the unmistakable registration of the voter's will in substantial conformity to the statutory requirements." *Id.* at 799 (quoting *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa 1945)).

In *Weiskerger*, this Court refused to invalidate a ballot based upon the "minor irregularity" that it was completed in the wrong color of ink. The provision of the Election Code in question provided that "[a]ny ballot that is marked in blue, black or blue-black ink ... shall be valid and counted." *Weiskerger*, 290 A.2d at 109 (citing 25 P.S. § 3063). In providing that ballots completed in the right color must be counted, we noted that the General Assembly "neither stated nor implied that ballots completed in a different color must not be counted." *Id.* We thus treated the instruction to use blue, black or blue-black ink as merely directory.

In *Pa. Democratic Party*, we compared these cases to our decision in *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, Appeal of John Pierce*, 843 A.2d 1223 (Pa. 2004), where we held that the Election Code's "in-person" ballot delivery requirement, see 25 P.S. § 3146.6, was mandatory, and that votes delivered by third persons must not be counted. *Appeal of Pierce*, 843 A.2d at 1231. There, we recognized that the in-person requirement served important purposes in the Election Code, including "limit[ing] the number of third persons who unnecessarily come in contact with the ballot[.]"

... provid[ing] some safeguard that the ballot was filled out by the actual voter, ... and that once the ballot has been marked by the actual voter in secret, no other person has the opportunity to tamper with it.” *Id.* at 1232. We thus explained in *Pa. Democratic Party* that “the clear thrust of *Appeal of Pierce*, ... is that, even absent an express sanction, where legislative intent is clear and supported by a weighty interest like fraud prevention, it would be unreasonable to render such a concrete provision ineffective for want of deterrent or enforcement mechanism.” *Pa. Democratic Party*, 238 A.3d at 380 (citing *Appeal of Pierce*, 843 A.2d at 1232).

Based upon this comparison between *Shambach*, *Weiskerger* and *Appeal of Pierce*, in *Pa. Democratic Party* we determined that the decision in *Appeal of Pierce* provided the appropriate guidance for the analysis of the secrecy envelope requirement. We held that “[i]t is clear that the Legislature believed that an orderly canvass of mail-in ballots required the completion of two discrete steps before critical identifying information on the ballot could be revealed. The omission of a secrecy envelope defeats this intention.” *Pa. Democratic Party*, 238 A.3d at 380. Unlike in *Shambach* and *Weiskerger* which involved “minor irregularities,” the use of a secrecy envelope implicated a “weighty interest,” namely secrecy in voting protected expressly by Article VII, Section 4 of our state charter. *Id.* As such, we recognized the use of a secrecy envelope as a mandatory requirement and that failures to comply with the requirement required that the ballot must be disqualified.” *Id.*; see also *id.* at 378 (quoting *JPay, Inc. v. Dep’t of Corr. & Governor’s Office of Admin.*, 89 A.3d 756, 763 (Pa. Commw. 2014) (“While both mandatory and directory provisions of the Legislature are meant to be followed, the difference between a mandatory and directory provision is the consequence for non-compliance: a failure to

strictly adhere to the requirements of a directory statute will not nullify the validity of the action involved.”)).

To determine whether the Election Code’s directive that the voter handwrite their names, address and the date of signing the voter declaration on the back of the outer envelope is a mandatory or directory instruction requires us to determine whether the intent of the General Assembly was clear and whether the failure to handwrite the information constitutes “minor irregularities” or instead represent “weighty interests,” like fraud prevention or ballot secrecy that the General Assembly considered to be critical to the integrity of the election.

(1) Failures to include handwritten names and addresses

Beginning with the Campaign’s contention that ballots may not be counted if a voter fails to handwrite their name and/or address under the full paragraph of the declaration on the back of the outer envelope, we conclude that given the factual record in this case and the mechanics of the pre-canvassing and canvassing procedures including the incorporation of reliance on the SURE system, this “requirement” is, at best, a “minor irregularity” and, at worst, entirely immaterial. More to the point, the direction to the voter to provide a handwritten name and/or address is not only not mandatory, it is not a directive expressed in the Election Code. Thus, these directions do not meet the first prong of the test used in *Pa. Democratic Party*: the clear intent of the General Assembly.

The Election Code does not require that the outer envelope declaration include a handwritten name or address at all. Instead, Sections 3146.4 (absentee) and 3150.14(b) (mail-in) provide only that the declaration must include “a statement of the elector’s

qualifications, together with a statement that the elector has not already voted in the primary or election.” 25 P.S. §§ 3146.4, 3150.14(b). Aside from this information (none of which is relevant to the present issue), the General Assembly delegated to the Secretary of the Commonwealth the obligation to prescribe the form of declaration and envelope for absentee and mail-in ballots, presumably to allow the inclusion of information that would be helpful for administrative or processing purposes. *Id.*² As such, the decision to include spaces in the declaration for handwritten names and addresses was made solely by the Secretary of the Commonwealth, not the General Assembly. It would be a stretch to divine that the General Assembly was advancing any weighty interest for the inclusion of handwritten names and addresses in the declaration such that a voter’s failure to include them should result in the ballot not being counted. Moreover, the Campaign does not argue that the Secretary’s request for handwritten names and addresses implicated any “weighty interests” that would compel a finding that the request to provide them constituted a mandatory requirement.³

² None of the parties have challenged whether these provisions constituted improper delegations of legislative authority. *Protz v. Workers’ Compensation Appeal Board (Derry Area School District)*, 161 A.3d 827 (Pa. 2017).

³ Conversely, the Philadelphia Board and the DNC have both selectively relied upon guidance provided by the Secretary to the county boards of election that indicated that a voter’s failure to handwrite his/her name and address was not a ground to set the ballot aside. Philadelphia Board’s Brief at 19; DNC’s Brief at 15. They have directed the Court to the Guidance published on September 11, 2020, in which the Secretary advised that “[i]f the Voter’s Declaration on the return envelope is signed and the county board is satisfied that the declaration is sufficient, the mail-in or absentee ballot should be approved for canvassing.” Guidance, 9/11/2020, at 3. As discussed *infra* at n.6, however, on September 28, 2020 the Secretary issued arguably contrary guidance stating that “[a] ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted.” Guidance,

The Campaign argues that we should read the “handprinted name and address” requirement into the directives in Section 3146.6(a) and 3150.16(a) that the voter “fill out” the declaration. Campaign’s Brief at 30. Citing to dictionary definitions, the Campaign contends that “fill out” means “to write or type information in spaces that are provided for it.” *Id.* at 32. Because 8,349 voters did not “fill out” one or more spaces provided on the outer envelope provided in the declaration (including the voter’s name and/or address), the Campaign argues that those ballots were non-conforming and could not be counted. *Id.* at 29. The directive to “fill out” does not give any legislative definition to the specific information to be placed in the blank spaces. It is the weight of the information that must be tested in the analysis. As stated, since the General Assembly did not choose the information to be provided, its omission is merely a technical defect and does not invalidate the ballot.

Further, as Judge Crumlish observed, the term “fill out” is ambiguous.⁴ Trial Court Opinion, 11/13/2020, ¶ 4. As Judge Crumlish recognized, the term “fill out” is not a defined term under the Election Code. *Id.* Moreover, and contrary to the Campaign’s contention that no alternative understanding of the term “fill out” has been proffered, the Campaign has failed to recognize, **the voter’s name and address are already on the back of the outer envelope on a pre-printed label affixed no more than one inch**

9/28/20, at 9. Confusingly, she also incorporated by reference the September 11, 2020 Guidance. Both sets of Guidance are set forth on pages 8-10 *supra*.

⁴ Where an election statute is ambiguous, courts apply the interpretative principle that that “election laws ... ordinarily will be construed liberally in favor of the right to vote.” *Pa. Democratic Party*, 238 A.3d at 360–61.

from the declaration itself. A voter could reasonably have concluded that the blanks requesting his or her name and address needed to be “filled out” only if the name and/or address on the label was incorrect or incomplete, as it was unnecessary to provide information that was already on the back of the outer envelope.⁵ To add further confusion, the declaration itself can be read to refer to the label: “I hereby declare that I am qualified to vote from the below stated address” can be read to mean the address as already stated on the label.

The text of the Election Code provides additional evidence of the directory nature of the provisions at issue. With regard to individuals who are not able to sign their name due to illness or physical disability, the General Assembly imposed a requirement that the declarant provide his or her “complete address.” 25 P.S. § 3146.6(a)(3); 25 P.S. §

⁵ The DNC argues, with some persuasive force, that the Campaign’s requested interpretation of Pennsylvania’s Election Code could lead to a violation of federal law by asking the state to deny the right to vote for immaterial reasons. Nobody acting under color of state law may deny anyone the right to vote “in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B).

Under this section, the so-called “materiality provision” of the Voting Rights Act, federal courts have barred the enforcement of similar administrative requirements to disqualify electors. See, e.g., *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003) (disclosure of voter’s social security number is not “material” in determining whether a person is qualified to vote under Georgia law for purposes of the Voting Rights Act); *Washington Ass’n of Churches v. Reed*, 492 F.Supp.2d 1264 (W.D. Wash. 2006) (enjoining enforcement of “matching” statute, requiring state to match potential voter’s name to Social Security Administration or Department of Licensing database, because failure to match applicant’s information was not material to determining qualification to vote); *Martin v. Crittenden*, 347 F.Supp.3d 1302 (N.D. Ga. 2018), *reconsideration denied*, 1:18-CV-4776-LMM, 2018 WL 9943564 (N.D. Ga. Nov. 15, 2018) (voter’s ability to correctly recite his or her year of birth on absentee ballot envelope was not material to determining said voter’s qualifications).

3150.16(a.1). These provisions demonstrate that the General Assembly clearly knew how to impose such a requirement when it wishes to do so. *In re Nov. 3, 2020 Gen. Election*, __ A.3d __, 2020 WL 6252803, at *14 (Pa. 2020) (stating that the General Assembly's prior inclusion of a signature comparison requirement demonstrated that "it understands how to craft language requiring signature comparisons at canvassing when it chooses to do so"). Moreover, Sections 3146.6(a)(3) and 3150.16(a.1) contain a precise form of declaration, crafted by the General Assembly, pertaining to voters with disabilities evidencing the General Assembly's understanding of how to mandate a precise declaration without resort to delegating non-essential information to the Secretary.

Finally, the text of the Election Code further demonstrates the lack of any need for handwritten names and addresses. Section 3146.8(g)(3), which relates to the canvassing of official absentee ballots and mail-in ballots, provides, in relevant part:

When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable.

25 P.S. § 3146.8(g)(3). The county board of elections' duty to keep a "Military Veterans and Emergency Civilians Absentee Voters File," which is not relevant to the current dispute, is governed by 25 P.S. § 3146.2c(b). Section 3146.2c(a) previously housed the board's duty to keep a "Registered Absentee and Mail-in Voters File." However, the General Assembly recently eliminated this directive. See 2020, March 27, P.L. 41, No.

12, § 8, imd. effective (deleting subsection (a), which required county board of elections to maintain at its office “a file containing the duplicate absentee voter's temporary registration cards of every registered elector to whom an absentee ballot has been sent”). By virtue of this amendment, the General Assembly eliminated one of the reference points that still appear in Section 3146.8(g)(3). The current Section 3146.2c(c) directs the county board to maintain the “the absentee voters' list” referenced in Section 3146.8(g)(3). The General Assembly also amended Section 3146.2c(c), which previously only directed the chief clerk to “prepare a list for each election district showing the names and post office addresses of all voting residents thereof to whom official absentee ballots shall have been issued,” to include such voting residents who were issued mail-in ballots. See 2019, Oct. 31, P.L. 552, No. 77, § 5.1, imd. effective (inserting “or mail-in” twice in subsection (c)).

As such, as relevant for our purposes, Section 3146.8(g)(3) directs that “the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the ... the absentee voters' list,” which, pursuant to Section 3146.2c(c), now also contains voters who received mail-in ballots. A close reading of the language chosen by the General Assembly here is telling. Section 3146.8(g)(3) directs the board to “examine the declaration **on the envelope**” and “compare the information **thereon**” to the absentee (and mail-in) voters' list. 25 P.S. § 3146.8(g)(3) (emphasis added). Reading these phrases together, it is clear that the General Assembly intended that the information to be compared to the absentee (and mail-in) voters' list is the information on the outer envelope which includes the pre-printed name and address. If

the General Assembly intended for the information written by the voter to be compared to the absentee voters' list, it would have used the term "therein," thus directing the board to compare the information contained "within" the declaration (the handwritten name and address).

The following sentence in this section further suggests that the General Assembly intended such bifurcation. Section 3146.8(g)(3) next states:

If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the ... the absentee voters' list ... verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3). Here, the board is directed to consider whether the declaration is sufficient (i.e., the examination contained in the previous sentence) and also ensure that the absentee voters' list confirms the voter's right to vote (i.e., the comparison of the printed information to the relevant list from the prior sentence).

(2) Failures to include dates

Both the Campaign and Zicarelli argue that the requirement to state the date on which declaration was signed is a mandatory obligation requiring disenfranchisement for lack of compliance. We disagree, as we conclude that dating the declaration is a directory, rather than a mandatory, instruction, and thus the inadvertent failure to comply does not require that ballots lacking a date be excluded from counting. As reviewed hereinabove, in our recent decision in *Pa. Democratic Party*, we reiterated that the distinction between directory and mandatory instructions applies with respect to a voter's obligations under the Election Code, and that only failures to comply with mandatory

obligations, which implicate both legislative intent and “weighty interests” in the election process, like ballot confidentiality or fraud prevention, will require disqualification. *Pa. Democratic Party*, 238 A.3d at 379-80.

The Commonwealth Court and Zicarelli relied upon the Election Code’s use of the of “**shall** ... date” language in construing the date obligation as mandatory. *In Re: 2,349 Ballots in the 2020 General Election, Appeal of: Nicole Zicarelli*, __ A.3d __, 1162 C.D. 2020, 10 (Pa. Comm. 2020). Although unlike the handwritten name and address, which are not mentioned in the statute, the inclusion of the word “date” in the statute does not change the analysis because the word “shall” is not determinative as to whether the obligation is mandatory or directive in nature. That distinction turns on whether the obligation carries “weighty interests.” The date that the declaration is signed is irrelevant to a board of elections’ comparison of the voter declaration to the applicable voter list, and a board can reasonably determine that a voter’s declaration is sufficient even without the date of signature. Every one of the 8,329 ballots challenged in Philadelphia County, as well as all of the 2,349 ballots at issue in Allegheny County, were received by the boards of elections by 8:00 p.m. on Election Day, so there is no danger that any of these ballots was untimely or fraudulently back-dated. Moreover, in all cases, the receipt date of the ballots is verifiable, as upon receipt of the ballot, the county board stamps the date of receipt on the ballot-return and records the date the ballot is received in the SURE system. The date stamp and the SURE system provide a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superfluous.

Zicarelli offers two alternative “weighty interests” for our consideration. She first contends that the date on which the declaration was signed may reflect whether the

person is a “qualified elector” entitled to vote in a particular election. Pursuant to Section 3150.12b (entitled “Approval of application for mail-in ballot”), a board of elections may have determined that the person was a qualified elector and thus entitled to receive a mail-in ballot. Pursuant to Section 2811, however, to be a qualified elector, “[h]e or she shall have resided in the election district where he or she shall offer to vote at least thirty days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within thirty days preceding the election.” 25 P.S. § 2811. As a result, Zicarelli contends that the person may have been qualified to vote in a particular voting district at the time of applying for a mail-in ballot, but no longer a qualified elector in that voting district on Election Day. Zicarelli’s Brief at 16.

This unlikely hypothetical scenario is not evidence of a “weighty interest” in the date on the document for assuring the integrity of Pennsylvania’s system for administering mail-in voting. Among other things, the canvassing statute, 25 P.S. § 3146.8(g)(3), directs the board to examine the declaration on the envelope of each ballot and compare the information thereon with that contained in the now defunct “Registered Absentee and Mail-in Voters File.” See discussion *supra* pp. 27-29. The date of signing the declaration will not be of any benefit in performing this task, as the name of the voter at issue will be on this list (as a result of his or her approval to receive a mail-in ballot), and the date of signing will provide no information with respect to whether or not he or she has left the voting district in the interim. Most critically, our current statutory framework includes no requirement that a county board of elections investigate whether an individual who had

been confirmed as a qualified elector at the time of approval to receive a mail-in ballot remains as a qualified elector on Election Day. If the General Assembly had so intended, it would certainly have expressly stated it, as opposed to nebulously tucking such an unprecedented requirement into the instructions to the Secretary for designing the declaration.

Second, Ziccarelli argues that the date of signature of the declaration will serve to prevent double voting, as “whether an elector has already voted in the election for which the ballot is issued, by its very nature, depends on the date on which the declaration was signed.” Ziccarelli’s Brief at 16. Boards of elections do not use signatures or any handwritten information to prevent double voting. Duplicate voting is detected by the use of bar codes through the SURE system, and the board identifies the earlier cast vote by referencing the date it received the ballot, not the date on which the declaration was signed.

Ziccarelli and the Commonwealth Court insist that this Court “has already held that mail-in ballots with undated declarations are not ‘sufficient’ and, thus, must be set aside.” Ziccarelli’s Brief at 9; *In Re: 2,349 Ballots in the 2020 General Election*, 1162 C.D. 2020, at 10. In support of this contention, they reference an observation in our recent decision in *In re November 3, 2020 General Election*, __ A.3d __, 2020 WL 6252803 (Pa. 2020), that when assessing the sufficiency of a voter’s declaration, “the county board is required to ascertain whether the return envelope has been filled out, dated, and signed – and if it fails to do so then the ballot cannot be designated as “sufficient” and must be set aside.”⁶

⁶ In her brief, Ziccarelli cites to the Guidance distributed by the Secretary of the Commonwealth on September 28, 2020 to the county boards of elections, advising that

Id. at *12-13. This statement is being taken out of context. Our statement in 2020 *General Election* was in reference to the limitations on what an election board is directed by the statute to do when assessing the sufficiency of a voter's declaration for the express purpose of indicating what they were not to do, i.e., signature comparisons. The question in *In Re: Nov. 3, 2020 General Election* was a narrow one. We did not address (as it was not at issue) whether a county board of elections could find a declaration as sufficient even though it was undated. That question requires an entirely different analysis that

"[a] ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted." As noted in footnote 3 *supra*, however, the Secretary also issued Guidance on September 11, 2020, which was cited with approval by the Philadelphia Board and the DNC. No party referenced both sets of Guidance, however, even though the September 28 Guidance incorporated the September 11 Guidance. See Guidance, 9/28/2020, at 9 ("For more information about the examination of return envelopes, please refer to the Department's September 11, 2020 Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes.").

In any event, we will not consider this Guidance in making our decision. Neither of the parties explain how the potentially contradictory directives are to be understood. More importantly, the Secretary has no authority to definitively interpret the provisions of the Election Code, as that is the function, ultimately, of this Court. The Secretary also clearly has no authority to declare ballots null and void. "[I]t is the Election Code's express terms that control, not the written guidance provided by the Department and as this Court repeatedly has cautioned, even erroneous guidance from the Department or county boards of elections cannot nullify the express provisions of the Election Code." *In re Scroggin*, 237 A.3d 1006, 1021 (Pa. 2020). Moreover, the Secretary has no authority to order the sixty-seven county boards of election to take any particular actions with respect to the receipt of ballots. 25 P.S. § 2621(f.2).

Finally, with respect to the September 28 Guidance indicating that undated ballots must be set aside, we note that in addition to the Philadelphia and Allegheny County Boards, at least two other boards of elections also did not follow it. *Donald J. Trump for President Inc. v. Bucks Cnty. Bd. of Elections*, No. 2020-05786 (Bucks Cty. Ct. Com. Pl.); *Donald J. Trump for President, Inc., et al. v. Montgomery Cnty. Bd. of Elections*, No. 2020-18680 (Nov. 13, 2020). Both the Bucks County and Montgomery County Courts of Common Pleas affirmed the counting of the ballots even though the declarations had not been filled out in full. Each of the courts of common pleas appropriately applied this Court's precedent in doing so.

depends in significant part on whether dating was a mandatory, as opposed to a directive, requirement. We have conducted that analysis here and we hold that a signed but undated declaration is sufficient and does not implicate any weighty interest. Hence, the lack of a handwritten date cannot result in vote disqualification.

IV. CONCLUSION

As we recognized in *Pa. Democratic Party*, “while both mandatory and directory provisions of the Legislature are meant to be followed, the difference between a mandatory and directory provision is the consequence for non-compliance: a failure to strictly adhere to the requirements of a directory statute will not nullify the validity of the action involved.” *Pa. Democratic Party*, 238 A.3d at 378. Here we conclude that while failures to include a handwritten name, address or date in the voter declaration on the back of the outer envelope, while constituting technical violations of the Election Code, do not warrant the wholesale disenfranchisement of thousands of Pennsylvania voters. As we acknowledged in *Shambach*, “ballots containing mere minor irregularities should only be stricken for compelling reasons.” *Shambach*, 845 A.2d at 799; see also *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945) (“[T]he power to throw out a ballot for minor irregularities ... must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons.”). Having found no compelling reasons to do so, we decline to intercede in the counting of the votes at issue in these appeals.

The decision of the Philadelphia Court of Common Pleas is hereby affirmed. The decision of the Commonwealth Court is hereby reversed and the decision of the Allegheny County Court of Common Pleas is reinstated.

Justices Baer and Todd join the opinion.

Justice Wecht concurs in the result and files a concurring and dissenting opinion.

Justice Dougherty files a concurring and dissenting opinion in which Chief Justice Saylor and Justice Mundy join.

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APPENDIX B

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[J-116-2020]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

IN RE: CANVASSING OBSERVATION	:	No. 30 EAP 2020
	:	
APPEAL OF: CITY OF PHILADELPHIA BOARD OF ELECTIONS	:	Appeal from the November 5, 2020, Single-Judge Order of the Honorable Christine Fizzano Cannon of the Commonwealth Court at No. 1094 CD 2020, reversing the November 3, 2020 Order of the Honorable Stella Tsai of the Court of Common Pleas of Philadelphia County at November Term 2020, No. 07003
	:	SUBMITTED: November 13, 2020

OPINION

JUSTICE TODD

DECIDED: November 17, 2020

This appeal arises out of the processing of mail-in and absentee ballots received from voters in Philadelphia County in the November 3, 2020 General Election. Specifically, Appellee Donald J. Trump, Inc. (the “Campaign”) orally moved for the Philadelphia County Court of Common Pleas to give its representative more proximate access to the canvassing activities being carried out by Appellant, the Philadelphia County Board of Elections (the “Board”). The trial court denied relief, the Commonwealth Court reversed, and the Board now appeals that order. For the following reasons, we vacate the order of the Commonwealth Court, and reinstate the trial court’s order denying the Campaign relief.

I. Background

This dispute concerns the Board's pre-canvassing and canvassing of mail-in and absentee ballots at the Philadelphia Convention Center. According to the Board, in advance of the election, it arranged the workspace of its employees at this facility in a manner that it considered best suitable for the processing and maintenance of the security of the estimated 350,000 absentee and mail-in ballots it anticipated receiving, while ensuring that the social distancing protocols for COVID-19 promulgated by the federal Centers for Disease Control were maintained and the voter's privacy in his or her ballot was protected, and providing a candidate or campaign representative with the ability to observe the entirety of the pre-canvassing and canvassing process. N.T. Hearing, 11/3/20, at 10-11.¹

Under the Board's authority, a designated area of the Convention Center was divided into discrete sections, each devoted to various aspects of the pre-canvassing and canvassing process. *Id.* at 22. Each section contained three rows of fifteen folding tables with each table separated by 5-6 feet. *Id.* at 24. In the first section, workers examined the back of the ballot return envelopes and then, based on that examination, sorted the envelopes into different trays. *Id.* at 27. In the next section, ballots in their secrecy envelopes were first extracted from the ballot return envelope by machine, and then, while encased in their secrecy envelopes, were sent on to another machine which sliced open the secrecy envelope and removed the ballot from within. *Id.* at 28. During this phase, ballots without secrecy envelopes – so-called “naked” ballots – were segregated and placed into a separate tray.² *Id.* at 30.

¹ Except as otherwise noted, such citations are to the notes of testimony of the hearing before the trial court.

² Ballots not placed into the provided secrecy envelopes are invalid. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020).

Pursuant to the Election Code, designated observers for campaigns or candidates were permitted to physically enter the Convention Center hall and observe the entirety of this process; however, the Board erected a waist-high security fence to separate the observers from the above-described workspace of Board employees. The fence, behind which observers could freely move, was separated from the first row of employees' desks in each section by a distance of approximately 15-18 feet. *Id.* at 23. Board employees used this "buffer" area between the security fence and their workspace to enter or leave their work areas for their shifts, or to take scheduled breaks. *Id.* at 30-31.

On the morning of November 3, 2020 – Election Day – the Campaign sent a designated representative, Attorney Jeremy Mercer, to observe the pre-canvassing and canvassing process. Attorney Mercer entered the Convention Center at 7:00 a.m. and remained there throughout the entire day. He testified that he was able to move freely along the length of the security fence and observe the employees engaged in their pre-canvassing and canvassing activities from various vantage points. *Id.* at 21. He related that, while he could see the Board employees in the first section of the workspace examining the back of the ballot return envelopes, from his position, he could not read the actual declarations on the ballot envelopes. *Id.* at 27. Regarding the ballot extraction activities in the next section, Attorney Mercer testified that he could see employees removing the ballots contained in secrecy envelopes from the return envelopes, and that, when "watching closely," he could discern if any return envelopes contained naked ballots. *Id.* at 30. However, he stated that he could not see whether there were any markings on the security envelopes themselves.³ *Id.* at 38.

³ The Election Code prohibits the security envelope from containing any "text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference." 25 P.S. § 3146.8(g)(4)(ii).

At 7:45 a.m. on Election Day, the Campaign filed a suit in the Philadelphia Court of Common Pleas challenging the location where observers such as Attorney Mercer could watch the process. The Campaign subsequently withdrew that action, without prejudice, but then refiled it at 9:45 p.m. that night. The trial court subsequently conducted an evidentiary hearing that same night utilizing the “Zoom” videoconference tool, which enabled Attorney Mercer to testify remotely.

After hearing Attorney Mercer’s testimony and argument from the Campaign and the Board, the trial court rejected the Campaign’s primary argument, raised orally during the hearing, that Section 3146.8(b) of the Election Code – which allows designated watchers or observers of a candidate “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) – requires that the observers have the opportunity to “meaningfully . . . see the process.” N.T. Hearing, 11/3/20, at 49. In rejecting the argument, the trial court noted that Section 3146.8 contained no language mandating “meaningful observation”; rather, the court interpreted the section as requiring only that the observer be allowed to be “present” at the opening, counting, and recording of the absentee or mail-in ballots. Trial Court Opinion, 11/4/20, at 3-4.

The court observed that Attorney Mercer’s testimony that he could not see individual markings on the secrecy envelopes, or determine whether the signature on all the ballot envelopes was properly completed, did not establish a violation of Section 3416.8, inasmuch as that statute “provides for no further specific activities for the watchers to observe, and no activities for the watchers to do other than simply ‘be present’.” *Id.* at 4. The court opined that, under this section, “[w]atchers are not directed to audit ballots or to verify signatures, to verify voter address[es], or to do anything else that would require a watcher to see the writing or markings on the outside of either

envelope, including challenging the ballots or ballot signatures.” *Id.* Consequently, that same day, the trial court denied the Campaign’s request that the Board modify the work area to allow for closer observation of the ongoing ballot canvassing. The court indicated, however, that it was not discouraging the Board from providing an additional corridor for observers along the side of the tables to watch the proceedings, provided COVID-19 protocols and voter information secrecy protections were maintained.⁴ Trial Court Order, 11/3/20.

The Campaign immediately appealed to the Commonwealth Court, and the matter was assigned to the Honorable Christine Fizzano Cannon.⁵ Judge Fizzano Cannon held a status conference on the night of November 4, 2020, and issued an order on the morning of November 5, 2020, which reversed the trial court. She directed the trial court to enter an order by 10:30 a.m. to require “all candidates, watchers, or candidate representatives be permitted to be present for the canvassing process pursuant to 25 P.S. § 2650 and/or 25 P.S. § 3146.8 and to be permitted to observe all aspects of the canvassing process within 6 feet, while adhering to all COVID-19 protocols.” Commonwealth Court Order, 11/5/20.

In her opinion, filed later that day, Judge Fizzano Cannon focused her analysis on what she considered to be the relevant governing provisions of the Election Code, Section 3146.8(b) and Section 3146.8(g)(1.1). Section 3146.8(b) provides:

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.

⁴ It should be noted that the pre-canvassing and canvassing activities were also broadcast live on YouTube.

⁵ The Pennsylvania Democratic Party (“Intervenor”) was granted leave to intervene in these proceedings by the Commonwealth Court.

25 P.S. § 3146.8(b) (emphasis added). Section 3146.8(g)(1.1) states, in relevant part:

The county board of elections shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting . . . 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 pre-canvassed.

25 P.S. § 3146.8(g)(1.1) (emphasis added).

Judge Fizzano Cannon noted that the parties offered competing interpretations of the phrases “present,” and “to remain in the room,” with the Board arguing that these terms require only that the observer be physically present in the room where the ballot counting occurs; whereas the Campaign contended that these phrases required the observer to be able to *observe* “meaningfully,” in addition to being physically present. Judge Fizzano Cannon deemed each of these interpretations to be reasonable, and, hence, concluded the statutory language was ambiguous.

Because these provisions of the Election Code had as their purpose “maintaining the integrity of the elective process in the Commonwealth,” the judge determined that the language in question “imports upon . . . candidates’ representatives at least a modicum of observational leeway to ascertain sufficient details of the canvassing process for the purpose of intelligently assessing and/or reporting to the candidate represented the details of the canvassing process.” Commonwealth Court Opinion, 11/5/20, at 5. In her view, in order for representatives to fulfill their reporting duty to their candidate, they are required to “have the opportunity to observe the processes upon which they are to report,” *id.*, and so mere physical presence of the observers was insufficient to guarantee this “meaningful observation,” *id.* at 6.

Judge Fizzano Cannon then found that, based on Attorney Mercer’s testimony that, while he was physically present in the room where the pre-canvassing and

canvassing processes were occurring, the distance from which he was observing those processes, as well as the physical barriers in the room, prevented him from observing the ballots being processed, the ballot envelopes, the secrecy envelopes, and any markings on the secrecy envelopes, depriving him of the ability to actually observe those processes “in any meaningful way.” *Id.* at 8. Consequently, the judge concluded that the trial court erred as a matter of law in determining that the Board had complied with the Election Code. The Board filed an emergency petition for allowance of appeal with our Court on the morning of November 5, 2020.

While this petition was pending, that same day, the Campaign filed a one-page “Complaint and Motion for Emergency Injunction” in the United States District Court for the Eastern District of Pennsylvania alleging, *inter alia*, that, in the aftermath of the Commonwealth Court’s order in the instant case, the Board was violating the Election Code by “refusing to allow any representatives and poll watchers for President Trump and the Republican Party” to observe the counting of the ballots, and that the “counting continues with no Republicans present.” See Complaint and Motion for Emergency Injunction in *Donald J. Trump For President, Inc. v. Philadelphia County Board of Elections*, No. 20-5533 (E.D. Pa. filed Nov. 5 2020) (hereinafter “*Trump*”) (attached as Exhibit 2 to Board’s Brief), at ¶¶ 4 & 5.

That case was assigned to District Court Judge Paul S. Diamond, who held a hearing on the request for an emergency injunction at 5:30 p.m. on November 5, 2020. During the hearing, counsel for the Campaign stated that the Campaign had “a nonzero number of people in the room.” N.T. Hearing in *Trump*, 11/5/20 at 10. Judge Diamond, seeking clarification of the meaning of the term “nonzero”, asked counsel for the Campaign directly: “as a member of the bar of this Court, are people representing the

Donald J. Trump for President [campaign], representing the plaintiff in that room?” *Id.* at 11. Counsel replied “yes.” *Id.*

Because the District Court recognized that the petition for allowance of appeal filed by the Board was pending before our Court, and that a decision from our Court on the proper interpretation of the governing provisions of the Election Code would obviate the need for it to rule on a question of state law, the District Court encouraged the parties to reach an interim accommodation. Thus, the Board and the Campaign reached an agreement, which was entered on the record in open court before Judge Diamond, under which the crowd control barrier, which the Board had moved to within six feet of the first row of tables in its employees’ work area as the result of the Commonwealth Court decision, would remain in that position, and that all campaign observers would have equal access to positions behind that barrier to watch the canvassing process. *Id.* at 38-40. Judge Diamond deferred action on the merits of the underlying claims in the lawsuit, which remains pending.

Subsequently, on November 9, 2020, the Campaign filed yet another federal lawsuit, in the United States District Court of the Middle District of Pennsylvania, seeking to enjoin Pennsylvania from certifying the results of the November 3, 2020 General Election or, alternatively, to exclude from the certified results “the tabulation of absentee and mail-in and ballots for which [its] watchers were prevented from observing during the pre-canvass and canvass in the County Election Boards.” Complaint for Declaratory and Injunctive Relief in *Donald J. Trump, Inc., et.al. v. Boockvar*, No. 20-CV-02078 (M.D. Pa. filed Nov. 9, 2020) (Exhibit 1 to Board’s Brief), at 84. This matter was assigned to District Court Judge Matthew Brann who promptly issued an order setting an expedited schedule for the Campaign to file motions for injunctive relief, and for the Board to file a responsive motion thereto as well as a motion to dismiss. Notably, however, on November 15, 2020,

the Campaign filed an amended complaint, removing all counts which were based on canvassing access. See First Amended Complaint Verified Complaint for Declaratory and Injunctive Relief in *Donald J. Trump, Inc., et.al. v. Boockvar*, No. 20-CV-02078 (M.D. Pa. filed Nov. 15, 2020).

During the interim, on November 9, 2020, our Court granted the Board's emergency petition for allowance of appeal on the following issues:

1. Whether, as a matter of statutory construction pursuant to Pennsylvania law, the Commonwealth Court erred in reversing the trial court, which concluded that Petitioner City of Philadelphia Board of Elections' regulations regarding observer and representative access complied with applicable Election Code requirements.

2. Whether the issue raised in Petitioner's petition for allowance of appeal is moot.

3. If the issue raised in Petitioner's petition for allowance of appeal is moot, does there remain a substantial question that is capable of repetition yet likely to evade review, and, thus, fall within an exception to the mootness doctrine.

In our order, we directed the Prothonotary to establish an expedited briefing schedule; we also indicated that our grant order was not a stay of the Board's canvassing process, which is ongoing as of this writing.⁶

II. Mootness

⁶ Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives, have filed a motion to intervene in this matter before our Court, as well as an accompanying brief. While we deny this motion, we, nevertheless, accept the accompanying brief as an *amicus* brief.

We begin by addressing whether the central legal issue in this matter – involving an interpretation of the provisions of the Election Code establishing campaign access requirements to ballot canvassing activities – is moot. *See Stuckley v. Zoning Hearing Board of Newtown Township*, 79 A.3d 510, 516 (Pa. 2013) (we will generally not address matters where there is no actual case or controversy between the parties). Both parties and Intervenor argue that this case is not moot because the Board continues to count ballots, and the Campaign continues to want its representatives to have maximal access to the canvassing process.

We conclude that, because ballots are still being canvassed by the Board at the time of this writing, the legal question before us is not moot.⁷ In this regard, we note that the interim agreement between the parties entered in the federal litigation being overseen by Judge Diamond did not purport to resolve this question, and, indeed, Judge Diamond expressly refrained from addressing it as he viewed it as purely a question of Pennsylvania law which could be definitively resolved only by our Court. We will, therefore, proceed to address the merits of the issue before us.

III. Access under the Election Code

A. Arguments of the Parties

The Board argues that the Election Code granted to it the express statutory authority “[t]o make and issue such rules, regulations and instructions, not inconsistent

⁷ Even were the ballot counting process to conclude prior to our final disposition of this matter, we regard this issue before us as one which is capable of repetition but likely to evade review, and therefore subject to our review under this exception to the mootness doctrine. *See Reuther v. Delaware County Bureau of Elections*, 205 A.3d 302, 306 n.6 (Pa. 2019) (“Given the abbreviated time frame applicable to elections and the amount of time that it takes for litigation to reach this Court, this exception is particularly applicable when the question presented relates to an election dispute.”).

with law, as they may deem necessary for the guidance of . . . elections officers and electors.” Board Brief at 32 (quoting 25 P.S. § 2642(f)). Thus, it reasons that the access rules it established for ballot processing in Philadelphia County – which were based on its perceived need for protecting its workers’ safety from COVID-19 and physical assault from those individuals who have contact with its workers; ensuring security of the ballots; efficiently processing large numbers of ballots; protecting the privacy of voters; and ensuring campaign access to the canvassing proceedings – are a valid exercise of its authority. The Board maintains that these rules can be invalidated by a court only if they are inconsistent with the Election Code.

In determining whether its access rules are consistent with the Election Code, the Board contends that only two provisions of the Code are relevant: 25 P.S. § 3146.8(g)(1.1) (specifying that “[o]ne 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 pre-canvassed”), and Section 3146.8(g)(2) (providing that “[o]ne 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.”).

The Board rejects the relevance of Section 3146.8(b), given that it sets forth the access requirements for “watchers”.⁸ The Board characterizes this provision as vestigial

⁸ Section 3146.8(b) provides:

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.

in nature, reflecting the manner in which absentee ballots were handled prior to the 2006 and 2019 amendments to the Election Code which, respectively, added Section 3146.8(g)(2) and Section 3146.8(g)(1.1). Prior to those amendments, absentee ballots received by a board of elections were taken to the electors' local polling places to be canvassed, and, thus, candidates' designated poll watchers were permitted by Section 3146.8(b) to remain in the room at the polling place while the absentee ballots were canvassed. According to the Board, Sections 3146.8(g)(1.1) and (2) established that all mail-in and absentee ballots would be pre-canvassed and canvassed at a central location designated by the board of elections; hence, poll watchers are not granted access to these proceedings. Consequently, in the Board's view, the rights of the Campaign's designated representative in this matter are delineated exclusively by Sections 3146.8(g)(1.1) and (2).

The Board contends that these statutory provisions should be construed in accordance with the plain meaning of their terms, *i.e.*, requiring only that a candidate's authorized representative be permitted to remain in the room while the ballots are pre-canvassed or canvassed. The Board notes that the Campaign's representative was, in fact, permitted to be in the room at the Convention Center where the ballots were being pre-canvassed and canvassed at all times during this process, just as these provisions require. Relatedly, the Board contends that, even if Section 3146.8(b) of the Election Code were deemed to be applicable herein, its requirements were met as well, given that the Campaign's representative was present at all times when absentee and mail-in ballots were opened, counted, and recorded.

Moreover, the Board emphasizes that, contrary to the Commonwealth Court's conclusion, the evidence of record indicated that Attorney Mercer could see every portion of the pre-canvassing and canvassing process and, as a result, could confirm that the only ballots which were scanned and tabulated were those which had been removed from secrecy envelopes, and that the outer ballot envelope had been inspected for sufficiency and then sorted.

The Board points out that Attorney Mercer's complaints about being unable to read the actual declarations on the ballot envelopes, or his inability to see whether the secrecy envelopes contained improper markings, were relevant only to his desire to determine if the ballots met the requirements of the Election Code. However, the Board stresses that our Court very recently, in *In re: November 3, 2020 General Election*, ___ A.3d. ___, 2020 WL 6252803 (Pa. Oct. 23, 2020), interpreted the Election Code as precluding time-of-canvassing challenges by campaign representatives; hence, the Board maintains that a candidate's representative has no need for the information about which Attorney Mercer complains, as the representative cannot lodge a challenge based on it. Most importantly, however, from the Board's perspective, there is nothing in the statutory language of Sections 3146.8(g)(1.1) and (2) which grants a candidate's representative an unqualified right of access to that kind of information during the pre-canvassing and canvassing process.⁹

The Campaign responds that "the plain meaning and purpose of the statutes at issue is to provide the public the opportunity to observe and vet the canvassing and

⁹ Intervenor's brief endorses the Board's contention that the Commonwealth Court erred in its interpretation of the relevant provisions of the Election Code, but it does not develop a separate argument to support this claim.

tabulation of the vote.” Campaign Brief at 17. The Campaign reasons that, as the Election Code gives a candidate’s representative the right to be “present” and to “remain in the room” during the canvassing of absentee and mail-in ballots, citing 25 P.S. § 2650 (“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 machines affecting his candidacy.” (emphasis added)); *id.* § 3146.8(b) (allowing watchers to “be *present* when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded” (emphasis added)); *id.* § 3146.8(g)(2) (providing that an “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” (emphasis added)), these terms should be broadly interpreted consistent with their overall purpose of allowing public observation of the vote and the counting thereof. The Campaign rejects the Board’s interpretation as “a hyper-technical focus on the words themselves,” that disregards this purpose. Campaign Brief at 19.

The Campaign argues that, under the Board’s interpretation, merely being in the far end of a room like the Convention Center, which is as large as a football field, would be sufficient to comport with these requirements. This, in the Campaign’s view, “defies logic and reasonableness.” *Id.* at 20. The Campaign contends that the Board’s setup – imposing a barrier and having some tables in the area over a hundred feet away from the edge of the security fence – effectively deprived its representative of the ability to be truly

present, and effectively eliminates the representative's ability to perform his or her role of ensuring openness and transparency in the electoral process.

The Campaign denies that it was seeking the right to challenge mail-in or absentee ballots at the time of canvassing; rather, it claims that it was merely seeking the right to observe "in a meaningful way" the Board's conduct of the electoral process so that it could "challenge that process through appropriate litigation." Campaign Brief at 22 (emphasis omitted). The Campaign asserts its ability to do so is vital given that these canvassing activities have a high prospect of human error.

B. Analysis

As this issue presents a question of statutory interpretation under Pennsylvania law, our standard of review is *de novo*, and our scope of review is plenary. *Danganan v. Guardian Protection Services*, 645 Pa. 181, 179 A.3d 9, 15 (2018). Our objective is, therefore, to ascertain and effectuate the intent of the General Assembly. *Id.*; see also 1 Pa.C.S. § 1921(a). It is well established that "[t]he best indication of legislative intent is the plain language of the statute." *Crown Castle NG East v. Pennsylvania Public Utility Commission*, 234 A.3d 665, 674 (Pa. 2020). In ascertaining the plain meaning of statutory language, we consider it in context and give words and phrases their "common and approved usage." *Commonwealth by Shapiro v. Golden Gate National Senior Care*, 194 A.3d 1010, 1027-28 (Pa. 2017). When the words of a statute are free and clear of all ambiguity, they are the best indicator of legislative intent; hence, in such circumstances, "we cannot disregard the letter of the statute under the pretext of pursuing its spirit." *Fletcher v. Pennsylvania Property & Casualty Insurance Guarantee Association*, 603 Pa. 452, 985 A.2d 678, 684 (2009) (citing 1 Pa.C.S. § 1921(b)). Consistent with these

principles, when interpreting a statute “we must listen attentively to what the statute says, but also to what it does not say.” *Discovery Charter School v. School District of Philadelphia*, 166 A.3d 304, 321 (Pa. 2017). Moreover, regarding the factual findings of the trial court, we must defer to those findings if they are supported by the evidence. *Gentex Corp. v. WCAB (Morack)*, 23 A.3d 528, 534 (Pa. 2011); *Generette v. Donegal Mutual Insurance Company*, 957 A.2d 1180, 1189 (Pa. 2008).

As a threshold matter, given the specific issue in this case — the degree of access required by the Election Code for an “authorized representative” of a candidate to the pre-canvassing and canvassing proceedings of an election board — we regard Sections 3146.8(g)(1.1) and (2) of the Code to be the governing statutory provisions, as they directly set forth the rights of such individuals. Section 2650, offered by the Campaign, by its plain terms is inapplicable, as we are addressing the right of access of a campaign’s representative to canvassing proceedings, not a candidate or his “attorney in fact”. Section 3146.8(b) is likewise not controlling, given that it applies only to the right of “watchers” to be present while ballots are canvassed. The Election Code contains specific certification requirements for an individual to be appointed as a “watcher,” see 25 P.S. § 2687 (“Appointment of watchers”), and there is no evidence of record establishing that Attorney Mercer met these requirements, and, critically, he did not identify himself as a watcher, but rather as “one of the representatives designated by the Trump campaign . . . to observe the pre-canvass.” N.T. Hearing, 11/3/20, at 20-21.

As recited above, Section 3146.8(g)(1.1) requires only that an authorized representative “be permitted to *remain in the room* in which the absentee ballots and mail-in ballots are pre-canvassed,” 25 P.S. § 3146.8(g)(1.1) (emphasis added), and Section

3146.8(g)(2) likewise mandates merely that an authorized representative “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) (emphasis added). While this language contemplates an opportunity to broadly observe the mechanics of the canvassing process, we note that these provisions do not set a minimum distance between authorized representatives and canvassing activities occurring while they “remain in the room.” The General Assembly, had it so desired, could have easily established such parameters; however, it did not. It would be improper for this Court to judicially rewrite the statute by imposing distance requirements where the legislature has, in the exercise of its policy judgment, seen fit not to do so. See *Sivick v. State Ethics Commission*, __ A.3d __, 2020 WL 5823822, at *10 (Pa. filed Oct. 1, 2020) (“It is axiomatic that we may not add statutory language where we find the extant language somehow lacking.”).

Rather, we deem the absence of proximity parameters to reflect the legislature’s deliberate choice to leave such matters to the informed discretion of county boards of elections, who are empowered by Section 2642(f) of the Election Code “[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of . . . elections officers.” 25 P.S. § 2642(f).

In the case at bar, the Board promulgated regulations governing the locations in which authorized representatives were permitted to stand and move about while observing the pre-canvassing and canvassing process. The Board’s averments that it fashioned these rules based on its careful consideration of how it could best protect the security and privacy of voters’ ballots, as well as safeguard its employees and others who would be present during a pandemic for the pre-canvassing and canvassing process,

while, at the same time, ensuring that the ballots would be counted in the most expeditious manner possible, were undisputed by the Campaign. We discern no basis for the Commonwealth Court to have invalidated these rules and impose arbitrary distance requirements.

Significantly, as to any opportunity to observe the mechanics of the canvassing process, the evidence of record, provided through the Campaign's own witness, Attorney Mercer, whom the trial court deemed to be credible, indicates that the Board's rules regarding where campaign representatives could remain in the room to view the pre-canvassing and canvassing process did not deprive Attorney Mercer of the ability "to actually observe the . . . process in any meaningful way," as the Commonwealth Court concluded, Commonwealth Court Opinion, 11/5/20, at 8, and the Campaign presently argues. According to Attorney Mercer's candid testimony, which the trial court accepted as credible, from his vantage point, he could view the entirety of the pre-canvassing and canvassing process. Clearly, then, Attorney Mercer had the opportunity to observe the mechanics of the canvassing process. Specifically, Attorney Mercer witnessed Board employees inspecting the back of ballot envelopes containing the voter's declaration, before sending them on for processing; witnessed ballots being removed from their secrecy envelopes, and naked ballots which had been delivered to the Board without a secrecy envelope being segregated from ballots which arrived within such envelopes; saw that the ballot processing methods utilized by the Board were not destroying the ballot envelopes containing the voter's declaration; and perceived that the ballot secrecy envelopes were being preserved during their processing. See N.T. Hearing, 11/3/20, at 20-21, 27, 30, 38; Trial Court Order, 11/3/20 ("The [Campaign's] witness provided copious

testimony as to his ability to observe the opening and sorting of ballots.”). Although Attorney Mercer related that he could not view the actual declarations on the ballot envelopes, nor examine individual secrecy envelopes for improper markings, as the trial court properly determined, this information would only be necessary if he were making challenges to individual ballots during the pre-canvassing and canvassing process, which appeared to be his primary motivation in seeking such information. See *id.* at 37-38; Trial Court Order, 11/3/20 (“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.”). As discussed above, such challenges are not permissible under the Election Code. Thus, as found by the trial court, Attorney Mercer was able to appropriately observe that the Board’s employees were performing their duties under the Election Code.

In sum, we conclude the Board did not act contrary to law in fashioning its regulations governing the positioning of candidate representatives during the pre-canvassing and canvassing process, as the Election Code does not specify minimum distance parameters for the location of such representatives. Critically, we find the Board’s regulations as applied herein were reasonable in that they allowed candidate representatives to observe the Board conducting its activities as prescribed under the Election Code. Accordingly, we determine the Commonwealth Court’s order was erroneous. Thus, we vacate that order, and reinstate the trial court’s order.

Jurisdiction relinquished.

Justices Baer, Donohue, Dougherty and Wecht join the opinion.

Chief Justice Saylor files a dissenting opinion in which Justice Mundy joins.

Justice Mundy files a dissenting opinion.

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APPENDIX C

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**[J-113-2020]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

IN RE: NOVEMBER 3, 2020 GENERAL ELECTION	: No. 149 MM 2020 : : : : : :
PETITION OF: KATHY BOOCKVAR, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA	: SUBMITTED: October 16, 2020 : :

OPINION

JUSTICE TODD

DECIDED: October 23, 2020

On October 14, 2020, our Court granted the application of the Secretary of the Commonwealth, Kathy Boockvar (“Secretary”), to assume King’s Bench jurisdiction¹ and consider her request for declaratory relief, limited to answering the following question: “Whether the Election Code² authorizes or requires county election boards to reject voted absentee or mail-in ballots during pre-canvassing and canvassing³ based on signature

¹ As we have recently explained, our Court’s King’s Bench jurisdiction is derived from Article V, § 2 of the Pennsylvania Constitution and 42 Pa.C.S. § 502, and “is generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law.” *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 884 (Pa. 2020). We may exercise this power of review even where, as here, no dispute is pending in a lower court of this Commonwealth. *Id.*

² The Pennsylvania Election Code, 25 P.S. §§ 2600-3591 (“Election Code” or “Code”).

³ As defined by the Election Code, the process of “pre-canvassing” is “the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots. The term does not include the recording or publishing of the votes reflected on the ballots.” 25 P.S. § 2602. The process of “canvassing” is “the gathering

analysis where there are alleged or perceived signature variances?” *In Re: November 3, 2020 General Election, Petition of Kathy Boockvar, Secretary of the Commonwealth of Pennsylvania*, 149 MM 2020, 2020 WL 6110774 (Pa. filed Oct. 14, 2020) (order). For the reasons that follow, we conclude that the Election Code does not authorize or require county election boards to reject absentee or mail-in ballots during the canvassing process based on an analysis of a voter’s signature on the “declaration”⁴ contained on the official ballot return envelope for the absentee or mail-in ballot. We, therefore, grant the Secretary’s petition for declarative relief, and direct the county boards of elections not to reject absentee or mail-in ballots for counting, computing, and tallying based on signature comparisons conducted by county election officials or employees, or as the result of third-party challenges based on such comparisons.

I. Facts and Procedural History

As our Court has recently observed, “[i]n October 2019, the General Assembly of the Commonwealth of Pennsylvania enacted Act 77 of 2019,^[5] which, *inter alia*, created for the first time in Pennsylvania the opportunity for all qualified electors to vote by mail, without requiring the electors to demonstrate their absence from the voting district on

of ballots after the final pre-canvass meeting and the counting, computing and tallying of the votes reflected on the ballots.” *Id.* § 2602. At times herein, we refer to these two stages broadly as “canvassing.”

⁴ The voter’s declaration is a pre-printed statement required to appear on the ballot return envelope containing a voter’s absentee or mail-in ballot declaring: that the voter is qualified to vote the ballot enclosed in the envelope, and that the voter did not already vote in the election for which the ballot was issued. 25 P.S. § 3146.2. The declaration also contains lines for the voter to print his or her name and address, a space for the voter to sign his or her name or make a mark if unable to sign, and a space for the voter to enter the date on which he or she executed the declaration. *Id.* § 3146.6.

⁵ Act of October 31, 2019, P.L. 552, No. 77 (hereinafter, “Act 77”).

Election Day.” *Pennsylvania Democratic Party v. Boockvar*, 2020 WL 5554644, at *1 (Pa. Sept. 17, 2020). Subsequently, in March 2020, the legislature made further revisions to the Election Code via the passage of Act 12 of 2020,⁶ which, among other things, authorized for the June 2, 2020 primary election,⁷ and for all subsequent elections, the mail-in voting procedures established by Act 77.⁸

Because of the substantial nature of the recent Code amendments, as well as the anticipated massive increase in the number of mail-in and absentee ballots which county boards of elections would be confronted with due to the COVID-19 pandemic, in order to ensure that the procedures set forth in the Election Code regarding pre-canvassing and canvassing of absentee and mail-in ballots would be uniformly applied and implemented by county boards of elections, Secretary Boockvar issued two written guidance documents for those boards to follow when canvassing such ballots.

In the first guidance document issued on September 11, 2020 to all county boards, Secretary Boockvar set forth the procedure the boards were to follow upon receipt of an absentee or mail-in ballot. This guidance directed the county boards to examine the declaration contained on the ballot return envelope containing the absentee or mail-in ballot. It further directed the county board to “compare the information on the outer envelope, i.e., the voter’s name and address, with the information contained in the ‘Registered Absentee and Mail-In Voters File, the absentee voter’s list and/or the Military Veterans’ and Emergency Civilians Absentee Voters File.’” Pennsylvania Department of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return*

⁶ Act of March 27, 2020, P.L. 41, No. 12 (hereinafter, “Act 12”).

⁷ This election was rescheduled from May 17, 2020 due to the COVID-19 pandemic.

⁸ We collectively refer to Act 77 and Act 12 as the “recent Code amendments.”

Envelopes, 9/11/20, at 3, available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf>. The Secretary advised that, if the declaration is signed and the county board is satisfied that the declaration is sufficient, then the absentee or mail-in ballot should be approved for canvassing unless it is challenged in accordance with the Election Code. The Secretary specifically cautioned the county boards of elections in this regard that “[t]he Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections.” *Id.*

Subsequent to our Court’s decision in *Boockvar*, *supra*, the Secretary issued supplemental guidance to all county boards concerning, *inter alia*, matters addressed by our decision – *i.e.*, the establishment by county boards of satellite offices, provision of drop boxes for voters to return absentee and mail-in ballots, and the mandatory requirements that such ballots be returned only by the voter and be enclosed in a secrecy envelope. In this supplemental guidance, the Secretary also directed the county boards to set aside ballots which were returned to them without the declaration envelope having been “filled out, dated and signed.” Pennsylvania Department of State, *Guidance Concerning Civilian Absentee And Mail-In Ballot Procedures*, 9/28/20, at 9, available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/DOS%20Guidance%20Civilian%20Absentee%20and%20Mail-In%20Ballot%20Procedures.pdf>. This guidance buttressed her earlier instruction, reiterating that “[t]he Election Code does not permit county election officials to reject applications or voted ballots based solely on

signature analysis. . . . No challenges may be made to mail-in and absentee ballots at any time based on signature analysis.” *Id.*

Meanwhile, Intervenorors in the instant matter, Donald J. Trump for President, Inc., and the Republican National Committee, filed suit in the United States District Court for the Western District against the Secretary over several election issues.⁹ See *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966 (W.D. Pa.). In response to the Secretary’s guidance to the county boards, on September 23, 2020, Intervenorors filed an amended complaint in that matter challenging Secretary Boockvar’s interpretation of the Election Code as precluding county boards from rejecting absentee and mail-in ballots based on a signature comparison.

On October 1, 2020, Intervenorors filed a motion for summary judgment in the federal action alleging, *inter alia*, that the Secretary’s guidance was contrary to the Election Code and, thus, constituted an infringement on the “fundamental right to vote and to a free and fair election.” Plaintiff’s Memorandum of Law in Support of Motion for Summary Judgment filed in *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966 (W.D. Pa.) (Exhibit D to Secretary’s Application for Extraordinary Relief), at 15-19, 45-50. Intervenorors sought, as relief, the entry of an injunction directing the Secretary to withdraw her guidance, and, also, to require county boards of elections to compare signatures on

⁹ This lawsuit challenged, as an alleged violation of the due process and equal protection guarantees of the 14th Amendment to the United States Constitution, *inter alia*, the Secretary’s allowance in the upcoming election of the use of drop boxes, satellite election offices for the collection of absentee and mail-in ballots, and the counting of ballots which were returned without a secrecy envelope, and the requirement in the Election Code that poll watchers reside in the county in which they sought to serve in this capacity.

applications for absentee and mail-in ballots, and the ballots themselves, with the voter's permanent registration record. *Id.*

The Honorable J. Nicholas Ranjan denied Intervenor's motion for summary judgment, and granted judgment in favor of the Secretary. *Donald J. Trump for President, Inc. v. Boockvar*, 2020 WL 5997680 (W.D. Pa. filed Oct. 10, 2020) (hereinafter "*Trump*"). Relevant to the present dispute, in his scholarly and comprehensive supporting opinion, Judge Ranjan concluded that "the plain language of the Election Code imposes no requirement for signature comparison for mail-in and absentee ballots and applications." *Trump* at *53. In reaching this conclusion, Judge Ranjan analyzed the provisions of the Election Code governing pre-canvassing and canvassing of absentee and mail-in votes returned by the elector, set forth in Section 3146.8(g), which provides:

§ 3146.8. Canvassing of official absentee ballots and mail-in ballots

* * *

(g)(1)(i) An absentee ballot cast by any absentee elector as defined in section 1301(a), (b), (c), (d), (e), (f), (g) and (h) shall be canvassed in accordance with this subsection if the ballot is cast, submitted and received in accordance with the provisions of 25 Pa.C.S. Ch. 35 (relating to uniform military and overseas voters).

(ii) An absentee ballot cast by any absentee elector as defined in section 1301(i), (j), (k), (l), (m) and (n), an absentee ballot under section 1302(a.3) or a mail-in ballot cast by a mail-in elector shall be canvassed in accordance with this subsection if the absentee ballot or mail-in ballot is received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.

(1.1) The county board of elections shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting. A county board of elections

shall provide at least forty-eight hours' notice of a pre-canvass meeting by publicly posting a notice of a pre-canvass meeting on its publicly accessible Internet website. 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 pre-canvassed. No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.

(2) The county board of elections shall meet no earlier than the close of polls on the day of the election and no later than the third day following the election to begin canvassing absentee ballots and mail-in ballots not included in the pre-canvass meeting. The meeting under this paragraph shall continue until all absentee ballots and mail-in ballots received prior to the close of the polls have been canvassed. The county board of elections shall not record or publish any votes reflected on the ballots prior to the close of the polls. The canvass process shall continue through the eighth day following the election for valid military-overseas ballots timely received under 25 Pa.C.S. § 3511 (relating to receipt of voted ballot). A county board of elections shall provide at least forty-eight hours' notice of a canvass meeting by publicly posting a notice on its publicly accessible Internet website. 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.

(3) When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that

the declaration is sufficient and the information contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File" verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

(4) All absentee ballots which have not been challenged under section 1302.2(c) and all mail-in ballots which have not been challenged under section 1302.2-D(a)(2) and that have been verified under paragraph (3) shall be counted and included with the returns of the applicable election district as follows:

(i) The county board shall open the envelope of every unchallenged absentee elector and mail-in elector in such manner as not to destroy the declaration executed thereon.

(ii) If any of the envelopes on which are printed, stamped or endorsed the words "Official Election Ballot" contain any text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.

(iii) The county board shall then break the seals of such envelopes, remove the ballots and count, compute and tally the votes.

(iv) Following the close of the polls, the county board shall record and publish the votes reflected on the ballots.

(5) Ballots received whose applications have been challenged and ballots which have been challenged shall be placed unopened in a secure, safe and sealed container in the custody of the county board until it shall fix a time and place for a formal hearing of all such challenges, and notice shall be given where possible to all absentee electors and mail-in electors thus challenged and to every individual who made a challenge. The time for the hearing shall not be later than seven (7) days after the deadline for all challenges to be filed. On the day fixed for said hearing, the county board shall

proceed without delay to hear said challenges, and, in hearing the testimony, the county board shall not be bound by the Pennsylvania Rules of Evidence. The testimony presented shall be stenographically recorded and made part of the record of the hearing.

(6) The decision of the county board in upholding or dismissing any challenge may be reviewed by the court of common pleas of the county upon a petition filed by any person aggrieved by the decision of the county board. The appeal shall be taken, within two (2) days after the decision was made, whether the decision was reduced to writing or not, to the court of common pleas setting forth the objections to the county board's decision and praying for an order reversing the decision.

(7) Pending the final determination of all appeals, the county board shall suspend any action in canvassing and computing all challenged ballots received under this subsection irrespective of whether or not appeal was taken from the county board's decision. Upon completion of the computation of the returns of the county, the votes cast upon the challenged official absentee ballots that have been finally determined to be valid shall be added to the other votes cast within the county.

25 P.S. § 3146.8(g) (footnotes omitted).

Judge Ranjan discerned nothing in the text of these provisions which requires county boards of elections to “verify” the signatures on mail-in and absentee ballots – that is, to examine the signatures to determine whether or not they were authentic, *Trump* at *53, and thus rejected Intervenors’ argument that Section 3146.8(g)(3) requires county boards of elections to engage in signature comparison and verification. In Judge Ranjan’s view, the county board of elections is required under this statutory provision to verify only the proof of the voter’s identification by examining the voter’s driver’s license number, the last four digits of his or her social security number, or other specifically approved form of

identification which is required by Section 2602(z.5) of the Election Code.¹⁰ Indeed, Judge Ranjan noted that nowhere in Section 3146.8(g)(3) does the term “signature” appear. *Trump*, at *55.

¹⁰ This statutory section provides:

The words “proof of identification” shall mean:

(1) In the case of an elector who has a religious objection to being photographed, a valid-without-photo driver's license or a valid-without-photo identification card issued by the Department of Transportation.

(2) For an elector who appears to vote under section 1210, a document that:

(i) shows the name of the individual to whom the document was issued and the name substantially conforms to the name of the individual as it appears in the district register;

(ii) shows a photograph of the individual to whom the document was issued;

(iii) includes an expiration date and is not expired, except:

(A) for a document issued by the Department of Transportation which is not more than twelve (12) months past the expiration date; or

(B) in the case of a document from an agency of the Armed forces of the United States or their reserve components, including the Pennsylvania National Guard, establishing that the elector is a current member of or a veteran of the United States Armed Forces or National Guard which does not designate a specific date on which the document expires, but includes a designation that the expiration date is indefinite; and

(iv) was issued by one of the following:

(A) The United States Government.

(B) The Commonwealth of Pennsylvania.

(C) A municipality of this Commonwealth to an employee of that municipality.

(D) An accredited Pennsylvania public or private institution of higher learning.

(E) A Pennsylvania care facility.

(3) For a qualified absentee elector under section 1301 or a qualified mail-in elector under section 1301-D:

Judge Ranjan found that, while 25 P.S. §§ 3146.6(a) and 3150.16(a) require a voter submitting an absentee or mail-in ballot to “fill out and sign the declaration” printed on the ballot return envelope, the county board’s duty under these sections is merely to examine the declaration and determine if these requirements have been comported with. Critically, in his view, this language did not require that a county board inquire into the authenticity of the signature; rather, the county boards were required to determine only that a voter had supplied his signature in the declaration.

Judge Ranjan observed that, by contrast, other provisions of the Election Code such as those governing in-person voting, see 25 P.S. § 3050(a.3)(2), allow a vote to be challenged where a voter’s signature on the voting certificate executed at the polls is deemed not to be authentic when compared to the signature recorded in the district register of voters. Likewise, other sections of the Election Code allow boards of elections to reject provisional ballots based on an election official’s conclusion that the voter’s signature on the ballot envelope is not authentic, see 25 P.S. § 3050(a.4)(5)(i)-(ii), and allow election officials to reject nominating petitions based on the official’s conclusion that

(i) in the case of an elector who has been issued a current and valid driver's license, the elector's driver's license number;

(ii) in the case of an elector who has not been issued a current and valid driver's license, the last four digits of the elector's Social Security number;

(iii) in the case of an elector who has a religious objection to being photographed, a copy of a document that satisfies paragraph (1); or

(iv) in the case of an elector who has not been issued a current and valid driver's license or Social Security number, a copy of a document that satisfies paragraph (2).

25 P.S. § 2602(z.5) (footnotes omitted).

the signatures contained therein are not authentic, see 25 P.S. § 2936. From Judge Ranjan's perspective, these provisions of the Code demonstrated that the Pennsylvania General Assembly knew how to require signature verification when they so desired, and the fact they did not do so in Section 3146.8(g)(3) indicated that signature verification was not a requirement for absentee or mail-in ballots.

Judge Ranjan also considered the effect of interpreting Section 3146.8(g)(3) to require signature comparison. In his view, doing so would create a risk that voters would be disenfranchised, given that mail-in and absentee ballots are kept securely stored until election day when the pre-canvassing process begins, and the Election Code contains no requirement that voters whose ballots are deemed inadequately verified be apprised of this fact. Thus, unlike in-person voters, mail-in or absentee voters are not provided any opportunity to cure perceived defects in a timely manner.¹¹

In the instant matter, on October 4, 2020, just before Judge Ranjan issued his decision, Secretary Boockvar filed with this Court an application seeking invocation of our King's Bench authority, and seeking, *inter alia*, a declaration that, under the Election Code, county boards of elections are precluded from rejecting absentee or mail-in ballots at canvassing based upon signature comparisons, in accordance with her guidance to the county boards. Thereafter, the Secretary submitted a letter to our Court pursuant to Pa.R.A.P. 2501 apprising us of Judge Ranjan's decision. In this letter, the Secretary

¹¹ Judge Ranjan additionally rejected Intervenor's claims that a lack of signature comparison requirements violated the guarantees of the United States Constitution to substantive due process and equal protection. Because the present issue which we have accepted for our King's Bench review concerns only a pure question of state law involving interpretation of our Commonwealth's Election Code, we need not discuss Judge Ranjan's resolution of those claims.

noted that Judge Ranjan’s opinion concluded that her guidance to the county boards of elections was “uniform and non-discriminatory” and “informs the counties of the current state of the law as it relates to signature comparison.” Secretary’s Letter to Supreme Court Prothonotary, 10/11/20, at 2 (quoting *Trump* at *61). Nevertheless, recognizing that our Court is the final word on the interpretation of Pennsylvania law, the Secretary maintained her request for our Court to grant King’s Bench review. *Id.* (“[T]he district court’s opinion, while timely and persuasive, is not authoritative. Only this Court can render the ultimate determination concerning Pennsylvania law.”).

As indicated above, our Court granted the Secretary’s application for invocation of our King’s Bench authority because we determined the Secretary presented an issue of public importance that required our immediate intervention. *See supra* note 1. In our order granting review, we also granted the petitions to intervene of Donald J. Trump for President Inc., the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee (“Intervenors”). We denied the petitions for intervention of Elizabeth Radcliffe, a qualified elector, Bryan Cutler, Speaker of the Pennsylvania House of Representatives, Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives, Joseph B. Scarnati III, Pennsylvania Senate President Pro Tempore, and Jake Corman, Senate Majority Leader. However, these parties were granted leave to file *amicus* briefs.¹² We additionally granted leave for the Brennan Center for Justice, the Urban League of Pittsburgh, the Bucks,

¹² After the filing deadline set in our order, Senate President Pro Tempore Scarnati and Senate Majority Leader Corman filed an application for leave to file an *amicus* brief *nunc pro tunc*, alleging that technical difficulties with our electronic filing system prevented timely filing their *amicus* brief. We grant the application.

Chester, Montgomery and Philadelphia County Boards of Elections, and the Pennsylvania Alliance for Retired Persons to file *amicus* briefs.

II. Arguments of the Parties

The Secretary first highlights the fact that, when a voter applies for a mail-in ballot, Sections 3150.12(a) and (b)(1)-(2) of the Election Code require the voter to fill out an application form listing his name, address, date of birth, voting district, and the length of time he has resided in the voting district.¹³ According to the Secretary, the paper version of that form also requires a voter to sign a declaration that he or she is eligible to vote in the election for which he is requesting a ballot.¹⁴ Upon receipt of this application, a county board of elections confirms whether the applicant is qualified to receive a mail-in ballot under Section 3250.12b by verifying the proof of identification supplied with the application, such as the voter's drivers' license number or the last four digits of the voter's social security number, and the county board compares that information with the voter's permanent registration card. The Secretary contends that this comparison process is all that is required by the Election Code, and that there is no provision therein which requires county boards of elections to compare signatures for purposes of verification, which is why, the Secretary points out, the application can be completed and submitted electronically through a Commonwealth website.

Once this verification is completed, the Secretary proffers that the Code requires the application be marked approved and a ballot issued. See 25 P.S. § 3150.12b(a)(1).

¹³ The Secretary argues that absentee ballot application and approval procedures set forth in 25 P.S. §§ 3146.2 and 3146.2b are similar and, hence, for the sake of convenience, discusses only the mail-in balloting provisions.

¹⁴ This form is available on the Secretary's website at https://www.votespa.com/Register-to-Vote/Documents/PADOS_MailInApplication.pdf.

The Secretary emphasizes that the only permissible challenge to the ballot application under Section 3150.12b(a)(2) is that the applicant was not a qualified elector.

With regard to the pre-canvassing and canvassing procedures for absentee and mail-in ballots set forth in Section 3146.8 of the Election Code,¹⁵ the Secretary notes that the pre-canvassing process, which entails opening the ballot return envelopes, removing the ballots, and counting, computing and tallying them, can begin no earlier than 7:00 a.m. on election day. When the return envelope is opened during that process, according to the Secretary, the only examination which the county board may conduct under Section 3146.8(g)(3) and 3146.2c(c)¹⁶ is to compare “the ‘information’ on the envelope—i.e., the

¹⁵ Section 3146.8, by its title, “Canvassing of official absentee ballots and mail-in ballots,” and its plain terms, governs both the pre-canvassing and canvassing of absentee and mail-in ballots.

¹⁶ Section 3146.2c(c) provides:

Not less than five days preceding the election, the chief clerk shall prepare a list for each election district showing the names and post office addresses of all voting residents thereof to whom official absentee or mail-in ballots shall have been issued. Each such list shall be prepared in duplicate, shall be headed “Persons in (give identity of election district) to whom absentee or mail-in ballots have been issued for the election of (date of election),” and shall be signed by him not less than four days preceding the election. He shall post the original of each such list in a conspicuous place in the office of the county election board and see that it is kept so posted until the close of the polls on election day. He shall cause the duplicate of each such list to be delivered to the judge of election in the election district in the same manner and at the same time as are provided in this act for the delivery of other election supplies, and it shall be the duty of such judge of election to post such duplicate list in a conspicuous place within the polling place of his district and see that it is kept so posted throughout the time that the polls are open. Upon written request, he shall furnish a copy of such list to any candidate or party county chairman.

25 P.S. § 3146.2c(c).

voter's name and address—with the names and addresses on the lists of approved absentee and mail-in voters.” Secretary’s Application for Extraordinary Relief, 10/04/20, at 19. The Secretary stresses that no other examination is permitted under the plain terms of the Code.

If the county board’s examination determines that the declaration is sufficient, and the voter’s name and address appears in the lists of approved absentee and mail-in voters, then, according to the Secretary, the Code requires the ballots to be counted. 25 P.S. § 3146.8(g)(3) and (4). The Secretary asserts that the only exception involves challenges to a voter’s eligibility raised at the ballot application stage under Section 3150.12b(a)(2).¹⁷ The Secretary contends that such challenges must be made by 5:00 p.m. on the Friday before election day and, thus, cannot be made during the pre-canvassing procedure (which does not begin until election day).

The Secretary argues that there is no provision of the Election Code which allows or requires the county boards of elections to entertain challenges “based on perceived signature mismatches,” Secretary’s Application for Extraordinary Relief, 10/04/20, at 20, or to reject absentee or mail-in ballots because of such an assessment. The Secretary notes that the General Assembly knows how to draft provisions requiring signature comparison, as it did for the in-person voting process governed by Section 3050(a.3)(2), which directs election officials to compare the signature of the voter signing the voter certificate at the polls with the district register, and then to make the determination of whether the signature on the voter certificate is genuine. Moreover, unlike for in-person

¹⁷ See also 25 P.S. § 3146.2b(b) and (c) (limiting challenges to approval of application for absentee ballots to the ground that the applicant was not a “qualified absentee elector” or a “qualified elector”).

voting, there is no provision in the Code which requires a voter to be notified that his signature has been challenged during the canvassing process; hence, a voter whose ballot is rejected during canvassing because of a perceived signature mismatch has no opportunity to respond to the challenge and have his ballot counted. In sum, the Secretary contends that requiring signature comparison during canvassing would improperly add a requirement to the Election Code which the legislature did not see fit to include.

Although the Secretary views the Election Code in this regard to be clear and unambiguous, she notes that, even if we were to find it to be ambiguous, we must still reject a signature comparison requirement, given that there are no standards or guidelines contained within the Code governing how an election official should perform such a comparison. In this vacuum, the Secretary asserts individual county boards will improvise “*ad hoc*” procedures, which would vary from county to county, creating a significant risk of error and uncertainty in the review of ballots. Secretary’s Application for Extraordinary Relief, 10/04/20, at 24. In the Secretary’s view, this would constitute a denial of equal protection to voters whose ballots were challenged and rejected under such varying and imprecise standards. This process would also present an “unjustified risk of disenfranchisement,” *id.* at 25, given that a voter’s ballot could be rejected without any opportunity to be heard on the issue.

Intervenors respond that the Election Code’s use of the term “shall” in Sections 3146.6(a) and 3150.16(a) with respect to the requirement that electors sign the declaration on the outside of the ballot return envelope, together with the Code’s companion requirement that county boards examine the declaration and determine if it is

“sufficient,” mandates that county boards conduct signature verification. Intervenor Supplemental Brief at 6. Intervenor develops that, “because a voter’s noncompliance with the signature mandate ‘renders the ballot invalid,’ that mandate necessarily contemplates the ‘enforcement mechanism’ of county boards engaging in—and invalidating ballots during the pre-canvass or canvass based upon—verification of the voter’s signature.” *Id.* Intervenor maintains that the “mandate” established by these statutory provisions “authorizes and requires signature verification and invalidation of ballots based upon signature mismatch.” *Id.* Additionally, Intervenor maintains that, because Section 3148.8(g)(3) requires a determination of whether a declaration is “sufficient,” and establishes that a declaration will only be sufficient when signed by the elector, this “encompasses the enforcement mechanism of signature analysis and verification during the pre-canvass and canvass.” *Id.* Further, Intervenor insists that objections can be made at canvassing to ballots revealing signature mismatches.

Although contending that these provisions of the Election Code are clear, Intervenor asserts that principles of statutory construction also support their suggested interpretation. Specifically, Intervenor maintains that signature comparison is necessary to prevent fraud, and that prior decisions from lower courts of the Commonwealth have endorsed this practice to effectuate this purpose. *See id.* at 7-8 (citing *Appeal of Orsatti*, 598 A.2d 1341 (Pa. Cmwlth. 1991); *In re Canvass of Absentee Ballots of Nov. 2, 1965, Gen. Election*, 39 Pa. D. & C.2d 429 (Montg. Cty. Common Pleas 1965); *Fogleman Appeal*, 36 Pa. D. & C.2d 426 (Juniata Cty. Common Pleas 1964); *In re City of Wilkes-Barre Election Appeals*, 44 Pa. D. & C.2d 535 (Luzerne Cty. Common Pleas 1967)). Intervenor also suggests the fact that, when a ballot return envelope is scanned upon

receipt by a county board of elections, the voter's registration card, which includes his or her signature, as contained in the Commonwealth's "SURE" ("Statewide Uniform Registry of Electors") system appears on the election official's computer screen. Intervenor's view this fact as indicating that even the Secretary believes signature verification is required.

Addressing the potential impacts of the competing interpretations, Intervenor's suggest that the Secretary's interpretation implicates due process and equal protection concerns, given that voters who vote in person are subject to signature verification, whereas those who vote by mail-in or absentee ballots would not be. Intervenor's contend we should avoid an interpretation of the Code that results in such potential constitutional violations.

Intervenor's rebuff the practical difficulties of implementing a system of signature verification raised by the Secretary, asserting that Chester County has already promulgated and produced such a system.¹⁸ Intervenor's further dispute that voters could be disenfranchised without their knowledge based on enforcement of a signature comparison requirement. They point to the notice, hearing, and judicial review provisions in Section 3146.8(g)(5)-(7) for adjudicating ballot challenges, which they contend would allow a voter whose signature has been challenged during canvassing to have the challenge adjudicated and thereby preserve their right to vote.

III. Analysis

As the issue on which we accepted King's Bench review is purely one of statutory interpretation, our standard of review is *de novo*, and our scope of review is plenary. *Danganan v. Guardian Protective Services*, 179 A.3d 9, 15 (Pa. 2018). In

¹⁸ Notably, Chester County filed an *amicus* brief supporting the Secretary's position.

matters of statutory interpretation, our objective is to ascertain and effectuate the intent of the General Assembly. *Id.*; see also 1 Pa.C.S. § 1921(a). As we have so oft observed, “[t]he best indication of legislative intent is the plain language of the statute.” *Crown Castle NG East v. Pennsylvania Public Utility Commission*, 234 A.3d 665, 674 (Pa. 2020). In ascertaining the plain meaning of statutory language, we consider it in context and give words and phrases their “common and approved usage.” *Commonwealth by Shapiro v. Golden Gate National Senior Care*, 194 A.3d 1010, 1027-28 (Pa. 2017). When the words of a statute are free and clear of all ambiguity, they are the best indicator of legislative intent; hence, in such circumstances, “we cannot disregard the letter of the statute under the pretext of pursuing its spirit.” *Fletcher v. Pennsylvania Property & Casualty Insurance Guarantee Association*, 985 A.2d 678, 684 (Pa. 2009) (citing 1 Pa.C.S. § 1921(b)).

Turning to the text of the governing statutory provisions, Section 3146.8(g)(3) of the Election Code enumerates only three duties of the county boards of elections during the pre-canvassing and canvassing process:

- (1) to “examine the declaration on the envelope of each ballot not set aside under subsection (d) [requiring rejection of ballots for deceased voters] and shall compare the information thereon with that contained in the ‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File,’ whichever is applicable”;
- (2) to verify “the proof of identification as required under this act,” and
- (3) to be “satisfied that the declaration is sufficient and the information contained in the ‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File’ verifies his right to vote.”

25 P.S. § 3146.8(g)(3).

If an absentee or mail-in ballot comports with these statutory requirements, and it has not been challenged under Section 3146.2b (providing for challenges to approval of absentee ballot application on the ground that the applicant was not a “qualified absentee

elector,” or a “qualified elector”), or Section 3150.12b (providing that the exclusive means for challenging a mail-in ballot application is “on the grounds that the applicant was not a qualified elector”),¹⁹ then Section 3146.8(g)(4) requires the ballot to be considered “verified” and directs that it “shall be counted and included with the returns of the applicable election district.” 25 P.S. § 3146.8(g)(4)(a). The only exception is set forth in Section 3146.8(g)(4)(ii), which requires that, “[i]f any of the envelopes on which are printed, stamped or endorsed the words ‘Official Election Ballot,’ contain any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.” *Id.* § 3146.8(g)(4)(ii).

To assess the signature analysis question before us, we review in turn each of the three canvassing duties set forth above from Section 3146.8(g)(3). First, as noted, the county boards must examine the declaration on the ballot return envelope and then “compare the information thereon with that contained in the ‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File.’” *Id.* § 3146.8(g)(3).

Initially, we note that, with respect to the “Registered Absentee and Mail-in Voters File,” it seems this file, previously utilized, is now a virtually empty relic. Prior to the recent Code amendments, subsection (a) of Section 3146.2c specified that this file was to

¹⁹ As the Secretary has argued, the plain text of these provisions requires challenges to applications for mail-in ballot applications to be brought no later than 5:00 p.m. on the Friday before the election. 25 P.S. § 3150.12b(a)(2). Likewise, challenges to absentee ballot applications of registered voters, except for those permanently registered, must be brought by that same deadline. *Id.* § 3146.2b(c). Finally, challenges which are brought to a registered voter who is on the permanent registration list must be brought by the deadline for receipt of absentee ballots. *Id.* § 3146.2b(b). Hence, none of these challenges may be brought during the canvassing process.

contain duplicate “voter’s temporary registration cards.”²⁰ See *id.* § 3146.2c(a) (effective to Oct. 30, 2019). Indeed, the provision provided that these registration cards “shall constitute” the file, indicating the file had no other content. *Id.* Critically, however, with the passage of Act 12, the legislature deleted subsection (a). Act 12, § 8 (deleting 25 P.S. § 3146.2c(a)). Thus, while the canvassing provisions of 25 P.S. § 3146.8(g)(3) still require a voter’s declaration to be compared against the file, that comparison would appear to be a meaningless exercise. The only informational remnant in the file, if it is still being maintained, is that set forth in Sections 3146.2(h) and 3150.12(e), requiring a voter’s absentee and mail-in ballot application number to be entered in the file. Manifestly, there is no present requirement that the file contain the type of signature information necessary to perform the signature comparison Intervenor’s contend is mandatory.

With respect to a comparison of the declaration against the absentee voters’ list and the “Military Veterans and Emergency Civilians Absentee Voters File,” as highlighted by the Secretary, see Secretary’s Application for Extraordinary Relief, 10/04/20, at 19 n.14, the only lists against which such a comparison may be conducted are those which

²⁰ This provision then provided, in full:

The county board of elections shall maintain at its office a file containing the duplicate absentee voter’s temporary registration cards of every registered elector to whom an absentee ballot has been sent. Such duplicate absentee voter’s temporary registration cards shall be filed by election districts and within each election district in exact alphabetical order and indexed. The registration cards so filed shall constitute the Registered Absentee Voters File for the Primary or Election of (date of primary or election) and shall be kept on file for a period commencing the Tuesday prior to the day of the primary or election until the day following the primary or election or the day the county board of elections certifies the returns of the primary or election, whichever date is later. Such file shall be open to public inspection at all times subject to reasonable safeguards, rules and regulations.

25 P.S. § 3146.2c(a) (effective to Oct. 30, 2019).

the county boards are required to keep under subsections (b) and (c) of Section 3146.2c.

Those subsections provide:

(b) The county board of elections shall post in a conspicuous public place at its office a master list arranged in alphabetical order by election districts setting forth the name and residence, and at primaries, the party enrollment, of (1) every military elector to whom an absentee ballot is being sent, each such name to be prefixed with an "M"; (2) every bedridden or hospitalized veteran outside the county of his residence who is not registered and to whom an absentee ballot is being sent, each such name to be prefixed with a "V"; and (3) every registered elector who has filed his application for an absentee ballot too late for the extraction of his original registration card and to whom a ballot is being sent and every qualified elector who has filed his application for an absentee ballot and is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting, each such name to be prefixed with a "C." This list shall be known as the Military, Veterans and Emergency Civilians Absentee Voters File for the Primary or Election of (date of primary or election) and shall be posted for a period commencing the Tuesday prior to the day of the primary or election until the day following the primary or election or the day on which the county board of elections certifies the returns of the primary or election, whichever date is later. Such file shall be open to public inspection at all times subject to reasonable safeguards, rules and regulations. This posted list shall not contain any military address or reference to any military organization. Upon written request, the county board shall furnish a copy of such list to any candidate or party county chairman.

(c) Not less than five days preceding the election, the chief clerk shall prepare a list for each election district showing the names and post office addresses of all voting residents thereof to whom official absentee or mail-in ballots shall have been issued. Each such list shall be prepared in duplicate, shall be headed "Persons in (give identity of election district) to whom absentee or mail-in ballots have been issued for the election of (date of election)," and shall be signed by him not less than four days preceding the election. He shall post the original of each such list in a conspicuous place in the office of the county election board and see that it is kept so posted

until the close of the polls on election day. He shall cause the duplicate of each such list to be delivered to the judge of election in the election district in the same manner and at the same time as are provided in this act for the delivery of other election supplies, and it shall be the duty of such judge of election to post such duplicate list in a conspicuous place within the polling place of his district and see that it is kept so posted throughout the time that the polls are open. Upon written request, he shall furnish a copy of such list to any candidate or party county chairman.

25 P.S. § 3146.2c(b) and (c).

Notably, the only information required to be kept in these lists is, as the Secretary highlights, the names and addresses of registered voters, and, in the case of voters serving in the military, even their addresses need not be disclosed. Consequently, in comparing a declaration against these lists, a county board may determine only whether the name and address information the voter has listed on the ballot envelope matches.²¹ There is no signature information in these lists for county election officials to compare against a voter's signature on his declaration; therefore, pursuant to the plain language of the Election Code, these lists cannot facilitate the signature comparison Intervenor maintain is required.

Next, in canvassing the ballots under Section 3146.8(g)(3), the county boards must verify "the proof of identification as required under this act." As indicated above, see *supra* note 9, Section 2602(z.5)(3)(i)-(iv) of the Election Code enumerates the various *types* of identification which a voter may utilize in completing a ballot application. Consequently, we conclude the county board's duty in this regard is to check the identification listed on the voter's mail-in or absentee ballot to see if it is of the *type* permitted by the Election Code, and to verify that it is valid. This duty does not, however, require or authorize county boards to go further and compare the signature on the voter's

²¹ This comparison process operates to eliminate ballots of voters who have provided a different name entirely than that which appears on these lists.

mail-in or absentee ballot to ensure that it is the same as that which appears on the form of identification the voter has listed on the application. Hence, this unambiguous provision likewise does not permit or require signature comparison.

Finally, a county board is required to determine if the ballot declaration is “sufficient.” 25 P.S. § 3146.8(g)(3). The requirements for a ballot declaration are set forth in Section 3146.6(a) (absentee ballots) and Section 3150.16(a) (mail-in ballots). Both sections require that the elector “fill out, date and sign the declaration.” *Id.* §§ 3146.6(a), 3150.16(a). Thus, in determining whether the declaration is “sufficient” for a mail-in or absentee ballot at canvassing, the county board is required to ascertain whether the declaration on the return envelope has been filled out, dated, and signed. This is the extent of the board’s obligation in this regard. In assessing a declaration’s sufficiency, there is nothing in this language which allows or compels a county board to compare signatures. Accordingly, we decline to read a signature comparison requirement into the plain and unambiguous language of the Election Code, as Intervenor urge us to do, inasmuch as the General Assembly has chosen not to include such a requirement at canvassing.

Even if there were any ambiguity with respect to these provisions, we observe that the General Assembly has been explicit whenever it has desired to require election officials to undertake an inquiry into the authenticity of a voter’s signature. See, e.g., 25 P.S. § 3050(a.3)(2) (governing procedures for in-person voting at polling places and requiring an “election officer” to “compare the elector’s signature on his voter’s certificate with his signature in the district register,” and based “upon such comparison . . . if the signature on the voter’s certificate, as compared with the signature as recorded in the district register, *shall not be deemed authentic by any of the election officers*, such elector shall not be denied the right to vote for that reason, but shall be considered challenged

as to identity,” and requiring the voter to execute an affidavit and provide proof of his identity in order to vote (emphasis added)); *id.* § 3050(a.4)(5)(i) (“Except as provided in subclause (ii), if it is determined that [an individual who attempts to cast an in-person ballot at a polling place, but whose name did not appear on the district register of eligible voters] was registered and entitled to vote at the election district where the ballot was cast, the county board of elections shall compare the signature on the provisional ballot envelope with the signature on the elector’s registration form *and, if the signatures are determined to be genuine*, shall count the ballot if the county board of elections confirms that the individual did not cast any other ballot, including an absentee ballot, in the election.” (emphasis added)).

In this regard, we note that, when the Election Code was first promulgated by the General Assembly in 1937, it contained explicit signature comparison requirements for canvassing certain absentee ballots. See Act of June 3, 1937, P.L. 1333, No. 320. Article XIII of that law, a precursor of the current mail-in ballot procedures, provided certain military service members the right to use mail-in ballots, referred to as “Detached Soldier’s Ballots.” Similar to today’s mail-in ballots, the service member was required to complete an affidavit on an outer envelope, along with the jurat of his witnessing officer, and then place his completed ballot inside that outer envelope. *Id.* § 1329. In canvassing such ballots, the county boards were instructed to “open such registered letter and after examining the affidavit and jurat, [to] *compare the signature of such absent voter with his signature upon any register or other record in their possession. If the county board is satisfied that the signatures correspond and that the affidavit and jurat are sufficient*, they shall announce the name of the elector and shall give any person present an opportunity to challenge the same” *Id.* § 1330 (emphasis added). Absent any challenge, such

ballots were counted. Notably, in 1945, this signature comparison language was removed from the Code.²²

We draw two inferences from this early history. First, the legislature understands how to craft language requiring signature comparisons at canvassing when it chooses to do so, as it did in 1937. Second, in the 1937 Code, the legislature drew a clear distinction between assessing the *sufficiency* of the ballot affidavit (and jurat) and a *comparison* of the ballot signature. The legislature having subsequently stripped out the signature comparison language from the Code, we ought not to construe, as Intervenor suggests, the remaining sufficiency determination as incorporating a signature comparison.

Our conclusion that Section 3146.8(g)(3) of the Election Code does not impose a duty on county boards to compare signatures is also consistent with the recent evolution of the Election Code, wherein the legislature expanded the allowances for voting by mail. Notably, at the same time it liberalized voting by mail, the legislature first restricted, and then eliminated, the ability of third-parties to challenge ballots at canvassing.

Prior to the recent Code amendments, absentee ballots were the only permissible form of voting by mail. At that time, at canvassing, after a county board was satisfied that the declaration on an absentee ballot was sufficient, the Code provided that the board “shall announce the name of the elector and shall give any candidate representative or party representative present an opportunity to challenge any absentee elector” on

²² Act of March 9, 1945, P.L. 29, No. 17, §§ 9-10. Thereafter, as set forth in the 1945 amendment, the county board was required to maintain a “Military File” containing the names and addresses of service members sent absentee ballots, *id.* § 10 (reenacting Section 1305 of Act of 1937), something akin to the “Military Veterans and Emergency Civilians Absentee Voters File” in the present Election Code. Also, like the current Code, at canvassing, the board was required to review only the ballot affidavit (and jurat) to determine “[i]f the board is satisfied that the affidavit and jurat are sufficient and that the elector has qualified.” *Id.* § 10 (reenacting Section 1307 of Act of 1937). Thus, signature comparison was no longer part of the county board’s canvassing obligations.

specified grounds. See 25 P.S. § 3146.8(g)(3) (effective Nov. 9, 2006 to Mar. 13, 2012).²³ There were three permissible grounds for challenge: that the absentee elector was not a qualified elector; that the absentee elector, despite alleging otherwise, was present in his municipality of residence on election day; or that the absentee elector, despite alleging otherwise, was in fact able to appear at the polling place on election day. *Id.*

However, when the legislature first allowed for no-excuse mail-in voting in 2019, the legislature simultaneously reduced the bases on which canvassing challenges could be made by eliminating the present-in-his-municipality objection (albeit while allowing the remaining challenges to be asserted against mail-in ballots). See Act 77, § 7 (amending 25 P.S. § 3146.8(g)(3)). Then, in 2020, the legislature eliminated time-of-canvassing challenges *entirely* from Section 3146.8(g)(3). See Act 12, § 11 (amending 25 P.S. § 3146.8(g)(3) to eliminate the challenging grounds and procedures, and amending Section 3146.8(g)(2) to eliminate the proviso that “Representatives shall be permitted to challenge any absentee elector or mail-in elector in accordance with the provisions of paragraph (3)”). Accordingly, the Election Code presently provides no mechanism for time-of-canvassing challenges by candidate or party representatives. See 25 P.S. § 3146.8(g)(4) (“All absentee ballots which have not been challenged under section 1302.2(c) [pertaining to absentee ballot *applications*] and all mail-in ballots which have not been challenged under section 1302.2-D(a)(2) [pertaining to mail-in ballot *applications*] and that have been verified under paragraph (3) shall be counted and included with the returns of the

²³ A similar procedure was provided to allow poll watchers to challenge ballots. 25 P.S. § 3146.8(e) (effective Nov. 9, 2006 to Mar. 13, 2012). However, this procedure was deleted in its entirety in 2019. See Act 77, § 7 (deleting 25 P.S. § 3146.8(e)).

applicable election district . . .”).²⁴ Moreover, as is plain from the above account, at no time did the Code provide for challenges to ballot *signatures*.²⁵

Presumably, in expanding voting by mail, the legislature sought to streamline the process for canvassing such ballots, perhaps to avoid undermining the expansion effort by eliminating the prospect that voters – including a potentially large number of new mail-in voters – would be brought before the board or the courts to answer third-party challenges. Regardless, Intervenor would have us interpret the Election Code, which now does not provide for time-of-canvassing ballot challenges, and which never allowed for signature challenges, as both requiring signature comparisons at canvassing, and allowing for challenges on that basis. We reject this invitation.

It is a well established principle of statutory interpretation that that we “may not supply omissions in the statute when it appears that the matter may have been intentionally omitted.” *Sivick v. State Ethics Commission*, 2020 WL 5823822, at *10 (Pa. Oct. 1, 2020). It is not our role under our tripartite system of governance to engage in judicial legislation and to rewrite a statute in order to supply terms which are not present therein, and we will not do so in this instance.

IV. Conclusion

²⁴ Admittedly, there are some vestiges remaining in the Election Code of the prior, now eliminated, system for time-of-canvassing ballot challenges. See, e.g., 25 P.S. § 3146.8(f) (requiring a \$10 deposit for each challenge to an absentee or mail-in ballot application *or ballot*); *id.* § 1308(g)(5) (discussing procedures for handling “[b]allots received whose applications have been challenged and *ballots which have been challenged*” (emphasis added)). Now untethered to a procedure for asserting time-of-canvassing challenges in Section 3146.8(g)(3), however, we view the references to ballots in these provisions to be the overlooked remnants of a prior, now eliminated, process.

²⁵ For this reason, we reject Intervenor’s contention that the notice, hearing, and judicial review provisions in Section 3146.8(g)(5)-(7) pertain to adjudicating signature challenges.

For all of the aforementioned reasons, we grant the Secretary's petition for declarative relief, and hold that county boards of elections are prohibited from rejecting absentee or mail-in ballots based on signature comparison conducted by county election officials or employees, or as the result of third-party challenges based on signature analysis and comparisons.

Chief Justice Saylor and Justices Baer, Donohue, Dougherty and Wecht join the opinion.

Justice Mundy concurs in the result.

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APPENDIX D

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Canvass of Absentee	:	
and/or Mail-in Ballots of	:	
November 3, 2020 General Election	:	
	:	
v.	:	No. 1191 C.D. 2020
	:	Submitted: November 23, 2020
Appeal of: Donald J. Trump for	:	
President, Inc.	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
JUDGE COHN JUBELIRER**

FILED: November 25, 2020

Donald J. Trump for President, Inc. (Appellant) appeals from the Order of the Court of Common Pleas of Bucks County (common pleas) that overruled the Appellant's objections to certain absentee and/or mail-in ballots, denied Appellant's requested relief, and dismissed Appellant's appeal from the Bucks County Board of Elections' (Board) determination that the challenged ballots were valid and could be counted in the General Election of November 3, 2020 (Election).¹ Appellant argues the Board violated the Election Code² (Code) when it did not reject and, over objection, accepted 2,177 ballots on the basis that they did not comply, in some way, with Sections 3146.6 or 3150.16 of the Code, 25 P.S. §§ 3146.6 (absentee electors),

¹ Others challenged the Board's decision to common pleas, but only Appellant has filed a notice of appeal from the common pleas' Order.

² Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2601-3591.

3150.16 (mail-in electors). Appellant has since withdrawn some of the challenges, and of the remaining challenges, all but 69 ballots are resolved by a recent decision of the Supreme Court; common pleas' Order with regard to those ballots is, therefore, affirmed for that reason. The remaining 69 ballots were received with secrecy envelopes that were "unsealed." The statute unambiguously requires that secrecy envelopes shall be "securely seal[ed]," 25 P.S. §§ 3146.6(a), 3150.16(a), and that the board of elections shall "break the seals" on these envelopes before counting the ballots. Section 3146.8(g)(4)(iii) of the Code, 25 P.S. § 3146.8(g)(iii).³ Therefore, in future elections, the sealing requirement should be treated as mandatory and if unsealed secrecy envelopes are received, this will invalidate the ballots contained therein. However, because of the facts and circumstances in this case, this interpretation will be applied prospectively. Common pleas' Order is, therefore, affirmed with regard to those 69 ballots.

The parties filed a joint stipulation of facts with common pleas setting forth the following facts relevant to the Court's resolution of this appeal. On November 3, 2020, the Board met to pre-canvass absentee and mail-in ballots as set forth in Section 3146.8(g) of the Code. (Stip. ¶ 17.) During the course of the Board's canvass meeting on November 7, 2020, and with Authorized Representatives present and given an opportunity to provide argument, the Board considered whether certain voter declarations on the outer envelope were "sufficient" to meet the requirements of Section 3146.8(g). (*Id.* ¶ 18.) The Board separated the ballots into 10 different categories, and accepted some of the categories for canvassing and rejected others. (*Id.* ¶ 19.) Of the categories accepted for canvassing, Appellant challenged six to common pleas. Those six categories were:

³ This section was added by Section 11 of the Act of March 6, 1951, P.L. 3.

- Category 1: 1,196 ballots whose outer envelopes did not contain a handwritten date or contained only a partial handwritten date.
- Category 2: 644 ballots whose outer envelopes did not include a handwritten name or address.
- Category 3: 86 ballots whose outer envelopes contained a partial written address.
- Category 4: 246 ballots whose outer envelopes contained mismatched addresses.
- Category 5: 69 ballots with “unsealed” secrecy envelopes.
- Category 6: 7 ballots whose secrecy envelopes had markings that did not identify the elector’s identity, political affiliation, or candidate preference.

(*Id.* ¶ 24.) During the hearing before common pleas, Appellant withdrew its challenges to Categories 4 and 6, (Hr’g Tr. at 114-15; common pleas’ op. at 6; common pleas’ November 23, 2020 Order Clarifying the Record.) Therefore, these challenges will not be discussed further.

The parties stipulated that “[w]hen received by [the Board,] each of the challenged ballots was inside a [secrecy] envelope, and the [secrecy] envelope was inside a sealed outer envelope with a voter’s declaration that had been signed by the elector.” (Stip. ¶ 45.) On the outer envelope “is a checklist for the voter, asking: “Did you . . . [p]ut your ballot inside the secrecy envelope and place it in here?” (*Id.* ¶ 10). With regard to Category 5 ballots, the parties stipulated that the Board “could not determine whether the [secrecy] envelopes were initially sealed by the elector but later became unsealed.” (*Id.* ¶ 46.) The electors whose ballots are being challenged have not been notified. (*Id.* ¶ 47.) The stipulation clearly establishes that Appellant does not allege, and there is no evidence of, fraud, misconduct, impropriety, or undue influence. (*Id.* ¶¶ 27-30.) Further, Appellant does not allege,

and there is no evidence, that the Board counted ballots that did not contain signatures on the outer envelope or “‘naked ballots,’ (ballots that did not arrive in a secrecy envelope).” (*Id.* ¶¶ 31-32.) Last, Appellant does not allege, and there is no evidence, that the electors who cast these votes were ineligible to vote, that votes were cast by or on the behalf of a deceased elector, or that votes were cast by someone other than the elector. (*Id.* ¶¶ 33-35.)

In addition to these stipulated facts, common pleas held a hearing, at which Thomas Freitag, the Board’s Director (Director), testified. (Hr’g Tr. at 63-64.) Director testified about the Board’s process in reviewing the ballots in general, the challenged ballots, and the Board’s determinations to accept or reject challenged ballots that were missing information on the outer envelopes. (*Id.* at 68-96.) Relevant specifically to Category 5 challenges, Director indicated that “the privacy of the ballots [were not] jeopardized in any manner[,]” there was no “view of the ballots” “to his knowledge,” and that there was no “way to determine by the Board whether or not [the secrecy envelope] had been sealed at one point and became unsealed.” (*Id.* at 97-98.) He testified that the Board provided the envelopes, including the secrecy envelopes, which were the type that had “to be either moistened by licking or water or glue,” and agreed that people would have to rely on the type of envelopes provided by the Board as to the quality of the seal. (*Id.* at 98-99.) Director agreed that the Board discussed the possibility that voters may have concerns about licking the envelopes, given the pandemic, which appeared to be a factor in its decisions. (*Id.* at 99.) He further agreed that the “ballots that were enclosed within unsealed [secrecy] envelopes” were “enclosed within [the] outer envelope.” (*Id.*) Director was subjected to limited cross-examination., but not on this issue. The parties then provided argument on the various challenges. Following

the hearing, common pleas issued an opinion and order rejecting the challenges and dismissing the appeal of the Board's decision. Appellant now appeals to this Court.⁴

As to Categories 1 through 3, which challenged the ballots on the basis of a deficiency on the outer envelopes, common pleas held that the information missing was not mandatory under the Election Code, but directory and, therefore, its absence would not invalidate those ballots. (Common pleas' op. at 14-19.) Appellant challenges these determinations before this Court. However, after the filing of the appeal, the Supreme Court of Pennsylvania rejected these same legal challenges in *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election* (Pa., Nos. 31-35 EAP 2020 and 29 WAP 2020, filed November 23, 2020) (*Philadelphia/Allegheny*), slip op. 19-32.⁵ In doing so, the Supreme Court "conclude[d] that the . . . Code does not require boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or date, where no fraud or irregularity has been alleged." *Id.*, slip op. at 3. Appellant acknowledges this holding in its brief, but points out that, per a majority of the Supreme Court, dating the outer envelope is a mandatory requirement, but would be applied prospectively. (Appellant's Brief (Br.) at 27.)

⁴ Common pleas' decision is reviewed on appeal "to determine whether the findings are supported by competent evidence and to correct any conclusions of law erroneously made." *In re Reading Sch. Bd. Election*, 634 A.2d 170, 171-72 (Pa. 1993). Issues involving the proper interpretation of the Code is a question of law, and the Court's standard of review is de novo and scope of review is plenary. *Banfield v. Cortes*, 110 A.3d 155, 166 (Pa. 2015.)

⁵ DNC Services Corporation/Democratic National Committee, an appellee here, filed an application for extraordinary relief with the Supreme Court requesting the Supreme Court exercise its extraordinary jurisdiction powers over this appeal, but this application was denied by the Supreme Court by order dated November 24, 2020.

This Court is bound by the Supreme Court’s decision,⁶ and, applying that decision, there was no error in common pleas rejecting Appellant’s challenges to Categories 1 through 3.⁷

The sole remaining issue before this Court is whether the ballots identified in Category 5, which are those ballots that were enclosed, but did not appear to be “sealed,” in the secrecy envelope, must be invalidated under the Code. In rejecting Appellant’s challenge to this category, common pleas explained that the ballots at issue were not “naked ballots,” which would have been invalid pursuant to the Supreme Court’s decision in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 378-80 (Pa. 2020). Common pleas held that “[t]here is no factual evidence that supports a conclusion that the envelopes had not been sealed by the elector prior to” the time of canvassing. (Common pleas op. at 20.) Instead, common pleas pointed to the parties’ stipulation that “[w]ith respect to Category 5 . . . [the Board] could not determine whether the [secrecy] envelopes were initially sealed by the elector but later became unsealed.” (*Id.* (quoting Stip. ¶ 46).) Accordingly, common pleas found “there [was] no evidence that the electors failed to ‘securely seal [the ballot] in the [secrecy] envelope,’ as required by the . . . Code.” (*Id.* (first and third alteration added).) It explained that “[t]he elector was provided the envelope by the government” and “[i]f the glue on the envelope failed[,] that would be the responsibility of the government.” (*Id.*) Therefore, common pleas held “[t]here

⁶ Notably, the Supreme Court referenced common pleas’ decision in this matter and held that common pleas “appropriately applied th[e Supreme] Court’s precedent” in affirming the counting of these ballots. *Philadelphia/Allegheny*, slip op. at 32-33 n.6.

⁷ To the extent Appellant seeks to “incorporate” Equal Protection arguments into this case that were raised in other cases, Appellant did not raise such claims before common pleas and, therefore, the Court will not consider them. Pennsylvania Rule of Appellate Procedure 302(a), Pa.R.A.P. 302(a) (“Issues not raised in the trial court are waived and cannot be raised for the first time on appeal.”).

[was] insufficient evidence to determine whether the specific language of the mandated law was violated” and “it would be an injustice to disenfranchise these voters when it cannot be shown that the ballots in question were not ‘securely sealed’ in the [secrecy] envelope prior to the canvassing of those ballots,” particularly where “there ha[d] been no suggestion or evidence that the absence of a sealed inner envelope in anyway jeopardized the privacy of the ballot.” (*Id.*)

Appellant, citing *Boockvar*, argues that the requirements of Sections 3146.6(a) and 3150.16(a) are mandatory, not directory. According to Appellant, the Supreme Court has recognized that these requirements of the Code “are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed -- particularly where . . . they are designed to reduce fraud.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1234 (Pa. 2004) (*Appeal of Pierce*). Therefore, Appellant argues, “absentee or mail-in ballots cast in contravention of the requirements of [Section 3146.6(a) and 3150.16(a) of the Code] are ‘void’ and cannot be counted.” (Appellant’s Br. at 23 (quoting *Appeal of Pierce*, 843 A.2d at 1234).)

The Board, as an appellee, argues that the deficiencies set forth in Category 5 are minor technical deficiencies related to the sealing of the secrecy envelopes and should be treated like other minor mistakes that do not require that the ballots be stricken. The Board maintains that there is no evidence that these 69 electors did not comply with the statutory language or that the secrecy of the ballots was in any way compromised. *Boockvar*, the Board asserts, requires that the ballots must be **enclosed** in the secrecy envelopes or the ballots should be disqualified. 238 A.3d at 380. Here, there is no dispute that the ballots were fully enclosed in the secrecy envelopes, consistent with the holding in *Boockvar*, and, as a factual matter, there

could be no determination as to whether the secrecy envelopes were sealed by the electors and later became unsealed. Given that the Court cannot tell whether the electors made errors in casting their ballots, and the lack of any allegation of fraud, the Board argues there is no compelling reason to disenfranchise these electors. *Appeal of James*, 105 A.2d 64, 66 (Pa. 1954).

Appellee DNC Services Corporation/Democratic National Committee (DNC) asserts there is no statutory requirement that the voter must seal the secrecy envelope in order for the ballot to be counted. Further, it asserts that the word “seal” is not a term of art and is not defined by the Code, is ambiguous and, per a dictionary definition, commonly means “to close” or “to make secure,” and there is no allegation that the secrecy envelopes were not closed or the ballots were not secure in the envelopes. (DNC’s Br. at 16-17.) DNC argues that noncompliance with this requirement does not justify disenfranchisement because, unlike with “naked ballots,” the identity of the electors was protected, which is consistent with the statutory purpose.⁸

Relevant here are Sections 3146.6(a), 3150.16(a), and 3146.8(g)(4)(ii) and (iii) of the Code. Section 3146.6(a) states, in pertinent part:

at any time after receiving an official absentee ballot, but on or before eight o’clock P.M. the day of the primary or election, **the elector shall**, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, **enclose and securely seal the same in the envelope on which is printed, stamped or endorsed “Official Election Ballot.”** This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector’s county board of election and the local election

⁸ DNC argues this Court does not have jurisdiction to consider this matter; however, our Supreme Court’s order denying DNC’s request for that Court to exercise its powers of extraordinary jurisdiction confirms this Court’s jurisdiction.

district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3146.6(a) (emphasis added). Section 3150.16(a) contains the nearly identical statement that “**the mail-in elector shall**, in secret, proceed to mark the ballot . . . and then fold the ballot, **enclose and securely seal the same in the envelope** on which is printed, stamped or endorsed ‘Official Election Ballot’” and “[t]his envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector’s county board of election and the local election district of the elector” 25 P.S. § 3150.16(a) (emphasis added).

Section 3146.8(g)(4)(ii) and (iii), governing “Canvassing of official absentee ballots and mail-in ballots,” specifies that

(4) All absentee ballots which have not been challenged under section 1302.2(c) and all mail-in ballots which have not been challenged under section 1302.2-D(a)(2) and that have been verified under paragraph (3) shall be counted and included with the returns of the applicable election district as follows:

. . . .

(ii) If any of the envelopes on which are printed, stamped or endorsed the words “Official Election Ballot” contain any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.

(iii) **The county board shall then break the seals of such envelopes, remove the ballots and count, compute and tally the votes.**

25 P.S. § 3146.8(g)(4)(ii), (iii) (emphasis added).

The parties present three legal interpretive approaches to whether these 69 ballots were properly accepted by the Board when they were enclosed, but not sealed, in the secrecy envelope at the time of canvassing. Appellant argues this requirement is mandatory and allows for **no** exception. The Board and DNC argue that this requirement is directory and noncompliance with that requirement is a minor defect that should be excused. The Board alternatively argues, in accordance with common pleas' reasoning, that as a factual matter, a violation of this requirement by the electors has not been established, and, in the absence of compelling reasons, such as allegations of fraud or infringement on the electors' secrecy, the electors should not be disenfranchised.

“[T]he polestar of statutory construction is to determine the intent of the General Assembly.” *Appeal of Pierce*, 843 A.2d at 1230. Generally, “the best indication of the legislative intent is the plain language of a statute.” *Id.* (citation omitted). In construing that language, “[w]ords and phrases shall be construed according to the rules of grammar and according to their common and approved usage” *Id.* (citation omitted). The Court is mindful that, “[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” *Id.* (citation omitted). It is only when the words of the statute “are not explicit” that the Court may then “resort to other considerations, such as the statute’s perceived ‘purpose,’ in order to ascertain legislative intent.” *Id.* (citation omitted). The Court is likewise mindful that, as our Supreme Court has explained, “all things being equal, the [Code] will be construed liberally in favor of the right to vote but, at the same time, we cannot ignore the clear mandates of the . . . Code.” *Id.* at 1231.

The operative provisions at issue here involve the statutory direction that “the elector shall . . . fold the ballot, **enclose and securely seal** the same in the envelope on which is printed, stamped or endorsed ‘Official Election Ballot.’” 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added). At canvassing, “[t]he county board shall then **break the seals** of such envelopes, remove the ballots and count” 25 P.S. § 3146.8(g)(4)(iii) (emphasis added).

The provisions that are at issue here are contained within sections that our Supreme Court has found to contain both mandatory and directory provisions. However, particularly applicable here, the Supreme Court in *Boockvar* held that “the secrecy provision language in Section 3150.16(a) is **mandatory** and the mail-in elector’s failure to comply with such requisite by enclosing the ballot in the secrecy envelope renders the ballot invalid.” *Boockvar*, 238 A.3d at 380 (emphasis added). In *Boockvar*, our Supreme Court considered whether county boards of election should be required to “clothe and count naked ballots,” that is, place ballots that were returned to the county board without the secrecy envelopes into an envelope and count them. 238 A.3d at 374. As here, the Supreme Court was presented with conflicting assertions that this requirement was directory or mandatory. After examining the statutory text, the Court concluded that the legislative intent was for the “**secrecy envelope provision**” to be mandatory, citing article VII, section 4 of the Pennsylvania Constitution, providing that “secrecy in voting shall be preserved,” PA. CONST. art. VII, § 4, and Section 3146.8(g)(4)(ii). The Supreme Court explained that the two statutory provisions, dealing with the same subject, “must be read *in pari materia*.” *Boockvar*, 238 A.3d at 378. Based on that statutory language, the Supreme Court held that it was clear that the legislature intended “that, during the collection and canvassing processes, when the outer envelope in which the ballot

arrived is unsealed and **the sealed ballot** removed, it should not be readily apparent who the elector is, with what party [the elector] affiliates, or for whom the elector has voted.” *Id.* (emphasis added). Per the Court, “[t]he secrecy envelope properly unmarked **and sealed** ensures that result, unless it is marked with identifying information, in which case that goal is compromised” and that “[t]he omission of a secrecy envelope defeats this intention.” *Id.* at 378, 380 (emphasis added). The Supreme Court in *Boockvar* found the matter analogous to the issue in *Appeal of Pierce*, where there was a challenge to absentee ballots that were delivered to the county board of election by third persons in violation of the Code’s “in-person” delivery requirement. *Id.* at 379. In *Appeal of Pierce*, the Supreme Court held that the “so-called technicalities of the . . . Code,” such as the requirement that an elector personally deliver the elector’s absentee ballot, “are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed – particularly where, as here, they are designed to reduce fraud.” 843 A.2d at 1234. Therefore, the Court in that case, found that the in-person delivery requirement was mandatory and the absentee ballots delivered in contravention of this mandatory provision were void. *Id.*

The Court recognizes that the unsealed envelopes here could be viewed as a less substantial noncompliance than an elector’s failure to use the secrecy envelope, as the ballots here were actually enclosed in the secrecy envelope and then in the sealed outer envelope. However, the language relating to securely sealing the secrecy envelope is encompassed within the provision directing the use of the secrecy envelope, which the Supreme Court found mandatory in *Boockvar*. That the legislature intended the secrecy envelopes to remain sealed until the ballots are counted is further evidenced by the directive in Section 3146.8(g)(4)(iii) that “[t]he

county board **shall then break the seals of such envelopes**, remove the ballots and **count**” 25 P.S. § 3146.8(g)(4)(iii) (emphasis added). Such language, when read *in pari materia* with Sections 3146.6(a) and 3150.16(a), reflects that the legislature intended the secure sealing of the secrecy envelope to be mandatory. *Boockvar*, 238 A.3d at 378. Accordingly, Appellant’s argument that this directive is mandatory such that an elector’s noncompliance results in a ballot that is not valid is supported by the statutory language and *Boockvar*.

The parties stipulated that these challenged ballots were “unsealed” in the secrecy envelopes when canvassing of the ballots was to begin. The text of the Code unambiguously states that the elector “shall . . . enclose and securely seal the [ballot] in the envelope . . . ,” 25 P.S. §§ 3146.6(a), 3150.16(a), and that, at canvassing, “[t]he county board shall then break the seals of such envelopes, remove the ballots and count,” 25 P.S. § 3146.8(g)(4)(iii). The legislature did not merely require the envelope to be sealed, but specified that it be “**securely**” sealed. 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added). The Code unambiguously requires the envelopes remain sealed until the county board of elections can “break the seals” of the secrecy envelopes. 25 P.S. § 3146.8(g)(4)(iii). When the text of the statute is clear and unambiguous, those words best reflect the legislative intent, and “the letter of [the unambiguous language] is not to be disregarded under the pretext of pursuing its spirit.” *Appeal of Pierce*, 843 A.2d at 1230 (citation omitted).

Justice Wecht recently in *Philadelphia/Allegheny* highlighted that there are times a Court should give prospective application to a ruling under the Code. Slip op. at 17-18 (Wecht, J., concurring). Citing *In Appeal of Zentner*, 626 A.2d 146 (Pa.1993), as precedent, Justice Wecht concurred in the decision of the Court to count the ballots that were undated, and would prospectively apply a more strict

interpretation of the statute favored by three other justices. As did Justice Wecht, this Court recognizes the tremendous challenges presented by the massive expansion of mail-in voting, and the lack of precedential rulings on the requirement of a “securely sealed” secrecy envelope. Moreover, the parties stipulated in this case reveals that the instructions on the outer envelope for the elector stated only that the ballot should be placed in the secrecy envelope and did not specify that the envelope needed to be securely sealed or the consequences of failing to strictly adhere to that requirement. *See Philadelphia/Allegheny*, slip op. at 20 (Wecht, J., concurring). Moreover, in this case, it cannot be established that the electors did not seal the secrecy envelope. Importantly, the Court must point out that there are absolutely **no allegations** of any fraud, impropriety, misconduct, or undue influence, that anyone voted who was not eligible to vote, or that the secrecy of the ballots cast was jeopardized. For these reasons, the decision of the Court will be applied prospectively, and the 69 ballots will not be invalidated.

Accordingly, common pleas’ Order is affirmed.



RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Canvass of Absentee
and/or Mail-in Ballots of
November 3, 2020 General Election

v.

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

:
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:
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:
:
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No. 1191 C.D. 2020

ORDER

NOW, November 25, 2020, the Order of the Court of Common Pleas of Bucks County, entered in the above-captioned matter, is **AFFIRMED** in accordance with the foregoing opinion.



RENÉE COHN JUBELIRER, Judge

RETRIEVED FROM DEMOCRACYDOCKET.COM

APPENDIX E

RETRIEVED FROM DEMOCRACYDOCKET.COM

In re 2,349 Ballots in 2020 General Election

Decided Nov 19, 2020

No. 1162 C.D. 2020

11-19-2020

In Re: 2,349 Ballots in the 2020 General Election Appeal of: Nicole Zicarelli

MEMORANDUM OPINION BY JUDGE BROBSON

Submitted: November 19, 2020 **BEFORE: HONORABLE P. KEVIN BROBSON, Judge HONORABLE PATRICIA A. McCULLOUGH, Judge HONORABLE MICHAEL H. WOJCIK, Judge**

OPINION NOT REPORTED

MEMORANDUM OPINION BY JUDGE BROBSON

Nicole Zicarelli, a Republican candidate for State Senator from the 45th Senatorial District in the General Election (Candidate), initiated a statutory appeal under the Pennsylvania Election Code¹ (Election Code) in the Court of Common Pleas of Allegheny County (Common Pleas Court) from a decision by the Allegheny County Board of Elections (Elections Board) to canvass and count 2,349 absentee or mail-in ballots for the November 3, 2020 General Election (General Election) notwithstanding the lack of a date of signature by the elector on the statutorily required elector declaration on the outside envelope of the ballots. On appeal, the Common Pleas Court rejected the Campaign Committee's arguments and affirmed the Elections Board's decision in a

2 November 18, 2020 Order.² *2

¹ Act of June 3, 1937, P.L. 1333, as amended, 25 P.S. §§ 2600-3591.

² On application by Candidate, this Court issued an Order late on November 18, 2020, enjoining the Elections Board from canvassing and counting the disputed ballots and directed that the Elections Board segregate those ballots pending further order of the Court.

The Committee filed a timely appeal from the Common Pleas Court's order with this Court, contending that the disputed ballots are invalid and cannot be counted. The parties have submitted briefs in support of their respective arguments on the merits.

Given the exigency,³ we dispense with an extensive summary of the parties' respective positions on appeal. Generally, the Candidate alleges that the absentee and mail-in ballots that are the subject of this appeal are defective and, therefore, cannot be counted under the Election Code. The Elections Board and DNC Services Corp./Democratic National Committee (DNC)⁴ generally contend that we must interpret and apply the Election Code to enfranchise, rather than disenfranchise voters. This means, according to the Elections Board and the DNC, that what they term "minor irregularities" in elector declarations can, and in this case should, be overlooked in the absence of any evidence of fraud.

3 "The integrity of the election process requires immediate resolution of disputes that prevent certification." *In re 2003 Election for Jackson Twp. Supervisor*, 840 A.2d 1044, 1046 (Pa. Cmwlt. 2003) (Kelly, S.J.).

4 Though not a named party originally, the Common Pleas Court granted the DNC intervenor status as a respondent.

Each county board of election is required to provide the mail-in ballot elector with the following: (1) two envelopes—an inner secrecy envelope in which the executed ballot is placed and an outer mailing envelope in which the secrecy envelope (containing the executed ballot) is placed for mailing (or drop off); (2) a list of candidates, if authorized; and (3) "the uniform instructions in form and substance as prescribed by the Secretary of the Commonwealth and nothing else." Sections 1304 and 1304-D(c) of the Election Code, 25 P.S. §§ 3146.4, 3150.14(c). The outer mailing envelope must include an elector declaration and the name and *3 address of the proper county board of election. Sections 1304 and 1304-D(a) of the Election Code. The form of the declaration is left up to the Secretary of the Commonwealth (Secretary). It must, however, include "a statement of the elector's qualifications, together with a statement that the elector has not already voted in the primary or election." Sections 1304 and 1304-D(b) of the Election Code. The Secretary adopted a form declaration that includes the required statutory language and space for the elector to sign, date, and fill out the elector's name and address.

In its recent decision in *In re November 3, 2020 General Election*, ___ A.3d ___ (Pa., No. 149 MM 2020, filed Oct. 23, 2020), the Pennsylvania Supreme Court reviewed the requirements in the Election Code with respect to the elector declaration on mail-in and absentee ballots. To execute a mail-in or absentee ballot, the Election Code requires the elector to "fill out, date and sign the declaration printed on [the outside] envelope." Sections 1306(a) and 1306-D(a), 25 P.S. §§ 3146.6(a), 3150.16(a). During the pre-canvass or canvass of mail-in and absentee ballots, the board of election "is required to determine if the ballot declaration is 'sufficient.'" *In re: November 3, 2020 Gen. Election*, ___ A.3d at ___, slip op. at 25 (quoting Section 1308(g)(3) of the Election Code,⁵ 25 P.S. § 3146.8(g)(3)). With respect to determining the sufficiency of the declaration, the Pennsylvania Supreme Court explained the boards of election's obligation: "[I]n determining whether the declaration is 'sufficient' for a mail-in or absentee ballot at canvassing, the county board *is required* to ascertain whether the declaration on the return envelope has been filled out, *dated*, and signed. This is the extent of the board's obligation in this regard." *Id.* (emphasis added). *4

⁵ Added by the Act of March 6, 1951, P.L. 3.

The concern that an elector might fail to "fill out" the declaration in full, let alone date and sign the declaration, in part prompted the Pennsylvania Democratic Party and Democratic elected official and candidates (Democratic Party) to initiate a suit in this Court's original jurisdiction against the Secretary and every Pennsylvania county board of election earlier this year, seeking declaratory and injunctive relief. The Pennsylvania Supreme Court, pursuant to Section 726 of the Judicial Code, 42 Pa. C.S. § 726, assumed jurisdiction over the case to address issues relating to the interpretation and implementation of Act 77 of 2019⁶—the statute that amended the Election Code to authorize mail-in voting (a/k/a no-excuse absentee voting).

⁶ Act of October 31, 2019, P.L. 552, No. 77 (Act 77).

Among the issues/concerns raised by the Democratic Party was that electors may submit their mail-in or absentee ballots with "minor facial defects resulting from their failure to comply with the statutory requirements for voting by mail." *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 372 (Pa. 2020). The Democratic Party asked the Pennsylvania Supreme Court to require county boards of election to give those electors notice and an opportunity to cure the defective ballots. In advancing that argument, the Democratic

Party relied on the same principles the Board relies on in this case—*i.e.*, liberal construction of the Election Code requirements and the favoring of enfranchising voters, not disenfranchising them. *Id.* at 372-73. The Secretary opposed the relief requested:

Unlike the other claims asserted herein, the Secretary opposes [p]etitioner's request for relief in this regard. She counters that there is no statutory or constitutional basis for requiring the [b]oards [of election] to contact voters when faced with a defective ballot and afford them an opportunity to cure defects. The Secretary further notes that, while [p]etitioner relies on the Free and Equal Elections Clause [of the

5 *5

Pennsylvania Constitution], that Clause cannot create statutory language that the General Assembly chose not to provide.

The Secretary submits that so long as a voter follows the requisite voting procedures, he or she "will have an equally effective power to select the representative of his or her choice." Emphasizing that [p]etitioner presents no explanation as to how the [b]oards [of election] would notify voters or how the voters would correct the errors, the Secretary further claims that, while it may be good policy to implement a procedure that entails notice of defective ballots and an opportunity to cure them, *logistical policy decisions like the ones implicated herein are more properly addressed by the Legislature, not the courts.*

Pa. Democratic Party v. Boockvar, 238 A.3d at 373 (emphasis added) (citations omitted) (quoting *League of Women Voters v. Cmwlth.*, 178 A.3d 737, 809 (Pa. 2018)). Apparently persuaded by the Secretary's arguments, the Pennsylvania Supreme Court rejected the request for a judicially mandated notice and opportunity to cure:

Upon review, we conclude that the [b]oards [of election] are not required to implement a "notice and opportunity to cure" procedure for mail-in and absentee ballots that voters have filled out incompletely or incorrectly. Put simply, as argued by the parties in opposition to the requested relief, [p]etitioner has cited no constitutional or statutory basis that would countenance imposing the procedure [p]etitioner seeks to require (*i.e.*, having the [b]oards [of election] contact those individuals whose ballots the [b]oards [of election] have reviewed and identified as including "minor" or "facial" defects—and for whom the [b]oards [of election] have contact information—and then afford those individuals the opportunity to cure defects until the [federal Uniformed and Overseas Citizens Absentee Voting Act⁷] deadline).

While the Pennsylvania Constitution mandates that elections be "free and equal," it leaves the task of effectuating that mandate to the Legislature. As noted herein, although the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for the "notice and opportunity to cure" procedure sought by [p]etitioner. *To the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, we agree that the decision to provide a "notice and*

6 *6

opportunity to cure" procedure to alleviate that risk is one best suited for the Legislature. We express this agreement particularly in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots, all of which are best left to the legislative branch of Pennsylvania's government. Thus, for the reasons stated, the [p]etitioner is not entitled to the relief it seeks in Count III of its petition.

Id. at 374 (emphasis added) (citation omitted).

⁷ 52 U.S.C. §§ 20301-20311.

We must presume that the Elections Board was aware of the Pennsylvania Supreme Court's decision in *In re: November 3, 2020 General Election* and its earlier decision in *Pennsylvania Democratic Party* when the Elections Board began the canvass and pre-canvass process for mail-in and absentee ballots. The Elections Board chose, nonetheless, to ignore its obligations under the Election Code to determine the sufficiency of the mail-in and absentee ballots at issue, as recapitulated by the Supreme Court in *In re: November 3, 2020 General Election*, and apparently took the Pennsylvania Supreme Court's decision in *Pennsylvania Democratic Party* as both a ruling against a notice and opportunity to cure remedy for defective ballots and an invitation to, instead, simply *ignore* defects when canvassing and pre-canvassing. In so doing, the Elections Board even acted in conflict with September 28, 2020 guidance from the Secretary: "At the pre-canvass or canvass, as the case may be, the county board of election[] should . . . [s]et aside any ballots without a filled out, dated and signed declaration envelope." Pennsylvania Dep't of State, *Guidance Concerning Civilian Absentee and Mail-In Ballot Procedures*, 9/28/2020, at 8, available at

<https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/DOS%20Guidance%20Civilian%20Absentee%20and%20Mail-In%20Ballot%20Procedure>

⁷ [s.pdf](#) (last visited Nov. 20, 2020).⁸ Where the Elections Board tacitly derived its authority to ignore its statutory obligation to determine the sufficiency of ballots and to violate the will of the General Assembly reflected in Act 77, approved by the Governor, and the guidance of the Secretary is a mystery.

⁸ We note that the Pennsylvania Supreme Court cited to this supplemental guidance from the Secretary in its opinion in *In re: November 3, 2020 Gen. Election*, ___ A.3d at ___, slip op. at 4.

The General Assembly's authority in this regard, however, is certain. Under the United States Constitution, the General Assembly determines the "Times, Places and Manner of holding Elections for . . . Representatives," subject to any rules that Congress may establish.⁹ The General Election, during which the voters of Pennsylvania select their representatives to the United States House of Representatives, falls within the provision. Even in cases involving the right to vote, the rules of statutory construction apply. *See In re: November 3, 2020 Gen. Election*, ___ A.3d at ___, slip op. at 19-20; *Pa. Democratic Party*, 238 A.3d at 355-56. The Pennsylvania Supreme Court has already determined that the above statutory language regarding the casting and pre-canvassing and canvassing of mail-in and absentee ballots is "plain," *In re: November 3, 2020 Gen. Election*, ___ A.3d at ___, slip op. at 24, and "unambiguous," *id.*, slip op. at 25, with respect to an elector's obligation to "fill out, date and sign" the declaration and the county board of election's obligation to determine the sufficiency of that declaration. The constitutionality of these provisions is not in question here. It is not the judiciary's role, let alone the role of the Elections Board, to relax or ignore requirements that the General Assembly, with the Governor's approval, chose to include in the Election Code.

⁹ U.S. Const. art. I, § 4, cl. 1 ("Elections Clause"). The full text of the Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

In this regard, while we recognize the well-settled principle of statutory construction that the Election Code should be liberally construed in favor of voter enfranchisement, not disenfranchisement, like all principles of statutory construction this rule is only implicated where there is ambiguity in the Election Code. *See In re: Canvassing Observation*, ___ A.3d ___, (Pa., No. 30 EAP 2020, filed Nov. 13, 2020), slip op. at 15-16; *Pa.*

Democratic Party, 238 A.3d at 356. In *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223 (Pa. 2004), the Pennsylvania Supreme Court reversed a decision by this Court that would have allowed the Elections Board to count absentee ballots that were hand-delivered by a third person on behalf of electors *who were not disabled*. Then, and now, the Election Code expressly prohibits this practice. This Court's reason for disregarding the mandatory language of the Election Code that authorized only "in person" delivery as an alternative to mail was our view "that it was more important to protect the interest of the voters by not disenfranchising them than to adhere to the strict language of the statute under these circumstances." *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 839 A.2d 451, 460 (Pa. Cmwltth.) (en banc), *rev'd*, 843 A.2d 1223 (Pa. 2004).

In reversing this Court, the Pennsylvania Supreme Court looked to the rules of statutory construction. *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d at 1230. Critically for purposes of this matter, in terms of the Election Code, the Supreme Court held: "[A]ll things being equal, the law will be construed liberally in favor of the right to vote *but at the same time, we cannot ignore the clear mandates of the Election Code*." *Id.* at 1231 (emphasis added). *9 The relevant language in Section 1306(a) of the Election Code provided at the time what it provides today: "[T]he elector *shall* send [the absentee ballot] by mail, postage prepaid, except where franked, or deliver it in person to said county board of election." (Emphasis added.) The Supreme Court held that the General Assembly's use of the word "shall" had a clear "imperative or mandatory meaning." *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d at 1231. While the appellees argued that the word should be construed liberally (as directory and not mandatory) in favor of the right to vote, the Supreme Court disagreed:

In Section [1306(a)], there is nothing to suggest that an absentee voter has a choice between whether he mails in his ballot or delivers his ballot in person, or has a third-party deliver it for him. To construe Section [1306(a)] as merely directory would render its limitation meaningless and, ultimately, absurd.

Id. at 1232.¹⁰ Alternatively, even if the statutory language were ambiguous, the Court held that "there is an obvious and salutary purpose—grounded in hard experience—behind the limitation upon the delivery of absentee ballots." *Id.* The court explained:

The provision at issue limits the number of third persons who unnecessarily come in contact with the ballot and thus provides some safeguard that the ballot was filled out by the actual voter, and not by a perpetrator of fraud, and that once the ballot has been marked by the actual voter in secret, no other person has the opportunity to tamper

10 *10

with it, or even to destroy it. The provision, thus, is consistent with the spirit and intent of our election law, which requires that a voter cast his ballot alone, and that it remain secret and inviolate.

Id. (citation omitted). The Supreme Court concluded:

Our precedent is clear: we cannot simply ignore substantive provisions of the Election Code. . . . [S]o-called technicalities of the Election Code are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed—particularly where, as here, they are designed to reduce fraud.

Id. at 1234.

10 The dissent chooses to rely on *Appeal of James*, 105 A.2d 64 (Pa. 1954), a case that did not involve mail-in or absentee ballots, but whether actual votes cast for one candidate in particular on election day should count where the intent of the electors to vote for that particular candidate was clearly manifested, albeit imperfectly, on the actual ballot. *Appeal of James* does not stand for the proposition that courts can and should disregard the clear and unambiguous terms of the Election Code, as the Pennsylvania Supreme Court's more recent pronouncements cited above establish. This case is about whether electors followed the law in submitting their ballots. Accordingly, *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election* is much more on point than *Appeal of James*.

Here, we agree with, and are bound by, the Pennsylvania Supreme Court's ruling in *In re: November 3, 2020 General Election* that Sections 1306(a) (absentee ballots), 1306-D(a) (mail-in ballots), and 1308(g)(3) (pre-canvass and canvass) of the Election Code, are plain and unambiguous. The General Assembly's use of the word "shall" in these provisions has a clear imperative and mandatory meaning. *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d at 1231. The elector "**shall** . . . fill out, date and sign the declaration." The board of election "**shall** examine the declaration on the envelope of each ballot" and be "satisfied that the declaration is sufficient." A sufficient declaration is one where the elector filled out, dated, and signed the declaration. *In re: November 3, 2020 Gen. Election*, ___ A.3d at ___, slip op. at 25. To remove the date requirement would constitute a judicial rewrite of the statute, which, as the Pennsylvania Supreme

11 Court recently held, "would be improper." *In re: Canvassing Observation*, ___ A.3d at ___, slip. op. at 17.¹¹ *11

11 See also *In re Silcox*, 674 A.2d 224, 225 (Pa. 1996) (holding that signatures on nomination petition without date must be stricken under clear and unambiguous language of statute, reasoning that "until the legislature chooses to amend [the statutory requirement for a date], we are constrained to find that the elector shall sign the petition as well as add . . . date of signing").

As noted above, the Election Code requires the county boards of election to determine whether absentee and mail-in ballots are satisfactory. Under the law, a satisfactory ballot is one where the elector has filled out, signed, and dated the statutorily-required declaration. This was the policy choice of the General Assembly and the Governor in approving Act 77, and it is not the role of this Court or the Elections Board to second guess those policy choices. It is a myth that all ballots must be counted in the absence of proof of fraud. Ballots, under the law, may be set aside for "fraud or error." See Section 1407(b) of the Election Code, 25 P.S. § 3157 (emphasis added). While there may not be an allegation of fraud in this matter, there was clear error at two levels. First, the electors erred in failing to date their declarations, as required by the Election Code.¹² Second, the Elections Board erred when it failed to execute its duty during the canvass and pre-canvass process to determine the sufficiency of the declarations and set deficient ballots aside. Accordingly, the Common Pleas Court erred as a matter of law by failing to reverse the Elections Board's determinations with respect to counting these defective mail-in and absentee ballots.

12 This is not a situation involving an ambiguity or question as to what an elector must do to cast a ballot and, seeking assistance, a confused elector relies on advice of a local election official. As noted above, the Pennsylvania Supreme Court has already held that there is no ambiguity in this scheme as far as what the Election Code requires of the elector and the boards of election in determining whether a mail-in or absentee ballot is satisfactory. Moreover, there is simply no evidence that the electors who signed their declarations in this case failed to date the declaration in reliance on advice from a public official. See *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1234 n.14 (rejecting reliance argument where no evidence of reliance and where alleged advice is in clear contravention of law).

Even if we were to conclude that one of the relevant provisions of the Election Code suffered from some ambiguity that required us to resort to statutory construction to discern the General Assembly's intent, our result would be the same. *12 As was the case in *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, there is an obvious and salutary purpose behind the requirement that a voter date the declaration. The date provides a measure of security, establishing the date on which the elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place. The presence of the date also establishes a point in time against which to measure the elector's eligibility to cast the ballot, as reflected in the body of the declaration itself.¹³

¹³ In this regard, it does not matter whether the ballots at issue in this case were, setting aside these defects, otherwise valid. Our Election Code does not contemplate a process that bogs down county boards of election or the many election day volunteers to track down voters who committed errors of law in casting their ballots in order to verify the information that the elector, through his or her own negligence, failed to provide on the elector's mail-in or absentee ballot. See *Pa. Democratic Party*, 238 A.3d at 373-34. Decisions as to whether these defective ballots must be set aside are to be made at the canvass or pre-canvass based on objective criteria established by the General Assembly and what is before the elections board—that being the ballot itself. See *id.* at 388-89 (Wecht, J., concurring).

While we realize that our decision in this case means that some votes will not be counted, the decision is grounded in law. It ensures that the votes will not be counted because the votes are invalid as a matter of law. Such adherence to the law ensures equal elections throughout the Commonwealth, on terms set by the General Assembly. The danger to our democracy is not that electors who failed to follow the law in casting their ballots will have their ballots set aside due to their own error; rather, the real danger is leaving it to each county board of election to decide what laws must be followed (mandatory) and what laws are optional (directory), providing a patchwork of unwritten and arbitrary rules that will have some defective ballots counted and others discarded, depending on the county in which a voter resides. Such a patchwork system does not guarantee voters an "equal" election,¹⁴ *13 particularly where the election involves inter-county and statewide offices. We do not enfranchise voters by absolving them of their responsibility to execute their ballots in accordance with law.

¹⁴ "Elections shall be free and equal." Pa. Const. art. I, § 5.

Accordingly, the Common Pleas Court's order is reversed. This matter is remanded to the Common Pleas Court to issue an order sustaining the Campaign Committee's challenge to the Elections Board's determination and directing the Elections Board to exclude the challenged 2,349 ballots from the certified returns of election for the County of Allegheny under Section 1404 of the Election Code, [25 P.S. § 3154](#).

/s/_____

14 P. KEVIN BROBSON, Judge *14 **ORDER**

AND NOW, this 19th day of November, 2020, the November 18, 2020 Order of the Court of Common Pleas of Allegheny is REVERSED, and this matter is REMANDED to the court of common pleas for further proceedings in accordance with the accompanying opinion.

/s/_____

15 P. KEVIN BROBSON, Judge *15 BEFORE: HONORABLE P. KEVIN BROBSON, Judge HONORABLE PATRICIA A. McCULLOUGH, Judge HONORABLE MICHAEL H. WOJCIK, Judge DISSENTING OPINION BY JUDGE WOJCIK

I respectfully dissent from the majority's decision to reverse the order of the Court of Common Pleas of Allegheny County (trial court) in this matter.

The Pennsylvania Supreme Court has explained:

'The power to throw out a ballot for minor irregularities, like the power to throw out the entire poll of an election district for irregularities, must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons. * * * 'The purpose in holding elections is to register the actual expression of the electorate's will' and that 'computing judges' should endeavor 'to see what was the true result.' There should be the same reluctance to throw out a single ballot as there is to throw out an entire district poll, for sometimes an election hinges on one vote.'

In resolving election controversies it would not be amiss to consider the following criteria:

1. Was any specific provision of the Election Code violated?

16 *16

2. Was any fraud involved?

3. Was the will of the voter subverted?

4. Is the will of the voter in doubt?

5. Did the loser suffer an unfair disadvantage?

6. Did the winner gain an unfair disadvantage?

Appeal of James, 105 A.2d 64, 67 (Pa. 1954) (citation omitted). It is undisputed that only the first of the foregoing six criteria is at issue with respect to the contested ballots herein.

Regarding the submission of a vote by absentee ballot, Section 1306(a) of the Pennsylvania Election Code¹⁵ provides, in relevant part:

¹⁵ Act of June 3, 1937, P.L. 1333, added by the Act of March 6, 1951, P.L. 3, as amended, 25 P.S. §3146.6(a).

[A]t any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election, the elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

Likewise, with respect to voting by mail-in ballot, Section 1306-D(a) of the Pennsylvania Election Code¹⁶

17 states: *17

16 Added by the Act of October 31, 2019, P.L. 552, 25 P.S. §3150.16a.

At any time after receiving an official mail-in ballot, but on or before eight o'clock P.M. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

In light of the foregoing statutory requirements, the majority seeks to disenfranchise 2,349 registered voters who timely returned their absentee or mail-in ballots to the Allegheny County Board of Elections (Board), which ballots were sealed in secrecy envelopes and inserted in sealed outer envelopes containing a declaration that the voters signed, but did not date, and which ballots the Board received by 8:00 p.m. on the date of the General Election, November 3, 2020. Unlike the majority, I do not believe that *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), compels such a massive disenfranchisement as that case addressed a voter's ability to cure a "minor" defect on a mail-in or absentee ballot declaration page that consisted of a voter failing to "fill out, date and sign the declaration." In contrast, this case involves neither a voter's ability to cure a
 18 defective declaration page nor an unsigned declaration page. Moreover, as *18 noted above, this case does not involve any claim that any of the ballots in question were in any way fraudulent.

There is no dispute that the voters who cast the questioned 2,349 ballots were qualified, registered electors. Moreover, there is no allegation that any of the 2,349 voters in question had voted more than once. Importantly, there is no allegation that the subject 2,349 ballots were not received by the Board prior to the deadline for receipt on General Election Day. The only sin that would lead these votes to be discarded is that the qualified, registered voters failed to enter a date on the declaration portion of the ballot's outer envelope. I would agree that an entirely blank declaration properly would be discarded, as this is the situation contemplated by *Boockvar*. I would suppose that a declaration that the voter did not sign likewise would be discarded, as there would be no confirmation that the ballot is genuinely that of the registered elector. Both of these results would ameliorate purported voter fraud, which is not at issue here.

What then is the protection afforded by the insertion of a date in the declaration? I would posit that it is to ensure that the ballot was timely cast, that is, before the 8:00 p.m. deadline on General Election Day. This interest is protected in this case by the Board's procedures, *i.e.*, the ballots were processed in the Statewide Uniform Registry of Electors and time stamped when received by the Board. Thus, I would hold that this process ensures that the ballots were timely cast.

The majority posits that the voter's entry of the date onto the declaration is material in that it measures a point in time to establish a voter's eligibility to cast a vote. This is simply incorrect, as the date on which a voter fills
 19 in a mail-in or absentee ballot is not the critical date, it is receipt on or before *19 General Election Day that is determinative. If a voter fills in a mail-in or absentee ballot, including the complete declaration, and dies prior to General Election Day, the vote is not valid regardless of when it was executed.¹⁷

¹⁷ In this regard, I strongly disagree with the majority's reliance on case law interpreting the inapposite provisions of the Pennsylvania Election Code requiring the inclusion of the date of signature on nomination petitions as that requirement implicates a distinct consideration relating to the timeliness of the circulation of the petitions. As indicated, the

timeliness of the ballots cast herein is not at issue.

I view the requirement of a voter-inserted date on the declaration as similar to the issue of the color of ink that is used to fill in the ballot. As outlined above, Sections 1306(a) and 1306-D(a) of the Pennsylvania Election Code plainly state the voter "**shall**, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen." 25 P.S. §§3146.6(a), 3150.16(a) (emphasis added). Our Supreme Court approved the marking of absentee ballots with green or red pen to be appropriate despite the General Assembly's use of the word "shall" when describing the method of marking the ballots. See *In re Luzerne County Return Board*, 290 A.2d 108, 109 (Pa. 1972). There, our Supreme Court construed the Election Code liberally so as to not disenfranchise Pennsylvania voters over a technicality.¹⁸ In

20 light of the foregoing criteria, I would do so here as well, and I *20 would not blithely disenfranchise those 2,349 voters who merely neglected to enter a date on the declaration of an otherwise properly executed and timely-submitted ballot.

¹⁸ Similarly, I would revisit the so-called "naked ballot" issue where counties have been instructed to disqualify mail-in and absentee ballots that were returned without first being sealed in the "secrecy envelope." I believe that the "secrecy envelope" is an anachronism that should have been abandoned when the Pennsylvania Election Code was recently amended. Under the prior version, absentee ballots were delivered to the corresponding polling places and opened there after the polls closed on General Election Day. Typically, there were a mere handful of absentee ballots at each poll. Without the "secrecy envelope," there was a high probability that the poll worker would know the voters whose absentee ballots were opened there, which would impair those voters' right to cast a secret ballot. As a result of the recent amendments to the Pennsylvania Election Code, mail-in and absentee ballots are retained at a centralized location and opened *en masse* beginning on General Election Day. Under the current regime, in cases of "naked ballots," I would favor a voter's right to cast a vote over the right to cast a secret ballot, because I believe that it is extremely unlikely that the election official who opens the envelope would know the voter whose ballot is being processed. -----

Accordingly, unlike the majority, I would affirm the trial court's order in this case.

/s/_____

MICHAEL H. WOJCIK, Judge

APPENDIX F

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

NICOLE ZICCARELLI,

No. GD 20-011793

Petitioner,

v.

ALLEGHENY COUNTY BOARD OF
ELECTIONS,

MEMORANDUM AND ORDER OF COURT

Respondent,

Honorable Joseph M. James

and

PENNSYLVANIA DEMOCRATIC PARTY
AND JAMES BREWSTER,

Copies Sent To:

Intervenors.

Matthew H. Haverstick, Esquire
Andrew F. Szefi, Esquire
Allan J. Opsitnick, Esquire
Michael J. Healey, Esquire

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

NICOLE ZICCARELLI,

Petitioner,

v.

ALLEGHENY COUNTY BOARD OF
ELECTIONS,

Respondent

and

PENNSYLVANIA DEMOCRATIC
PARTY AND JAMES BREWSTER,

Intervenors.

No. GD 20-011793

MEMORANDUM AND ORDER OF COURT

James, J.

November 18, 2020

Petitioner Nicole Zicarelli, candidate for the Senate of Pennsylvania from the 45th Senatorial District, filed a Petition for Review of Decision by the Respondent Allegheny County Board of Elections (“the Board”) on November 16, 2020, seeking to set aside

approximately 300 provisional ballots cast by voters in the November 3, 2020 General Election. Voters were required to sign on two lines and on these ballots they only signed one. Petitioner seeks review of the Board's decision to overrule Petitioner's objection to count these ballots. The Court conducted a hearing on November 17, 2020 via Microsoft Teams. The Pennsylvania Democratic Party and James Brewster moved to intervene in the action. Petitioner and the Board did not object and the motion was granted by the Court. Petitioner stated that she was not claiming any voter fraud regarding the challenged ballots. The Board argues that if an error or defect is caused by the misrepresentation or error of the election administration, the voter should not be penalized. Here, voters presented at their polling location and voted with a provisional ballot. Poll workers handed them all of the materials and gave them instructions how to fill out the outer envelope. Many people are unfamiliar with this process and rely on the information given to them at the polling location. Pennsylvania law holds that there is a breakdown in the administrative process when the facts demonstrate that "an administrative board or body is negligent, acts improperly or unintentionally misleads a party." Union Electric Corp. v. Board of Property Assessment, 746 A.2d 581, 584 (Pa. 2000). In construing election laws, while we must strictly enforce all provisions to prevent fraud, the overriding concern at all times must be to be flexible in order to favor the right to vote. Our goal must be to enfranchise and not to disenfranchise. See, James Appeal, 105 A.2d 64 (Pa. 1954), In re Luzerne Cty. Return Bd., 290 A.2d 108, 109 (Pa. 1972). Similarly, in the In re Nomination Petitions of Howells case, 20 A.3d 617, (Pa. Cmwlth. 2011), an incumbent candidate running for magisterial district judge was given erroneous instructions by the Lehigh County Board of Elections about filing his statement of financial

interest. The Commonwealth Court held that given his reliance upon erroneous information provided by the county elections department that fatal error was curable. Finally, in In re Hall Nomination Petition, 362 A.2d 475, 477 (Pa. 1976), a candidate's petition was presented for filing within the deadline established by the Election Code but was not properly filed due to an error by the Election Bureau and not by the candidate himself. Keeping in mind that the Election Code must be liberally construed so as not to deprive an individual of his right to run for office or the voters their right to elect a candidate of their choice, the Court permitted the candidate to file *nunc pro tunc*.

In light of the fact that there is no fraud alleged in this case, these provisional ballots submitted by registered and eligible voters must be counted. They should not be penalized because they were given and relied on incorrect information by the election administration. The Petition for Review is denied and the Board's decision is affirmed.

Joseph M. James

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

NICOLE ZICCARELLI,

Petitioner,

v.

ALLEGHENY COUNTY BOARD OF
ELECTIONS,

Respondent,

and

PENNSYLVANIA DEMOCRATIC
PARTY AND JAMES BREWSTER,

Intervenors.

No. GD 20-011793

ORDER OF COURT

And NOW, this 18th day of November 2020, upon consideration of the Petition For Review In the Nature Of A Statutory Appeal filed by Nicole Zicarelli, and any responses thereto, it is hereby ORDERED that the Petitioner's appeal is dismissed and the decision of the Board of Elections is affirmed.

BY THE COURT:

Joseph M. James

APPENDIX G

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Canvassing Observation	:	
	:	
Appeal of: Donald J. Trump	:	
for President, Inc.	:	No. 1094 C.D. 2020

ORDER

AND NOW, November 5, 2020, upon review of arguments contained in briefs submitted by Donald J. Trump for President, Inc. (Appellant), the Philadelphia County Board of Elections, and the Pennsylvania Democratic Party, it is hereby ORDERED that the November 4, 2020 order of the Court of Common Pleas of Philadelphia County (trial court) denying Appellant's oral motion to allow closer observation of the canvassing of ballots is REVERSED. The matter is REMANDED to the trial court to enter an ORDER no later than 10:30 a.m. today, November 5, 2020, effective immediately, requiring that all candidates, watchers, or candidate representatives be permitted to be present for the canvassing process pursuant to 25 P.S. § 2650 and/or 25 P.S. § 3146.8 and be permitted to observe all aspects of the canvassing process within 6 feet, while adhering to all COVID-19 protocols, including, wearing masks and maintaining social distancing. Opinion to follow.

s/Christine Fizzano Cannon

Christine Fizzano Cannon, Judge

Order Exit
11/05/2020

APPENDIX H

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**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT
TRIAL DIVISION – CIVIL SECTION**

IN RE:	:	Election Matter
	:	
CANVASSING OBSERVATION	:	
	:	NOVEMBER TERM 2020
	:	No. 07003
	:	(201107003)
	:	
APPEAL OF DONALD J. TRUMP for	:	
PRESIDENT, INC.	:	1094 CD 2020

OPINION

Tsai, J.

I. Introduction

Donald J. Trump for President, Inc. (“Appellant”) has taken an appeal from our November 3, 2020 Order denying his oral petition to conduct closer inspection of the ballot canvassing process at the Philadelphia Convention Center. In his oral petition, Appellant argued that the Commissioners did not provide his designated observers meaningful access to observe the Election Board employees who are canvassing the absentee and mail-in ballots under 25 P.S. § 3146.8(b) so they could report back to the Candidate as to the integrity of the canvassing process. Appellant had filed two similar motions earlier in the day, but withdrew them both without prejudice and presented the instant petition to the Election Court about 15 minutes before Election Court was scheduled to close at 10 p.m. EST. Based on the testimony of the witness presented by Appellant in support of the Petition, we found that the accommodations afforded to campaign representatives to observe the Election Board employees complied with the relevant provisions of the Election Code and denied the Petition.

For the reasons that follow, we respectfully ask this Court to affirm our decision.

II. Factual Findings

Appellant's representative, Jeremy Mercer, is a volunteer for Appellant's campaign. He served as an observer of the canvassing process on November 3, 2020 starting at 7 a.m. throughout the entire day. Mr. Mercer testified via Zoom technology.

The observer described how the canvassing room is set up. There are 3 rows of 15 tables spaced apart and observers are asked to stand behind a metal barrier facing the first table, which is about 15-18 feet away. Nov. 3, 2020 Tr. at 21:20-24:23. From that vantage point, Mr. Mercer can see the workers prepare the forms for evaluation, examine them, and sort the ballot into separate bins. He also described in detail the various stages of the process that he could observe, including "extraction" from about 20 feet away, "where the ballot envelopes are being fed through machines to slice them open so that what's inside the outer envelope can be removed, and then another set of what appear to be the same or very similar machines so that the inner secrecy envelopes then can be sliced open so that what's inside those can be removed." Nov. 3, 2020 Tr. At 28:14-30.

When asked about impediments to his line of sight, he identified the easels that identify each section of the canvassing process around which he can move. Nov. 3, 2020 Tr. 23:2-11. The observer was free to walk around the premises as he wished except beyond the metal safety or "crowd control" barrier. He recounted the specific steps followed by the staff to canvass a ballot. He cited concerns about the long distance between him and the employees, not because he could not see what they were doing, but because he could not see individual markings on the ballot or whether the signature page was completed properly and assess whether the Election Board employee was

handling the ballot properly under the Election Code. He was able to use binoculars, but he did not find them to be useful because the process is fast. Nov. 3, 2020 Tr. 36:2-14.

The Board designed the layout of the Philadelphia Convention Center for the canvassing process in keeping with CDC guidelines on social distancing between individuals and safety protocols.¹ In creating this physical layout, the Board struck the proper balance between the observer's ability to observe the canvassing process and the paramount interest of voter privacy, as there are declaration envelopes that are being opened, secrecy envelopes that are being opened, and ballots that are being extracted.²

III. Discussion

This Court ordered as it did based on our analysis of the statutory provision invoked by the Appellant, 25 P.S. § 3146.8(b), which states: "Watchers [also referred to herein as "observers"] 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." Despite Appellant's argument that the Board of Elections was not providing observers the opportunity to "meaningfully observe" the canvassing of ballots, Appellant was unable to point to any statutory language or case law using the word "meaningful" or elaborating on what constitutes "meaningful observation."

¹ The Election Board allows the public to observe the canvassing process on You Tube on their website at <https://youtu.be/-Zzb-7EH-MQ>

² The observer, who has worn a mask while observing the canvassing, testified that he saw Election Board workers who occasionally stood shoulder to shoulder, contrary to the CDC social distancing guidelines. The Appellant appears to contend that these incidents undercut the legitimacy of the social distancing guidelines which have influenced the design of the layout for observers. We do not believe these occasional, likely necessary, instances of shoulder-to-shoulder interactions between fellow workers to carry out their canvassing duties, is a legitimate reason to direct the Board to relax its current distancing requirements on observers.

Furthermore, § 3146.8(b), explicitly allows only for the watchers to “be present” for three activities: (1) the opening of the envelopes containing the ballots, (2) the counting of the ballots, and (3) the recording of the ballots.

The Appellant presented a witness, Jeremy Mercer, who provided copious testimony as to his ability to observe the opening and sorting of ballots. He testified as to his ability to observe the ballots being opened, placed in trays, and sorted – including the separation of so-called “naked ballots,” which do not have inner secrecy envelopes. This satisfies the three explicit objects of the statute. The witness’s concerns, however, pertained to his inability to observe the writing on the outside of the ballots. But observing the writing on the outside of the ballots is not necessary in order to simply be able to “be present” to watch the **opening** of the ballots or to watch the **counting and recording** of the ballots. The statute provides no further specific activities for the watchers to observe, and no activities for the watchers to do other than simply “be present.” Watchers are not directed to audit ballots or to verify signatures, to verify voter address, or to do anything else that would require a watcher to see the writing or markings on the outside of either envelope, including challenging the ballots or ballot signatures.³

³ “[I]n 2020, the legislature eliminated time-of-canvassing challenges *entirely* from Section 3146.8(g)(3). ... Accordingly, the Election Code presently provides no mechanism for time-of-canvassing challenges by candidate or party representatives. ... Moreover, as is plain from the above account, at no time did the Code provide for challenges to ballot *signatures*.”

Presumably, in expanding voting by mail, the legislature sought to streamline the process for canvassing such ballots, perhaps to avoid undermining the expansion effort by eliminating the prospect that voters – including a potentially large number of new mail-in voters – would be brought before the board or the courts to answer third-party challenges. Regardless, Intervenor would have us interpret the Election Code, which

Moreover, the Pennsylvania courts have clearly delineated the purpose of having watchers observe canvassing by making “a distinction between votes which are improperly cast and the subsequent mismanagement of votes by the election board, when those votes were completed correctly by the absentee voter.” *In re Canvass of Absentee Ballots of Gen. Election*, 39 Pa. D. & C.2d 429, 433 (Pa. Com. Pl. 1965).

The court further elaborated that:

In the first situation, the strict requirements must be followed to protect the individual's vote; in the latter case, although strict compliance is desired, it is not mandatory, because slight irregularities can be anticipated in the overall handling of absentee ballots. In the latter case, the principles of liberal interpretation should apply, consistent with the above-quoted approach of the Perles case, *supra*, viz.: “Every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it ...”D’

Id. at 433-34.

That line of reasoning ultimately led the court to hold that even when it does not condone a short-cutting of canvassing procedures under the act, such short-cutting does not by itself seriously breach the legislative intent. *See id.* at 434.⁴ The court thus

now does not provide for time-of-canvassing ballot challenges, and which never allowed for signature challenges, as both requiring signature comparisons at canvassing, and allowing for challenges on that basis. We reject this invitation.” *In re November 3, 2020 Gen. Election*, 149 MM 2020, 2020 WL 6252803, at *14 (Pa. Oct. 23, 2020) (footnotes, citations and quotations omitted).

⁴ “The Montgomery County Board of Elections, prior to the general election of November 2, 1965, met with representatives of both the Democratic and Republican Committees of this county for the purposes of setting up a facile procedure to expedite the handling of absentee ballots within the county. At that meeting, on September 7, 1965, it was agreed that certain procedures required for technical compliance with the dictates of the Absentee Voting Act would be eliminated or modified, so that, at time of canvass, there would be less confusion and involvement. This proposal was approved by Horace A. Davenport, Esq., the solicitor for the county board of elections, Peter P. Stevens, chief clerk for the election board, Sheldon W. Farber, Esq., attorney for the County Democratic Committee, and John G. Kauffman, Esq., attorney for the

denied a “general ‘blanket’ challenge presented by petitioner to all the absentee ballots on the basis of the election board’s departure from the statutory directions.” *Id.*

Likewise, we also recognized that canvassing arrangements may arguably be less than what the observer may deem as optimal without rising to the level of violating the statute, especially when the procedures need to be modified to promote safety during the COVID-19 pandemic. We therefore noted in our order that we “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.” *In re: Canvassing Observation*, Order of November 3, 2020.

Additionally, in *In re Recanvassing of the First Election Dist. of Jefferson Twp.*, 12 Pa. D. & C.4th 536 (Pa. Com. Pl. 1991), the court reasoned that “the Election Code speaks only of canvassing absentee ballots, not single ones,” and that the “intent of the statute [is] to preserve and insure the secrecy and anonymity of the voter.” *Id.* at 538. Indeed, if watchers like the witness were permitted to observe the canvassing of ballots closely enough to view the names and addresses on single ballots, they would be going beyond the purpose of the statute, which is only to provide for the canvassing of the ballots **writ large**. The watchers would also threaten the secrecy and anonymity of the voter in direct frustration of the statute’s purpose. If the watcher intends to observe the canvassing with the intent of voiding ballots, we must emphasize that we “will not disenfranchise a voter for an act that may be contrary to procedure for

Republican Committee of the county.” *In re Canvass of Absentee Ballots of Gen. Election*, 39 Pa. D. & C.2d 429, 433 (Pa. Com. Pl. 1965)

canvassing the vote,” as ballots are not to be voided “because of some minor irregularities or inconsistencies in the canvassing of the ballots.” *Id.* at 538, 539.

Overall, the watchers’ purpose is not to audit the individual ballots, and “meaningful observation” or “meaningful access” is not a legally recognized reason for a watcher getting close enough to do so. Indeed, the term “meaningful” is not even used in the statute. We note that a similar conclusion has been reached in a similar case in Nevada. In that case, the court explained that the statute provides that “[t]he county...shall allow members of the general public to observe the counting of the ballots...,” but does not “use the modifier ‘meaningful.’” *Kraus v. Cegavske*, First Judicial Dist. Of Nevada, Case No. 20 OC 00142 1B, Dept. 2, October 29, 2020, at p. 10. That court also specifically noted that “Petitioners seem to request ... observation of all information involved in the ballot counting process so they can verify the validity of the ballot, creating in effect a second tier of ballot counters and/or concurrent auditors of the ballot counting election workers,” adding that the “statutes created observers not counters, validators, or auditors.” *Id.* at 10-11.

IV. Conclusion

Appellant's witness, Jerry Mercer, provided exacting and copious testimony as to his ability to observe the opening and sorting of 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 and that Appellant is not entitled to the relief that he seeks.

BY THE COURT:

A handwritten signature in dark ink, appearing to read "Stary", is written over a horizontal line.

**J.
Presiding Election Day Judge**

APPENDIX I

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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
Office of Judicial Records
NOV 2020 2:26 pm
S. J. JO

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:

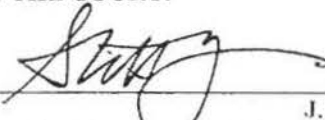
- ☒ oral Petition and Argument and any responses thereto ☐ written Petition and Argument and any responses thereto
☒ testimony and evidence presented by the witnesses and Argument; or
☐

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 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.

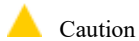
The following Parties participated in connection with the above matter:

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

Case ID: 201107003

APPENDIX J

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Caution

As of: December 16, 2020 9:19 PM Z

In re November 3, 2020 Gen. Election

Supreme Court of Pennsylvania

October 14, 2020, Decided

No. 149 MM 2020

Reporter

2020 Pa. LEXIS 5327 *; 2020 WL 6110774

IN RE: NOVEMBER 3, 2020 GENERAL ELECTION.
PETITION OF: KATHY BOOCKVAR, SECRETARY OF
THE COMMONWEALTH OF PENNSYLVANIA

Subsequent History: Petition granted by [In re November 3, 2020 Gen. Election, 2020 Pa. LEXIS 5560, 2020 WL 6252803 \(Pa., Oct. 23, 2020\)](#)

Prior History: [Donald J. Trump for President v. Boockvar, 2020 U.S. Dist. LEXIS 147232 \(W.D. Pa., Aug. 13, 2020\)](#)

Judges: [*1] Justice Dougherty files a concurring statement. Justice Baer files a dissenting statement. Chief Justice Saylor and Justice Mundy dissent.

Opinion

ORDER

PER CURIAM

AND NOW, this 14th day of October, 2020, the Application for King's Bench relief is **GRANTED**, limited to the following issue:

Whether the Election Code authorizes or requires county election boards to reject voted absentee or mail-in ballots during pre-canvassing and canvassing based on signature analysis where there are alleged or perceived signature

variances?

The Court will decide this issue based on the current filings; however, supplemental filings are permitted to be submitted by Friday, October 16, 2020, at 5 p.m. No other filings will be permitted thereafter.

Further, the motions to intervene filed by the following entities are **GRANTED**: Donald J. Trump for President, Inc., Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee. The motions to intervene filed by the following individuals are **DENIED**: Elizabeth Radcliffe, a qualified elector, Bryan Cutler, Speaker of the Pennsylvania House of Representatives, Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives, [*2] Joseph B. Scarnati III, Pennsylvania Senate President Pro Tempore, and Jake Corman, Senate Majority Leader. See *Pa.R.C.P. 2329(2)*. However, those individuals denied intervenor status are granted leave of court to file briefs as *amicus curiae*, pursuant to *Pa.R.A.P. 531*.

The motion for leave to file an *amicus* brief filed by the Brennan Center for Justice is **GRANTED**.

Any filings submitted by the Court's deadline by a non-party or non-intervenor will be accepted as an *amicus* brief.

Justice Dougherty files a concurring statement

Justice Baer files a dissenting statement.

Chief Justice Saylor and Justice Mundy dissent.

Concur by: DOUGHERTY

Concur

CONCURRING STATEMENT**JUSTICE DOUGHERTY**

I reluctantly agree that our exercise of King's Bench jurisdiction is warranted in this unique and time-sensitive case of substantial importance. *See, e.g., Friends of Danny DeVito v Wolf*, 227 A.3d 872, 884 (Pa. 2020) (granting review of matter of "public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law"). My hesitation largely tracks Justice Baer's concern over the arguable lack of a clear case or controversy before us. *See* Dissenting Statement at 1 (Baer, J.). However, I respectfully believe the proper course [*3] is not to elevate form over substance, and I ultimately depart from Justice Baer's assessment that the present legal question was resolved in *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 U.S. Dist. LEXIS 188390 (W.D. Pa. filed October 10, 2020).

Although Judge Ranjan opined our Election Code does not impose a signature-comparison requirement for absentee and mail-in ballots and applications, and Secretary Boockvar's directive to all Pennsylvania county boards of elections on this precise issue is consistent with that holding, *see id.*, slip op. at 95-106, Secretary Boockvar observes "the district court's decision, while timely and persuasive, is not authoritative." *See* Petitioner's Post-Submission Communication, dated October 11, 2020, at 2. In any event, the district court decision is surely subject to appeal. Secretary Boockvar thus continues to seek from this Court "an authoritative ruling of state law binding on all state election officials and courts." *Id.* Accordingly, although I note my disapproval of the precise manner in which the case was presented for our review, I am persuaded by the Secretary's assertion that "[o]nly this Court can render the ultimate determination concerning Pennsylvania [*4] law." *Id.* I reiterate that parties pursuing an exercise of this Court's jurisdiction under our extraordinary King's Bench powers should present a clear case or controversy and seek more than a purely advisory opinion. As I believe these conditions are met here, I join the Court's decision to grant the application to consider the merits of the important and unresolved legal question presented.

Dissent by: BAER

Dissent**DISSENTING STATEMENT****JUSTICE BAER**

I dissent from the Court's order granting the Secretary of the Commonwealth, Kathy Boockvar's ("Secretary") application for King's Bench review to resolve the issue of whether, pursuant to the *Election Code of Pennsylvania (Code)*, 25 P.S. §§ 2600-3591, signature comparison is warranted by county boards of elections in relation to absentee and mail-in ballots. In my view, there is no case or controversy for this Court to address and the legal question presented has been resolved in a federal lawsuit, *see infra*, thus, our exercise of jurisdiction would provide nothing more than an advisory opinion.

As indicated, no action has ever been filed in a lower court and the Secretary's application names no respondents. In substance, the Secretary's request to this Court is essentially a letter [*5] asking us to interpret a provision of the Code. While I recognize that in theory this Court may accept a King's Bench petition with no pending action and no opposing parties, the operative question is whether it should. In my respectful view, under the circumstances of this matter, the answer is a resounding no.

The Secretary's primary concern in seeking this Court's review emanated from a federal lawsuit, *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-00966-NR, 2020 U.S. Dist. LEXIS 188390 (W.D. Pa. 2020). The Secretary explained that the plaintiffs to the lawsuit argued that the Code authorizes and requires county boards of elections to set aside and challenge returned absentee and mail-in ballots that contain signatures that do not match a voter's signature in their permanent voter registration records. Because the Secretary took the contrary view of the Code, she had promulgated guidance indicating that "[t]he Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections." Department of State's September 11, 2020 *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes* at 3. In seeking our King's Bench review, [*6] the Secretary indicates that she fears that without a resolution of this issue, certain county boards of elections might not follow her guidance and large numbers of ballots could be rejected on Election Day based on signature comparison, which could lead to disenfranchisement on an arbitrary and wholly subjective basis without advance warning to a voter or notice and an opportunity to be heard.

After the Secretary filed her application, the federal court resolved the pending lawsuit in the Secretary's favor and conclusively determined that the Code does not allow for

signature comparison of absentee and mail-in ballots. *Donald J. Trump for President, Inc.*, *supra*, slip op. at 95-106. All of the county boards of elections were joined in that case and the federal court specifically indicated that the boards were obligated to follow the Secretary's guidance as the court's decision concluded that the Election Code does not warrant signature comparison with regard to absentee and mail-in ballots. *Id.* at 110-111 ("[T]o the extent there was uncertainty before, this decision informs the counties of the current state of the law as it relates to signature comparison. If any county still imposes a signature-comparison requirement in order to disallow ballots, it does [*7] so without support from the Secretary's guidance or the Election Code").

In my view, given that the Secretary did not provide the Court initially with a case regarding the question she asks us to address and that the federal court has resolved the controversy over interpretation of the Code in her favor, I see no basis for this Court to entertain further the Secretary's request for review. Accordingly, I would deny the application for King's Bench review.

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APPENDIX K

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3 USCS § 2

§ 2. Failure to make choice on prescribed day

Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.

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3 USCS § 5

§ 5. Determination of controversy as to appointment of electors

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

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3 USCS § 15

§ 15. Counting electoral votes in Congress

Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title [3 USCS § 6] from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 [3 USCS § 5] of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what

electors have been appointed, as mentioned in section 5 of this title [3 USCS § 5], is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

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28 USCS § 1257

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term “highest court of a State” includes the District of Columbia Court of Appeals.

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Pa. Const. Art. VII, § 14

§ 14. Absentee voting.

(a) The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

(b) For purposes of this section, “municipality” means a city, borough, incorporated town, township or any similar general purpose unit of government which may be created by the General Assembly.

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25 P.S. § 2650

§ 2650. Watchers or attorneys at sessions of county board; candidates may be present

(a) Any party or political body or body of citizens which now is, or hereafter may be, entitled to have watchers at any registration, primary or election, shall also be entitled to appoint watchers who are qualified electors of the county or attorneys to represent such party or political body or body of citizens at any public session or sessions of the county board of elections, and at any computation and canvassing of returns of any primary or election and recount of ballots or recanvass of voting machines under the provisions of this act. Such watchers or attorneys may exercise the same rights as watchers at registration and polling places, but the number who may be present at any one time may be limited by the county board to not more than three for each party, political body or body of citizens.

(b) 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 machines affecting his candidacy.

(c) Any candidate, attorney or watcher present at any recount of ballots or recanvass of voting machines shall be entitled to examine the ballots, or the voting machine and to raise any objections regarding the same, which shall be decided by the county board, subject to appeal, in the manner provided by this act.

25 P.S. § 3146.1

§ 3146.1. Qualified absentee electors

The following persons shall be entitled to vote by an official absentee ballot in any primary or election held in this Commonwealth in the manner hereinafter provided:

- (a) Any qualified elector who is or who may be in the military service of the United States regardless of whether at the time of voting he is present in the election district of his residence or is within or without this Commonwealth and regardless of whether he is registered or enrolled; or
- (b) Any qualified elector who is a spouse or dependent residing with or accompanying a person in the military service of the United States if at the time of voting such spouse or dependent is absent from the municipality of his residence: Provided, however, That the said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or
- (c) Any qualified elector who is or who may be in the service of the Merchant Marine of the United States if at the time of voting he is absent from the municipality of his residence: Provided, however, That the said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or
- (d) Any qualified elector who is a spouse or dependent residing with or accompanying a person who is in the service of the Merchant Marine of the United States if at the time of voting such spouse or dependent is absent from the municipality of his residence: Provided, however, That the said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or
- (e) Any qualified elector who is or who may be in a religious or welfare group officially attached to and serving with the armed forces if at the time of voting he is absent from the municipality of his residence: Provided, however, That the said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or

(f) Any qualified elector who is a spouse or dependent residing with or accompanying a person in a religious or welfare group officially attached to and serving with the armed forces if at the time of voting such spouse or dependent is absent from the municipality of his residence: Provided, however, That the said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or

(g) Any qualified elector who expects to be or is outside the territorial limits of the several States of the United States and the District of Columbia because his duties, occupation or business require him to be elsewhere during the entire period the polls are open for voting on the day of any primary or election or who is or who may be a civilian employee of the United States outside the territorial limits of the several States of the United States and the District of Columbia, whether or not such elector is subject to civil-service laws and the Classification Act of 1949 and whether or not paid from funds appropriated by the Congress, if at the time of voting he is absent from the municipality of his residence: Provided, however, That said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or

(h) Any qualified elector who is a spouse or dependent residing with or accompanying a person who expects to be or is outside the territorial limits of the several States of the United States and the District of Columbia because his duties, occupation or business require him to be elsewhere during the entire period the polls are open for voting on the day of any primary or election or who is a spouse or dependent residing with or accompanying a person who is a civilian employee of the United States outside the territorial limits of the several States of the United States and the District of Columbia, whether or not such person is subject to civil-service laws and the Classification Act of 1949 and whether or not paid from funds appropriated by the Congress, if at the time of voting such spouse or dependent is absent from the municipality of his residence: Provided, however, That the said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or

(i) Any qualified war veteran elector who is bedridden or hospitalized due to illness or physical disability if he is absent from the municipality of his residence and unable to attend his polling place because of such illness or physical disability regardless of whether he is registered and enrolled; or

(j) Any qualified registered and enrolled elector who expects to be or is absent from the municipality of his residence because his duties, occupation or business require

him to be elsewhere during the entire period the polls are open for voting on the day of any primary or election; or

(k) Any qualified registered and enrolled elector who because of illness or physical disability is unable to attend his polling place or operate a voting machine and secure assistance by distinct and audible statement as required in section 1218 of this act;

(l) Any qualified registered and enrolled elector who is a spouse or dependent accompanying a person employed in the service of this Commonwealth or in the service of the Federal Government within the territorial limits of the several States of the United States and the District of Columbia in the event the duties, profession or occupation of such person require him to be absent from the municipality of his residence; or

(m) Any qualified elector who is a county employe who cannot vote due to duties on election day relating to the conduct of the election; or

(n) Any qualified elector who will not attend a polling place because of the observance of a religious holiday:

Provided, however, That the words “qualified absentee elector” shall in nowise be construed to include persons confined in a penal institution or a mental institution nor shall it in anywise be construed to include a person not otherwise qualified as a qualified elector in accordance with the definition set forth in section 102(t) of this act.

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25 P.S. § 3146.2

§ 3146.2. Applications for official absentee ballots

(a) Any qualified elector defined in preceding section 1301, subsections (a) to (h), inclusive, may apply at any time before any primary or election for any official absentee ballot in person, on any form supplied by the Federal Government, or on any official county board of election form addressed to the Secretary of the Commonwealth of Pennsylvania or the county board of election of the county in which his voting residence is located.

(b) An application for a qualified elector under subsection (a) shall contain the following information: Home residence at the time of entrance into actual military service or Federal employment, length of time a citizen, length of residence in Pennsylvania, date of birth, length of time a resident of voting district, voting district if known, party choice in case of primary, name and, for a military elector, his stateside military address, FPO or APO number and serial number. Any elector other than a military elector shall in addition specify the nature of his employment, the address to which ballot is to be sent, relationship where necessary, and such other information as may be determined and prescribed by the Secretary of the Commonwealth. When such application is received by the Secretary of the Commonwealth it shall be forwarded to the proper county board of election.

(b.1) An application for a qualified elector other than under subsection (a) shall contain the following information: Date of birth, length of time a resident of voting district, voting district if known, party choice in case of primary and name. The elector shall in addition specify the nature of his or her employment, the address to which ballot is to be sent, relationship where necessary, and other information as may be determined and prescribed by the Secretary of the Commonwealth. When the application is received by the Secretary of the Commonwealth it shall be forwarded to the proper county board of election.

(c) A qualified absentee military or overseas elector, as defined by the Uniformed and Overseas Citizens Absentee Voting Act ([Public Law 99-410, 100 Stat. 924](#)), may submit his application for an official absentee ballot by electronic transmission method. The electronic transmission method shall not be acceptable for the official absentee ballot. As used in this subsection, “electronic transmission method” means any technology that can transmit a document or an image of a document via electronic or electromechanical means, including, but not limited to, facsimile method. An elector entitled to submit an application for an official absentee ballot under a method authorized under 25 Pa.C.S. Ch. 35 (relating to uniform military and overseas voters) may submit an application using a method authorized under 25 Pa.C.S. Ch. 35, in addition to the methods authorized in this article.

(d) The application of any qualified elector, as defined in preceding section 1301, subsections (a) to (h), inclusive, for an official absentee ballot in any primary or election shall be signed by the applicant, except that for electors under section 1301(a), an adult member of the applicant’s immediate family may sign the application on the elector’s behalf.

(e) Any qualified bedridden or hospitalized veteran absent from the municipality of his residence and unable to attend his polling place because of such illness or physical disability, regardless of whether he is registered or enrolled, may apply at any time before any primary or election for an official absentee ballot on any official county board of election form addressed to the Secretary of the Commonwealth of Pennsylvania or the county board of elections of the county in which his voting residence is located.

The application shall contain the following information: Residence at the time of becoming bedridden or hospitalized, length of time a citizen, length of residence in Pennsylvania, date of birth, length of time a resident in voting district, voting district if known, party choice in case of primary, name and address of present residence or hospital at which hospitalized. When such application is received by the Secretary of the Commonwealth, it shall be forwarded to the proper county board of elections.

The application for an official absentee ballot for any primary or election shall be made on information supplied over the signature of the bedridden or hospitalized veteran as required in the preceding subsection. Any qualified registered elector, including a spouse or dependent referred to in subsection (l) of section 1301, who expects to be or is absent from the municipality of his residence because his duties, occupation or business require him to be elsewhere on the

day of any primary or election and any qualified registered elector who is unable to attend his polling place on the day of any primary or election because of illness or physical disability and any qualified registered bedridden or hospitalized veteran in the county of residence, or in the case of a county employe who cannot vote due to duties on election day relating to the conduct of the election, or in the case of a person who will not attend a polling place because of the observance of a religious holiday, may apply to the county board of elections of the county in which his voting residence is located for an Official Absentee Ballot. Such application shall be made upon an official application form supplied by the county board of elections. Such official application form shall be determined and prescribed by the Secretary of the Commonwealth of Pennsylvania.

(1) The application of any qualified registered elector, including spouse or dependent referred to in subsection (1) of section 1301, who expects to be or is absent from the municipality of his residence because his duties, occupation or business require him to be elsewhere on the day of any primary or election, or in the case of a county employe who cannot vote due to duties on election day relating to the conduct of the election, or in the case of a person who will not attend a polling place because of the observance of a religious holiday, shall be signed by the applicant and shall include the surname and given name or names of the applicant, proof of identification, his occupation, date of birth, length of time a resident in voting district, voting district if known, place of residence, post office address to which ballot is to be mailed, the reason for his absence, and such other information as shall make clear to the county board of elections the applicant's right to an official absentee ballot.

(2) The application of any qualified registered elector who is unable to attend his polling place on the day of any primary or election because of illness or physical disability and the application of any qualified registered bedridden or hospitalized veteran in the county of residence shall be signed by the applicant and shall include surname and given name or names of the applicant, proof of identification, his occupation, date of birth, residence at the time of becoming bedridden or hospitalized, length of time a resident in voting district, voting district if known, place of residence, post office address to which ballot is to be mailed, and such other information as shall make clear to the county board of elections the applicant's right to an official ballot. In addition, the application of such electors shall include a declaration stating the nature of their disability or illness, and the name, office address and office telephone number of their attending physician: Provided, however, That in the event any elector entitled to an absentee ballot under this subsection be unable to sign his application because of illness or physical disability, he shall be excused from signing upon making a statement which shall be witnessed by one adult person in substantially the following form: I hereby state that I am unable to sign my application for an absentee ballot without assistance because I am unable to write by reason of my illness or physical disability. I have made or have received assistance in making my mark in lieu of my signature.

.....(Date)(Mark)

.....(Complete Address of Witness)(Signature of Witness)

(e.1) Any qualified registered elector who is unable because of illness or physical disability to attend his polling place on the day of any primary or election or operate a voting machine and state distinctly and audibly that he is unable to do so as required by section 1218 of this act may at any time request, with the certification by his attending physician that he is permanently disabled and physically unable to attend the polls or operate a voting machine and make the distinct and audible statement required by section 1218 appended to the application hereinbefore required, to be placed on a permanently disabled absentee ballot list file. An absentee ballot application shall be mailed to every such person otherwise eligible to receive one, by the first Monday in February each year, or within forty-eight hours of receipt of the request, whichever is later, so long as he does not lose his voting rights by failure to vote as otherwise required by this act. Such person shall not be required to file a physician's certificate of disability with each application as required in subsection (e) of this section. Should any such person lose his disability he shall inform the county board of elections of the county of his residence. An absentee ballot application mailed to an elector under this section, which is completed and timely returned by the elector, shall serve as an application for any and all primary, general or special elections to be held in the remainder of that calendar year and for all special elections to be held before the third Monday in February of the succeeding year. The transfer of a qualified registered elector on a permanently disabled absentee ballot list from one county to another county shall only be permitted upon the request of the qualified registered elector.

(e.2) Notwithstanding the other provisions of this act any qualified elector who expects to be or is absent from the municipality of his residence because his duties, occupation or business require him to be elsewhere on the day of any election or a county employee who cannot vote due to duties on election day relating to the conduct of the election or a person who will not attend a polling place because of the observance of a religious holiday may make an application for an absentee ballot by mail by sending a letter to the county board of elections in the county in which his voting residence is located. The letter shall be signed by the applicant and contain his name, place of residence and proof of identification.

(f) The county chairman of each political party or the head of each political body shall designate one representative from his respective political party or body for each public institution. The representatives so appointed shall, at the same time on a date fixed by the county board of election visit every public institution situate in the county for the purpose of obtaining the names and addresses of public institution residents who desire to receive applications for absentee ballots and to act as an election board as provided in subsection (g) of this section. The list of names and addresses thus obtained shall then be submitted by said representatives to the board which shall furnish applications individually to those appearing in the written request. If the chairman or head of a political party or body fails to appoint a representative within fifteen days from written notice from the county board of election, the county board of election shall appoint a representative from the political party or body.

(g) The county board of election shall appoint teams of three members for each public institution that shall go to the public institutions and hold the election on the first Friday prior to election day. Each member of the board shall appoint one member on every team. After the votes are cast, the teams shall collect the ballots and return them to the county board of election where they shall be placed unopened in a secure, safe and sealed container in the custody of the board until they shall be distributed to the respective absentee voters' election district as provided in section 1308 of this act where they shall be counted with the other absentee ballots, if any.

(h) The county board of election shall number, in chronological order, the applications for an official absentee ballot, which number shall likewise appear on the official absentee ballot for the qualified elector. The numbers shall appear legibly and in a conspicuous place but before the ballots are distributed the number on the ballot shall be torn off by the county board of election. This number information shall be appropriately inserted and become a part of the Registered Absentee Voters File and the Military, Veterans and Emergency Civilian Absentee Voters File provided in section 1302.3 of this act.

(i)

(1) Application for official absentee ballots shall be on physical and electronic forms prescribed by the Secretary of the Commonwealth. The application shall state that an elector who applies for an absentee ballot pursuant to section 1301 shall not be eligible to vote at a polling place on election day unless the elector brings the elector's absentee ballot to the elector's polling place, remits the ballot and the envelope containing the declaration of the elector to the judge of elections to be spoiled and signs a statement subject to the penalties of [18 Pa.C.S. § 4904](#) (relating to unsworn falsification to authorities) to the same effect. Such physical application forms shall be made freely available to the public at county board of elections, municipal buildings and at such other locations designated by the secretary. Such electronic application forms shall be made freely available to the public through publicly accessible means. No written application or personal request shall be necessary to receive or access the application forms. Copies and records of all completed physical and electronic applications for official absentee ballots shall be retained by the county board of elections.

(2) Nothing in this act shall prohibit a private organization or individual from printing blank voter applications for absentee ballots or shall prohibit the use of such applications by another individual, provided the form, content and paper quality have been approved by the Secretary of the Commonwealth.

(j) Notwithstanding the provisions of this section requiring proof of identification, a qualified absentee elector shall not be required to provide proof of identification if the elector is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (Public Law 99-410, 100 Stat. 924) or by an alternative ballot under the Voting Accessibility for the Elderly and Handicapped Act (Public Law 98-435, 98 Stat. 1678).

(k) The Secretary of the Commonwealth may develop an electronic system through which all qualified electors may apply for an absentee ballot and request permanent absentee voter status under subsection (e.1), provided the system is

25 P.S. § 3146.2

able to capture a digitized or electronic signature of the applicant. A county board of elections shall treat any application or request received through the electronic system as if the application or request had been submitted on a paper form or any other format used by the county.

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25 P.S. § 3146.6

§ 3146.6. Voting by absentee electors

(a) Except as provided in paragraphs (2) and (3), at any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election, the elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

(1) (Deleted by amendment).

(2) Any elector, spouse of the elector or dependent of the elector, qualified in accordance with the provisions of section 1301, subsections (e), (f), (g) and (h) to vote by absentee ballot as herein provided, shall be required to include on the form of declaration a supporting declaration in form prescribed by the Secretary of the Commonwealth, to be signed by the head of the department or chief of division or bureau in which the elector is employed, setting forth the identity of the elector, spouse of the elector or dependent of the elector.

(3) Any elector who has filed his application in accordance with section 1302 subsection (e) (2), and is unable to sign his declaration because of illness or physical disability, shall be excused from signing upon making a declaration which shall be witnessed by one adult person in substantially the following form: I hereby declare that I am unable to sign my declaration for voting my absentee ballot without assistance because I am unable to write by reason of my illness or physical disability. I have made or received assistance in making my mark in lieu of my signature.

(Date)

(Mark)

(Complete Address of Witness)

(Signature of Witness)

(b)

(1) Any elector who receives and votes an absentee ballot pursuant to section 1301 shall not be eligible to vote at a polling place on election day. The district register at

each polling place shall clearly identify electors who have received and voted absentee ballots as ineligible to vote at the polling place, and district election officers shall not permit electors who voted an absentee ballot to vote at the polling place.

(2) An elector who requests an absentee ballot and who is not shown on the district register as having voted the ballot may vote by provisional ballot under section 1210(a.4)(1).

(3) Notwithstanding paragraph (2), an elector who requests an absentee ballot and who is not shown on the district register as having voted the ballot may vote at the polling place if the elector remits the ballot and the envelope containing the declaration of the elector to the judge of elections to be spoiled and the elector signs a statement subject to the penalties under 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities) in substantially the following form:

I hereby declare that I am a qualified registered elector who has obtained an absentee ballot or mail-in ballot. I further declare that I have not cast my absentee ballot or mail-in ballot, and that instead I remitted my absentee ballot or mail-in ballot and the envelope containing the declaration of the elector to the judge of elections at my polling place to be spoiled and therefore request that my absentee ballot or mail-in ballot be voided.

(Date)

(Signature of Elector)..... (Address of Elector)

(Local Judge of Elections)

(c) Except as provided under 25 Pa.C.S. § 3511 (relating to receipt of voted ballot), a completed absentee ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.

25 P.S. § 3146.8

§ 3146.8. Canvassing of official absentee ballots and mail-in ballots

(a) The county boards of election, upon receipt of official absentee ballots in sealed official absentee ballot envelopes as provided under this article and mail-in ballots as in sealed official mail-in ballot envelopes as provided under Article XIII-D, shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections. An absentee ballot, whether issued to a civilian, military or other voter during the regular or emergency application period, shall be canvassed in accordance with subsection (g). A mail-in ballot shall be canvassed in accordance with subsection (g).

(b) 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.

(b.1)(Deleted by amendment).

(c) Deleted by 1968, Dec. 11, P.L. 1183 No. 375, § 8.

(d) Whenever it shall appear by due proof that any absentee elector or mail-in elector who has returned his ballot in accordance with the provisions of this act has died prior to the opening of the polls on the day of the primary or election, the ballot of such deceased elector shall be rejected by the canvassers but the counting of the ballot of an absentee elector or a mail-in elector thus deceased shall not of itself invalidate any nomination or election.

(e) (Deleted by amendment).

(f) Any person challenging an application for an absentee ballot, an absentee ballot, an application for a mail-in ballot or a mail-in ballot for any of the reasons provided in this act shall deposit the sum of ten dollars (\$10.00) in cash with the county board, which sum shall only be refunded if the challenge is sustained or if the challenge is withdrawn within five (5) days after the primary or election. If the challenge is dismissed by any lawful order then the deposit shall be forfeited. The county board shall deposit all deposit money in the general fund of the county.

Notice of the requirements of subsection (b) of section 1306 shall be printed on the envelope for the absentee ballot or mail-in ballot.

(g)

(1)

(i) An absentee ballot cast by any absentee elector as defined in section 1301(a), (b), (c), (d), (e), (f), (g) and (h) shall be canvassed in accordance with this subsection if the ballot is cast, submitted and received in accordance with the provisions of 25 Pa.C.S. Ch. 35 (relating to uniform military and overseas voters).

(ii) An absentee ballot cast by any absentee elector as defined in section 1301(i), (j), (k), (l), (m) and (n), an absentee ballot under section 1302(a.3) or a mail-in ballot cast by a mail-in elector shall be canvassed in accordance with this subsection if the absentee ballot or mail-in ballot is received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.

(1.1) The county board of elections shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting. A county board of elections shall provide at least forty-eight hours' notice of a pre-canvass meeting by publicly posting a notice of a pre-canvass meeting on its publicly accessible Internet website. 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 pre-canvassed. No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.

(2) The county board of elections shall meet no earlier than the close of polls on the day of the election and no later than the third day following the election to begin canvassing absentee ballots and mail-in ballots not included in the pre-canvass meeting. The meeting under this paragraph shall continue until all absentee ballots and mail-in ballots received prior to the close of the polls have been canvassed. The county board of elections shall not record or publish any votes reflected on the ballots prior to the close of the polls. The canvass process shall continue through the eighth day following the election for valid military-overseas ballots timely received under 25 Pa.C.S. § 3511 (relating to receipt of voted ballot). A county board of elections shall provide at least forty-eight hours' notice of a canvass meeting by publicly posting a notice on its publicly accessible Internet website. 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.

(3) When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the "Registered

Absentee and Mail-in Voters File,” the absentee voters’ list and/or the “Military Veterans and Emergency Civilians Absentee Voters File” verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

(4) All absentee ballots which have not been challenged under section 1302.2(c) and all mail-in ballots which have not been challenged under section 1302.2-D(a)(2) and that have been verified under paragraph (3) shall be counted and included with the returns of the applicable election district as follows:

(i) The county board shall open the envelope of every unchallenged absentee elector and mail-in elector in such manner as not to destroy the declaration executed thereon.

(ii) If any of the envelopes on which are printed, stamped or endorsed the words “Official Election Ballot” contain any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.

(iii) The county board shall then break the seals of such envelopes, remove the ballots and count, compute and tally the votes.

(iv) Following the close of the polls, the county board shall record and publish the votes reflected on the ballots.

(5) Ballots received whose applications have been challenged and ballots which have been challenged shall be placed unopened in a secure, safe and sealed container in the custody of the county board until it shall fix a time and place for a formal hearing of all such challenges, and notice shall be given where possible to all absentee electors and mail-in electors thus challenged and to every individual who made a challenge. The time for the hearing shall not be later than seven (7) days after the deadline for all challenges to be filed. On the day fixed for said hearing, the county board shall proceed without delay to hear said challenges, and, in hearing the testimony, the county board shall not be bound by the Pennsylvania Rules of Evidence. The testimony presented shall be stenographically recorded and made part of the record of the hearing.

(6) The decision of the county board in upholding or dismissing any challenge may be reviewed by the court of common pleas of the county upon a petition filed by any person aggrieved by the decision of the county board. The appeal shall be taken, within two (2) days after the decision was made, whether the decision was reduced to writing or not, to the court of common pleas setting forth the objections to the county board’s decision and praying for an order reversing the decision.

(7) Pending the final determination of all appeals, the county board shall suspend any action in canvassing and computing all challenged ballots received under this subsection irrespective of whether or not appeal was taken from the county board’s

decision. Upon completion of the computation of the returns of the county, the votes cast upon the challenged official absentee ballots that have been finally determined to be valid shall be added to the other votes cast within the county.

(h) For those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified:

(1) (Deleted by amendment).

(2) If the proof of identification is received and verified prior to the sixth calendar day following the election, then the county board of elections shall canvass the absentee ballots and mail-in ballots under this subsection in accordance with subsection (g)(2).

(3) If an elector fails to provide proof of identification that can be verified by the county board of elections by the sixth calendar day following the election, then the absentee ballot or mail-in ballot shall not be counted.

(i) Notwithstanding the provisions of this section, a qualified absentee elector shall not be required to provide proof of identification if the elector is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (Public Law 99-410, 100 Stat. 924) or by an alternative ballot under the Voting Accessibility for the Elderly and Handicapped Act (Public Law 98-435, 98 Stat. 1678).

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25 P.S. § 3150.11

§ 3150.11. Qualified mail-in electors

(a) General rule. A qualified mail-in elector shall be entitled to vote by an official mail-in ballot in any primary or election held in this Commonwealth in the manner provided under this article.

(1) [Repealed by amendment]

(2) [Repealed by amendment]

(b) Construction. The term “qualified mail-in elector” shall not be construed to include a person not otherwise qualified as a qualified elector in accordance with the definition in section 102(t).

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25 P.S. § 3150.16

§ 3150.16. Voting by mail-in electors

(a) General rule. At any time after receiving an official mail-in ballot, but on or before eight o'clock P.M. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

(a.1) Signature. Any elector who is unable to sign the declaration because of illness or physical disability, shall be excused from signing upon making a declaration which shall be witnessed by one adult person in substantially the following form:

I hereby declare that I am unable to sign my declaration for voting my mail-in ballot without assistance because I am unable to write by reason of my illness or physical disability. I have made or received assistance in making my mark in lieu of my signature.

(Mark)

(Date)

(Complete Address of Witness)

(Signature of Witness)

(b) Eligibility.

(1) Any elector who receives and votes a mail-in ballot under section 1301-D shall not be eligible to vote at a polling place on election day. The district register at each polling place shall clearly identify electors who have received and voted mail-in ballots as ineligible to vote at the polling place, and district election officers shall not permit electors who voted a mail-in ballot to vote at the polling place.

(2) An elector who requests a mail-in ballot and who is not shown on the district register as having voted may vote by provisional ballot under section 1210(a.4)(1).

(3) Notwithstanding paragraph (2), an elector who requests a mail-in ballot and who is not shown on the district register as having voted the ballot may vote at the polling place if the elector remits the ballot and the envelope containing the declaration of the

elector to the judge of elections to be spoiled and the elector signs a statement subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities) which shall be in substantially the following form:

I hereby declare that I am a qualified registered elector who has obtained an absentee ballot or mail-in ballot. I further declare that I have not cast my absentee ballot or mail-in ballot, and that instead I remitted my absentee ballot or mail-in ballot to the judge of elections at my polling place to be spoiled and therefore request that my absentee ballot or mail-in ballot be voided.

(Date)

(Signature of Elector)..... (Address of Elector)

(Local Judge of Elections)

(c) Deadline. Except as provided under 25 Pa.C.S. § 3511 (relating to receipt of voted ballot), a completed mail-in ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.

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APPENDIX L

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**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

IN RE: CANVASS OF ABSENTEE AND/OR	:	No. 676 MAL 2020
MAIL-IN BALLOTS OF NOVEMBER 3, 2020	:	
GENERAL ELECTION	:	
	:	
	:	
	:	
PETITION OF: DONALD J. TRUMP FOR	:	
PRESIDENT, INC.	:	

ORDER

PER CURIAM

AND NOW, this 8th day of December, 2020 the Emergency Petition for Allowance of Appeal is **DENIED**.

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APPENDIX M

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N.B. It is the responsibility of all parties to notify all interested parties of the content of this order/action

Heidelbaugh for Attorney General, Inc.³; and Petitioner Garrity for PA⁴. This matter has also been improperly captioned as "Donald J. Trump for President, Inc., et al. vs. Bucks County Board of Elections". The Respondent is the Bucks County Board of Elections⁵ (hereinafter referred to as "Board"). Parties also include the Democratic National Committee⁶, the Bucks County Democratic Committee⁷, and the Pennsylvania House Democratic Campaign Committee⁸; these parties were permitted to intervene without objection.

³ Petitioner Heidelbaugh for Attorney General, Inc. is the principal committee for the election campaign of Heather Heidelbaugh for the office of Attorney General of Pennsylvania. Heidelbaugh is the Republican candidate for the office of Attorney General of Pennsylvania in the November 3, 2020 General Election. Petitioner Heidelbaugh for Attorney General, Inc. is bringing this action for itself and on behalf of its candidate.

⁴ Petitioner Garrity for PA is the principle committee for the election campaign of Stacy L. Garrity for the Office of Treasurer of Pennsylvania. Stacy L. Garrity is the Republican candidate for the office of the Treasurer of Pennsylvania in the Election of November 3, 2020. Petitioner Garrity for PA is bringing this action for itself and on behalf of its candidate.

⁵ Respondent Bucks County Board of Elections is responsible for overseeing the conduct of elections in Bucks County, including the administration of the pre-canvass and canvass sessions of the Board during which absentee and mail-in ballots were opened, reviewed, and counted, as required by the Election Code.

⁶ The Democratic National Committee is a national committee dedicated to electing local, state, and national candidates of the Democratic Party to public office throughout the United States, including Pennsylvania. The Democratic National Committee has members who submitted absentee and mail-in ballots in the November 3, 2020 General Election.

⁷ The Bucks County Democratic Committee is a local committee with a mission of electing qualified members of the Democratic Party to local office at all levels of government. The Bucks County Democratic Committee has members and constituents across Bucks County who submitted absentee and mail-in ballots in Bucks County in the November 3, 2020 General Election.

⁸ The Pennsylvania House Democratic Campaign Committee is a state committee dedicated to electing local members of the Democratic Party to the Pennsylvania House of Representatives. The Pennsylvania House Democratic Campaign Committee has members and constituents who submitted absentee and mail-in ballots in Bucks County in the November 3, 2020 General Election.

In this appeal, Petitioners argue⁹ that the Board violated State Law when it failed to reject certain specific ballots, and over objection, accepted the ballots as valid votes of Bucks County citizens. The Respondent, as part of its statutory duties, sorted through and reviewed approximately 165,000 total absentee and mail-in ballots. In this process, the Respondent Board deemed a total of 918 ballots to be legally insufficient, and therefore, those specific ballots were not canvassed; in other words, the ballots were rejected. These ballots were not rejected because there was a finding that the person submitting the ballot was not authorized to vote, but rather because of some deficiency required by the Election Code, such as a lack of signature or a lack of privacy envelope.

The actual vote offered on any of those rejected ballots is unknown. Whether or not a specific vote on any of those ballots would be for or against any of the Petitioner candidates, or their opponents is unknown. There are 2,177 ballots are at issue in this case being challenged by the Petitioners.

This decision will be abbreviated because of time constraints caused by the need for a prompt resolution of the issues presented to allow for certification of votes. Should an appeal be filed the Court reserves the right to supplement this Memorandum with additional facts and law¹⁰.

⁹ On the day of the hearing, Petitioners were solely represented by Britain R. Henry, Esquire. Other attorneys had entered their appearance and represent all the Petitioners for purposes of the record. Attorney Henry confirmed that he had the authority to speak for all Petitioners, but that he was proceeding primarily on behalf of Petitioner Donald J. Trump for President, Inc.

¹⁰ While drafting this Memorandum and Order, the Court has learned that the Supreme Court of Pennsylvania has Exercised Extraordinary Jurisdiction over the some of the Commonwealth Courts cases with respect to Election Code issues similar to the ones at issue herein. In Order to expedite the completion of this Memorandum and Order, this

After careful deliberation and study of the relevant statutory and appellate case law, the undersigned is confident that the final decision is correct. However, the electorate and the various county boards of elections would benefit from clear precise legislation on the subjects presented in this appeal. It must be noted that the parties specifically stipulated in their comprehensive stipulation of facts that there exists no evidence of any fraud, misconduct, or any impropriety with respect to the challenged ballots. There is nothing in the record and nothing alleged that would lead to the conclusion that any of the challenged ballots were submitted by someone not qualified or entitled to vote in this election. At no time did Petitioners present evidence or argument to the contrary. The challenges are all to form rather than substance but premised on specific statutory language which Petitioners argue supported the issues presented. There is insufficient time for this Court to construct a comprehensive response to all issues raised but hopefully this decision will provide an explanation for the Court's reasoning.

II. Undisputed factual record

Upon assignment of this case the undersigned issued scheduling orders including an order that the parties meet prior to the date of the hearing on this matter to craft a stipulation of undisputed facts. Counsel for the parties did an excellent job crafting 47 paragraphs of stipulated facts. The stipulation was

Decision will not cite all of the legal authority reviewed and considered and which supports each and every conclusion. The Intervenor in this case, and the Respondent, submitted ample legal authority for their positions, and this Court will presume that all Appellate Judges reviewing this Decision will be familiar with the body of Election Law which defines and establishes broad principles of law, which for purposes of Petitioners' Appeal have not been challenged by any party, but which would normally be cited for completeness as a matter of course.

presented to the court during the on the record conference held the morning of the hearing. Stipulated Facts, Ct. Ex. 1. The hearing was held in the afternoon of November 17th, 2020. The stipulation of facts also included exhibits. During both the conference and the hearing, counsel were frequently questioned whether everyone agreed to something stated by an attorney or the Court. The record has not been transcribed and is not available to the Court at this time, and for that reason, there will be no references to a transcript. However, the Court is confident that the facts stated herein were agreed to by all parties on the record.

On November 7th, 2020 during the course of the canvass meeting of mail-in and absentee ballots, and in the presence of interested authorized representatives of the various candidates, the Respondent Board met to determine whether declarations on the envelopes of certain ballots were "sufficient" pursuant to the mandate of 25 P.S. § 3146.8(g)(3). 3,095 specific ballots had been identified and placed in different categories based on a possible deficiency of the ballot. The physical ballots were separated from the other ballots and secured along with all ballots of the same category. The Board made findings and decisions with respect to ten different categories of ballots, accepting some categories for canvassing and excluding others, as reflected in the Board's written decision made part of the record. The meeting and vote were conducted in the presence of authorized representatives of both Republican and Democratic candidates and parties. No one objected to or challenged the segregation of ballots into the designated categories. No one has appealed the

Board's decision to exclude 918 ballots for various reasons set forth in its written Decision. The only appeal has been from the Board's decision to not exclude certain ballots.

The parties' stipulation of facts identified the six categories which were challenged by Petitioners. During the hearing, counsel for Petitioner withdrew the challenge of category 6 and reduced the challenge of category 4. As a result, the following are the categories at issue for this decision:

- Category 1: 1196 ballots with no date or a partial date handwritten on the outer envelope;
- Category 2: 644 ballots with no handwritten name or address on the outer envelope;
- Category 3: 86 ballots with a partial written address on the outer envelope;
- Category 4: 182 ballots with a mismatched address on the outer envelope; and
- Category 5: 69 ballots with "unsealed" privacy envelopes.

The ballots in category 1 were deemed to be sufficient by the Respondent Board, and as a result they were canvassed. During oral argument the Court inquired whether it would be possible to segregate that category of ballots into two separate groups, one being ballots with no date and the other being ballots with a partial date. The Respondent Board has explained that the ballots were canvassed and cannot be retrieved as two separate groups. This Court believes

that the category as identified should have been segregated into two separate groups, however that was not done. All the ballots in this category are mingled together and a decision on those ballots must now accept this fact. Should this Court or an appellate court conclude that the absence of any date would invalidate a ballot but that a partial date would preserve the ballot the Court would be faced with the fact that invalidating the entire category would disenfranchise voters that had properly submitted their ballot. No record has been created to determine the exact number of ballots with no date versus ballots with a partial date. This Court concluded that to order a further review would be a futile exercise under the circumstances and now accepts the factual situation for what it is.

III. Discussion

Petitioners' Appeal as pled is limited to the argument that the Board's Decision to validate (and not reject) each of the ballots which have been categorized into five separate distinct groups was an "error of law." Petitioners have pled, in their challenge, that each category of ballots represents a violation of a specific provision of the Election Code citing §§ 3146.6(a) and 3150.16(a).

Although all provisions of the Election Code should be strictly enforced, the ultimate goal as confirmed by case law is to enfranchise voters, not to disenfranchise them. In re Wieskerger, 290 A.2d 108, 109 (Pa. 1972). The Court "cannot ignore the clear mandates of the Election Code." In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, 843 A.2d 1223, 1231 (Pa. 2004)

[hereinafter "Appeal of Pierce"]. But, the Court must be flexible in favor of the right to vote. Wieskerger, 290 A.2d at 109; Appeal of Pierce, 843 A.2d at 1231.

In an attempt to balance those two overriding principles, the Pennsylvania Supreme Court has ruled that certain provisions of the Election Code are mandatory, and some are directory. Specifically, the Pennsylvania Supreme Court has identified and explained principles of law which control the argument set forth by the litigants herein, which provides guidance and clear direction to this Court. Ballots should not be disqualified based upon failure to follow directory provisions of the law. Shambach v. Bickhart, 845 A.2d 793, 803 (Pa. 2004) (holding that although the Election Code provides that an elector may cast a write-in vote for any person not printed on the ballot, a write-in vote for a candidate whose name in fact appears on the ballot is not invalid where there is no evidence of fraud and the voter's intent is clear); Wieskerger, 290 A.2d at 109 (holding that the elector's failure to mark the ballot with the statutorily enumerated ink color does not render the ballot invalid unless there is a clear showing that the ink was used for the purpose of making the ballot identifiable or otherwise indicating fraud). There is an important difference between mandatory and directory provisions of law: failure to strictly adhere to the requirements of a directory statute will not nullify the validity of the action involved, whereas mandatory provisions must be followed.

Applying the law to the facts of this case, this Court is mindful of the following facts which are set forth in the parties' stipulation of facts. Petitioners do not

allege that there is any evidence of fraud, misconduct, impropriety, or any undue influence committed with respect to the challenged ballots. There is no suggestion, evidence, or allegation that the electors who cast the ballots at issue were ineligible to vote in this election. There is no suggestion, evidence, or allegation that the challenged ballots were cast by someone other than the elector whose signature was on the outer envelope. No mail-in or absentee ballots were mailed out to electors before October 7th, 2020. The ballots which are the subject of this challenge were timely received by the Respondent Board before 8:00 PM on Election Day, November 3rd, 2020.

Petitioners raise challenges under Section 3146.6 and 3150.16 of the Election Code. These provisions are nearly identical, but one is applicable to absentee ballots while the other is applicable to mail-in ballots. Section 3146.6(a) provides for voting by absentee electors:

Except as provided in paragraphs (2) and (3), at any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election, the elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3146.6(a). Section 3150.16(a) provides for voting by mail-in electors:

At any time after receiving an official mail-in ballot, but on or before eight o'clock P.M. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3150.16(a).

Pursuant to these provisions of the Election Code, Petitioners challenge ballots that were set aside for specific review in the following categories¹¹:

1. No date or partial date,
2. No printed name or address,
3. Partial address,

¹¹ There has been no challenge to the Board's Decision to set aside and not count ballots in the following categories:

- a. 110 ballots that failed to include a signature, which the Board ruled rendered the ballot "insufficient" and therefore it was not canvassed;
- b. 12 ballots where the elector's printed name did not match the name on the label located on the envelope;
- c. 2 ballots which came from the same household where the voters appeared to have inadvertently signed one another's declarations;
- d. 708 ballots which were not placed in a secrecy envelope thereby rendering them to be "naked"; and
- e. 21 ballots which contained secrecy envelopes with writing that revealed the elector's identity.

See Written Decision of Board.

4. Mismatched address, and
5. Unsealed privacy envelopes.

The relevant portion of the Election Code set forth above uses mandatory language which provides that electors "shall" take certain steps when submitting an absentee or mail-in ballot. Importantly, "the elector **shall** . . . fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed 'Official Election Ballot.'" 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added). And, "[t]he elector **shall** then fill out, *date* and *sign* the declaration printed on such envelope." Id. (emphasis added). Although not relevant to this decision, there is additional mandatory language in this provision of the Election Code: "[t]his envelope **shall** then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector"; "[s]uch envelope **shall** then be securely sealed"; and "the elector **shall** send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election." Id. (emphasis added).

Mandatory language is used throughout the Election Code. "Pennsylvania's Election Code, no less than any other, is steeped with requirements phrased in the imperative, not only in terms of the technical requirements for ballot completion, but also in terms of the overall conduct of elections." Bickhart, 845 A.2d at 806 (Saylor, C.J., concurring). Because of the excessive use of imperative language in the Election Code, the Supreme Court has distinguished between provisions that

are directory and those that are mandatory. "It would be unreasonable to assume that the General Assembly thus intended that, unless each and every such requirement [using imperative language] is strictly adhered to by those conducting the elections, election results must be deemed void." Id. If the provisions are read as directory, although "they are intended to be obeyed, and will be enforced if raised before or during an election, [they] do not require invalidation of the election or disenfranchisement of electors where discovered in the election aftermath." Id. at n.2.

Respondent and Intervenor argued that even when imperative language such as "shall" is used in the statute, it is not necessarily mandatory language; it can, in fact, be used in directory provisions. Respondent and Intervenor argued that looking to the consequence of non-compliance with the provision determined whether the provision was mandatory or directory; the inquiry did not end with the plain language of the Election Code.

In support of this argument, Respondent and Intervenor relied on the Pennsylvania Supreme Court's opinion in Boockvar, where the inquiry was to determine whether the Election Code allowed a board to void ballots that were not within a secrecy envelope. Pa. Democratic Party v. Boockvar, No. 133 MM 2020, 2020 Pa. LEXIS 4872, at *57 (Pa. 2020 Sept. 17, 2020). "In determining the propriety of naked ballots, we must ascertain the General Assembly's intention by examining the statutory text of the secrecy envelope provision to determine whether it is mandatory or directory, as that will govern the consequences for non-

compliance." 2020 Pa. LEXIS 4872, at *66. The Court ruled that "the difference between a mandatory and directory provision is the consequence for non-compliance: a failure to strictly adhere to the requirements of a directory statute will not nullify the validity of the action involved." Id. (quoting JPay, Inc. v. Dep't of Corrs. & Governor's Off. of Admin., 89 A.3d 756, 763 (Pa. Cmwlth. 2014)). The Court distinguished the statutory provision at issue from those involved in cases where imperative language was found to be directory. Specifically, it distinguished Bickhart and Wieskerger. Id. at *68-69. In both of those cases, the Court found that ballots with "minor irregularities" should only be stricken when there is a compelling reason to do so. In Bickhart, the Court counted a ballot where a candidate who was already named on the ballot was written in by the elector. Bickhart, 845 A.2d at 803. In Wieskerger, the Court counted a ballot that was completed in the wrong color ink. Wieskerger, 290 A.2d at 109. "Marking a ballot in voting is a matter not of precision engineering but of an unmistakable registration of the voter's will in substantial conformity to statutory requirement." Id. (quoting Reading Election Recount Case, 188 A.2d 254, 256 (Pa. 1963)).

In contrast, in Appeal of Pierce, where the provision at issue was the "in-person" delivery requirement, the Pennsylvania Supreme Court found this provision "unambiguously provided that 'the elector shall send [the absentee ballot] by mail, postage [prepaid], except where franked, or deliver it in person to [said county] board of election.'" Boockvar, 2020 Pa. LEXIS 4872, at *70. The Court "was unpersuaded by the argument that the language was directory and

declined the invitation to interpret 'shall' as anything less than mandatory." Id. "The word 'shall' carries an imperative or mandatory meaning." Appeal of Pierce, 843 A.2d at 1231. In Appeal of Pierce, the Supreme Court distinguished Wieskerger based on the fact that it was "decided before the enactment of the Statutory Construction Act, which dictates that legislative intent is to be considered only when a statute is ambiguous." Id. The Pennsylvania Supreme Court stated that to construe the provision at issue, which utilized the word "shall," as "merely directory would render its limitation meaningless and, ultimately, absurd." Id. at 1232. The Court stated that "precedent is clear: we cannot simply ignore substantive provisions of the Election Code." Id. at 1234. "[S]o-called technicalities of the Election Code are necessary for the preservation of secrecy and the sanctity of the ballot must therefore be observed." Id.

Being mindful of the Pennsylvania Supreme Court's recent rulings, interpreting the current Election Code, this Court finds the following with respect to each category:

1. Category 1: 1196 Ballots With No Date or a Partial Date Handwritten on the Outer Envelope

As mentioned, when setting aside ballots because of deficiencies in the completion of the declaration, the Board combined those ballots which had a partial date with those that had no date into one category. This category commingles what this Court considers two separate categories: ballots with no dates and ballots with partial dates. There are an undefined number of ballots with

absolutely no date whatsoever and an undefined number of ballots that were dated in some fashion, but where the date was considered to be partial. This Court would, with little hesitation, accept the argument that a deficiency (i.e., a partial date) on an envelope would not invalidate that ballot. The totality of the circumstances confirms that the ballot was signed on a date that qualified the ballot because the parties stipulated in their stipulation of facts at ¶ 44 that "challenged ballots were completed and received between October 7th and November 3rd, 2020." Therefore, these ballots would meet the requirement that the elector "shall fill out, date and sign the declaration" as stated in Sections 3146.6 and 3150.16 of the Election Code. See 25 P.S. §§ 3146.6(a), 3150.16(a). Within this subcategory, the elector would have complied with the law's mandate that "[t]he elector **shall** then fill out, date and sign the declaration printed on such envelope." Id. (emphasis added).

With respect to a subcategory of ballots which were completely undated, this Court finds that the question before the Court is much more complicated. Respondent and Intervenors passionately argue that the mandate to "date" is directory only and the totality of the evidence proves that the ballots were signed on a date consistent with the law. This Court agrees with the conclusion that the totality of the evidence, stipulated to by the parties, proves that the ballots were signed on some date appropriate to the Election Law; however, the only specific guidance available to this Court, on this subject, is found in In re Nov. 3, 2020, Gen. Election, No. 149 MM 2020, 2020 Pa. LEXIS 5560, at *36 (Pa. Oct. 23, 2020), where

the Pennsylvania Supreme Court specifically ruled on the Board's duty to determine the sufficiency of the Declaration on the envelope. The Pennsylvania Supreme Court has provided this Court, and all Board of Elections, with this mandate:

Both sections [3146.6(a) and 3150.16(a)] require that the elector "fill out, date and sign the declaration." Thus, in determining whether the declaration is "sufficient" for a mail-in or absentee ballot at canvassing, **the county board is required to ascertain whether the declaration on the return envelope has been filled out, dated, and signed.** This is the extent of the board's obligation in this regard. In assessing a declaration's sufficiency, there is nothing in this language which allows or compels a county board to compare signatures. Accordingly, we decline to read a signature comparison requirement into the plain and unambiguous language of the Election Code, as Intervenor urge us to do, inasmuch as the General Assembly has chosen not to include such a requirement at canvassing.

2020 Pa. LEXIS 5560, at *36 (emphasis added).

Intervenor and Respondent argued to this Court that the language of the Pennsylvania Supreme Court was dicta as it relates to the words "dated and signed". Ultimately, an Appellate Court may rule that the language was merely dicta; however, the undersigned feels constrained to follow the clear language of the Pennsylvania Supreme Court's Decision with respect to this issue. A studied review of election law has demonstrated to the undersigned that many sections of the Election Law which were ultimately concluded to be directory rather than mandatory despite the use of the word "shall", went through a gauntlet of judicial opinions with varying views up until the question was resolved by the Pennsylvania

Supreme Court. See Appeal of Pierce, 843 A.2d 1223 (Pa. 2003); Bickhart, 845 A.2d 793 (Pa. 2004).

In reflecting on this issue, the undersigned cannot help but see the irony in the fact that the absence of a signature invalidates the ballot. Respondent refused to Canvass ballots that had not been signed. However, if someone put an obviously false signature on the ballot, the ballot would have been most probably counted because the Court has also ruled that nothing in the language of the Statute compelled a County Board to compare the signature; whereas if someone put a date on the envelope which demonstrated that the vote was made at an improper time, that fact would be readily apparent to the Board when Canvassing and it would result in a ballot being set aside. During oral argument, the Court pointed out that virtually all-important documents are dated when signed. If these two subcategories of ballots had not been co-mingled, and if it were possible to segregate those ballots which had no date at all, this Court would have reflected on the issue further, searched for additional legal authority, but most probably would have ruled that an undated ballot is not sufficient based on the existing law set by the Pennsylvania Supreme Court's ruling in In re Nov. 3, 2020 Gen. Election. However, the ballots were co-mingled and therefore there is no practical way to discard those un-dated ballots without disenfranchising electors whose ballots (partially dated) this Court would conclude are valid.

The act of co-mingling those ballots was done in the presence of both Republican and Democratic representatives. All candidates had the right to

have a representative present when the Board issued its ruling. The representatives present were specifically named in the Stipulated Findings of Fact. Pursuant to this Court's Scheduling Order, those representatives received a copy of Petitioners' Petition and notice of the hearing. Only one of the named representatives participated in the hearing. The undersigned noted, on the record, that he was personally familiar with the lawyers who were acting as representatives and knew them to be bright, articulate people, not shy or reluctant to speak out. Those lawyer/representatives all knew how to contact the Bucks County Court of Common Pleas, and therefore, any or all of them could have insisted on subcategorizing this category of ballots before they were co-mingled.

This issue identified by the undersigned has effectively created a waiver issue for these ballots. This Court specifically finds with respect to these specific ballots that it would be unfair and improper to disenfranchise the undefined number of electors who issued a proper ballot, simply because their ballot was co-mingled with what the undersigned would have felt compelled under current law to deem "insufficient".

Upon review of this issue by an Appellate Court, this Court urges consideration to the issue of co-mingling and this Court's ruling that the issue has been waived. The issue of co-mingling was before the Pennsylvania Supreme Court in Appeal of Pierce, and is noted at footnote 16. See Appeal of Pierce, 843 A.2d at 250, n.16

There, the Court declined to rule on the validity of a co-mingled ballot because the issue was not preserved.

2. Categories 2-4: 644 Ballots With No Handwritten Name or Address on the Outer Envelope, 86 Ballots With a Partial Written Address on the Outer Envelope, and 182 Ballots With a Mismatched Address on the Outer Envelope

The 644 ballots with no handwritten name or address on the outer envelope, the 86 ballots with a partial written address on the outer envelope, and the 182 ballots with a mismatched address on the outer envelope should be counted as these errors are ministerial, technical errors. Failure of the elector to complete this information is not an error of law. Although the provision in question requires an elector to "fill out" the declaration, there is no requirement that filling out the declaration needs to include handwriting the elector's name and address. Even following a strict construction of the Election Code language, as urged by Petitioners, these "errors" (failure to adequately complete information on the outer envelope) are not mandated by the statute. Rather, these errors are "minor irregularities," which should not invalidate ballots. As with the Supreme Court's decision in Bickhart and Wieskerger, the minor irregularity of a lack of a complete handwritten name or address is not necessary to prevent fraud, and there would be no other significant interest undermined by allowing these ballots to be counted.

3. Category 5: 69 Ballots With "Unsealed" Privacy Envelopes

The ballots at issue in this category are not "naked ballots," which would be invalid pursuant to the Supreme Court's decision in Boockvar, 2020 Pa. LEXIS 4872, at *73. Rather, these ballots were enclosed within their respective privacy envelopes; however, those envelopes were not sealed at the time of canvassing. There is no factual evidence that supports a conclusion that the envelopes had not been sealed by the elector prior to that time. In the stipulation of facts at ¶ 46, the parties stipulated "[w]ith respect to Category 5 (69 ballots in "unsealed" privacy envelopes), Defendant could not determine whether the privacy envelopes were initially sealed by the elector but later became unsealed." Therefore, this Court finds there is no evidence that the electors failed to "securely seal [the ballot] in the [privacy] envelope," as required by the Election Code. The elector was provided the envelope by the government. If the glue on the envelope failed that would be the responsibility of the government. There is insufficient evidence to determine whether the specific language of the mandated law was violated. This Court finds it would be an injustice to disenfranchise these voters when it cannot be shown that the ballots in question were not "securely sealed" in the privacy envelope prior to the canvassing of those ballots, and for all of the reasons stated previously, there has been no suggestion or evidence that the absence of a sealed inner envelope in anyway jeopardized the privacy of the ballot.

IV. Conclusion

For the reasons set forth herein above, the objections to the ballots of Petitioner Donald J. Trump for President, Inc., et al. are all OVERRULED, the requests for relief made therein are DENIED and the Appeal is DISMISSED.

BY THE COURT:

11/19/20
DATE

Robert O. Baldi
ROBERT O. BALDI, J.

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

IN RE: CANVASS OF ABSENTEE AND/OR	:	
MAIL-IN BALLOTS OF NOVEMBER 3, 2020	:	No. 20-05786-35
GENERAL ELECTION	:	
ELECTION	:	
	:	
PETITION OF DONALD J. TRUMP FOR	:	
PRESIDENT, et al.	:	

ORDER

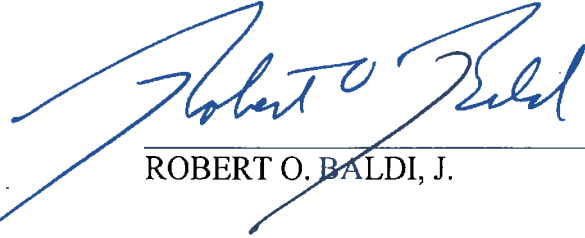
AND NOW, this 19th day of November, 2020, upon consideration of (1) the Petition for Review of Decision by the Bucks County Board of Elections filed on behalf of Petitioners Donald J. Trump for President, Inc., Republican National Committee, Heidelbaugh for Attorney General, Inc., and Garrity for PA; (2) the responses in opposition thereto filed by Respondent Bucks County Board of Elections, Intervenor Democratic National Committee, and Intervenors Pennsylvania House Democratic Campaign Committee and Bucks County Democratic Committee; and (3) the evidence presented including all stipulations and admissions by counsel as well as the arguments of counsel during the on the record prehearing conference and the hearing on November 17th, 2020, for the reasons set forth in the accompanying Memorandum, it is hereby **ORDERED** and **DECREED** that said Petition for Review is **DENIED**. The Bucks County Board of Elections is **ORDERED** consistent with the Memorandum to count the ballots which are the subject of the Petition:

1. 1,196 ballots with no date or a partial date handwritten on the outer envelope;
2. 644 ballots with no handwritten name or address on the outer envelope;
3. 86 ballots with a partial written address on the outer envelope;

N.B. It is the responsibility of
all parties to notify all interested
parties of the content of this
order/action

4. 182 ballots with a mismatched address on the outer envelope; and
5. 69 ballots with “unsealed” privacy envelopes.

BY THE COURT:

A handwritten signature in blue ink, appearing to read "Robert O. Baldi", written over a horizontal line.

ROBERT O. BALDI, J.

11/19/20

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APPENDIX N

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COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION

DONALD J. TRUMP FOR PRESIDENT, INC.,	:	
et al.,	:	
<i>Plaintiffs/ Petitioners</i>	:	NO. 2020-18680
	:	
v.	:	
	:	
MONTGOMERY COUNTY BOARD OF	:	
ELECTIONS,	:	
<i>Defendant/ Respondent</i>	:	
	:	
DEMOCRATIC NATIONAL COMMITTEE,	:	
et al.,	:	
<i>Intervenor</i>	:	

HAAZ, J. November 13, 2020

MEMORANDUM AND ORDER

I. INTRODUCTION

Petitioners, Donald J. Trump for President, Inc., et al., filed a Petition for Review of Decision by the Montgomery County Board of Elections (the “Board”) on November 5, 2020 seeking to invalidate about six hundred (600) absentee and mail-in ballots cast by voters in the November 3, 2020 General Election. Petitioners seek review of the Board’s decision to overrule Petitioners’ objections to count these ballots. Petitioners allege these challenged ballots were cast in violation of 25 P.S. §§ 3146.6(a) and 3150.16(a) because the electors failed to fill out their address immediately below their signed declaration on the outer envelope of the absentee and mail-in ballots. A telephone conference was held on November 6, 2020 where the parties agreed to submit stipulated facts. The Democratic National Convention (“DNC”) and the Montgomery County Democratic Committee moved to intervene in the action. Petitioners and Respondent did not object and these motions were granted by the court.

II. STIPULATED FACTS

The parties stipulated to the following facts:

1. Electors of the Commonwealth of Pennsylvania may choose to cast their vote in any primary or election by absentee or by mail-in ballot.
2. In both instances, the elector who desires to cast a vote either by absentee ballot or mail-in ballot must request such a ballot from the county board of elections, in this case, Respondent.
3. Upon application to, and approval of that application by Respondent, the elector is provided balloting materials that include: 1) instructions as to how the elector is to complete and return the ballot; 2) the ballot; 3) an inner secrecy envelope into which the ballot is to be placed; and 4) an outer envelope into which the secrecy envelope containing the ballot is to be placed and returned to Respondent.
4. When the balloting materials are sent to the elector by Respondent, pre-printed on the reverse side of the outer envelope is a voter's declaration.
5. Underneath the voter's declaration is a place for the voter to sign, date, and print their name and address.
6. Also pre-printed on the same side of the outer envelope as the voter's declaration is a unique nine-digit bar code that links the outer envelope to the voter's registration file contained in the Statewide Uniform Registry of Electors ("SURE") system. Also, in most cases, the elector's name and address is pre-printed on that side of the envelope.¹
7. On the front side of the outer envelope is preprinted the Respondent's address where the ballot is to be sent as well as a place in the upper left-hand corner where the elector may indicate his or her return address by writing it thereon or affixing a label.

¹ Footnote 1 of the parties' stipulation states as follows:

Of the 592 ballots at issue, 509 of those ballots have the voter's address pre-printed on the outer envelope to the right of the voter's declaration. This was done by the Board when it sent the ballot materials to the elector who had requested them. Of these 509 "pre-printed address" ballots, 266 voters also affixed their address in the space provided for return addresses on the front of the envelope. So, for 266 of these ballots, the voter's address actually appears twice. For the remaining 83 ballots, the pre-printed address was blacked-out in order to facilitate the delivery of the ballot materials by the USPS. In 47 of these "blacked-out ballots," the voter wrote their address on the space provided for a return address on the front of the outer envelope. 36 out of 592 ballots have an outer envelope with no easily discernable voter address. However, all 592 ballots contain the bar code that links each one to the SURE system and the specific voter's information – including address – is visible when scanned.

8. The Board has received 592 absentee and mail-in ballots where electors have signed the voter's declaration and provided a date, but have not printed their complete address in the space provided below the Declaration on the outer envelope.
9. Respondent has segregated and not opened nor counted these 592 ballots.
10. When Respondent brought the existence of this group of unopened ballots to the attention of Petitioners' counsel, an objection was verbally lodged.
11. Respondent has verbally overruled that objection and intends to open and count these ballots subject to a ruling of this honorable Court.
12. A true and correct copy of the instructions to absentee and mail-in electors contained in the ballot packages is attached hereto as Exhibit "A."
13. True and correct copies of examples of unopened absentee and mail-in ballots (front and back) that are part of, and indicative of, the 592 ballots at issue before this Court are attached as Exhibits "B" through "E" respectively.²

Stipulated Facts, filed 11/9/20.

Respondent and Intervenor filed responses in opposition to the Petition on November 9, 2020. The court heard oral argument on November 10, 2020. Petitioners stated they were not claiming any voter fraud, undue or improper influence regarding the challenged ballots at issue. N.T. 11/10/20, at 11.

The parties stipulated that all of the 592 ballots at issue are signed and dated. All of the outer declaration envelopes contain the electors' signatures directly below the Voter's Declaration which states as follows:

I hereby declare that I am qualified to vote from the below stated address at this election; that I have not already voted in this election; and I further declare that I marked my ballot in secret. I am qualified to vote the enclosed ballot. I understand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand I may only vote by provisional ballot at my polling place, unless I surrender my

² Exhibits A through E are appended hereto.

balloting materials, to be voided, to the judge of elections at my polling place.

Exhibits B-E, Stipulated Facts, filed 11/9/20. Beneath the elector's declaration and signature are areas for the elector to indicate the date they voted, their printed name and address.

Petitioners claim the Board violated the requirements of 25 P.S. §§ 3146.6(a) and 3150.16(a) by canvassing and counting absentee and mail-in ballots where the outer declaration envelope has not been properly "filled out" with the elector's address. The Board maintains the above provisions do not require the elector to provide their address and the outer envelopes comply with the above statutory requirements.³

III. DISCUSSION

The five statutory provisions of the Election Code at issue do not specifically require the absentee or mail-in elector to provide their address below the declaration on the outer envelope. 25 P.S. §§ 3146.6(a) and 3150.16(a) govern voting by absentee and mail-in electors. Sections 3146.4. and 3150.14(b) address the form of the declaration on the outer envelope. Section 3146.8(g) addresses the county board's obligations related to canvassing.

25 P.S. § 3146.6(a) states the following regarding absentee ballots:

(a) Except as provided in paragraphs (2) and (3), at any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election, the elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. **The elector shall then fill out, date and sign the declaration printed on such envelope.** Such envelope shall then be securely sealed and the elector shall send same by mail,

³ Both the Board and Intervenor, DNC, have argued that the 2020 amendments to the Election Code have eliminated time-of-canvassing challenges entirely from § 3146.8(g)(3). The court is not addressing the merits of this argument.

postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3146.6(a) (emphasis added). The same requirements are set forth with respect to mail-in ballots. *See* 25 P.S. § 3150.16(a) (“The elector shall then fill out, date and sign the declaration printed on such envelope.”).

Sections 3146.4 and 3150.14(b), regarding absentee and mail-in ballots respectively, both delegate the form of the declaration to the Secretary of the Commonwealth. For absentee ballots, Section 3146.4 states as follows:

. . . On the larger of the two envelopes, to be enclosed within the mailing envelope, shall be printed the form of the declaration of the elector, and the name and address of the county board of election of the proper county. The larger envelope shall also contain information indicating the local election district of the absentee voter. Said form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain among other things a statement of the electors qualifications, together with a statement that such elector has not already voted in such primary or election . . .
25 P.S. § 3146.4.

For mail-in ballots, the statute provides:

(b) Form of declaration and envelope.-- The form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain, among other things, a statement of the elector's qualifications, together with a statement that the elector has not already voted in the primary or election.
25 P.S. § 3150.14(b).

These two provisions, specific to the content of the voter declaration, do not require the elector’s address to be included in the declaration or for the elector to write it in.

The pre-canvassing or canvassing of ballots is processed as follows:

When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) and shall compare the information

thereon with that contained in the “Registered Absentee and Mail-in Voters File,” the absentee voters' list and/or the “Military Veterans and Emergency Civilians Absentee Voters File,” whichever is applicable. If the county board has verified the proof of identification as required under this act and **is satisfied that the declaration is sufficient** and the information contained in the “Registered Absentee and Mail-in Voters File,” the absentee voters' list and/or the “Military Veterans and Emergency Civilians Absentee Voters File” verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3) (emphasis added).

The court agrees with the Board’s interpretation of § 3146.6(a) and 3150.16(a). The statutory provisions provide that “[t]he elector shall then fill out, date and sign the declaration printed on such envelope.” 25 P.S. §§ 3146.6(a), 3150.16(a). The Legislature did not include a requirement that the elector include their address on the outer envelope. By contrast, in sections 3146.6(a)(3) and 3150.16(a.1), the Legislature explicitly imposed the requirement of a “Complete Address of Witness” when an elector is unable to sign the declaration due to illness or physical disability.⁴ Sections 3146.6(a) and 3150.16(a) do not include an explicit requirement to include the address of the elector as is clearly stated and required in subsequent subsections of the same statute. “It is a well established principle of statutory interpretation that we ‘may not supply omissions in the statute when it appears that the matter may have been intentionally omitted.’” *In*

⁴ By comparison, 25 P.S. § 3150.16(a.1) states as follows:

(a.1) Signature.—Any elector who is unable to sign the declaration because of illness or physical disability, shall be excused from signing upon making a declaration which shall be witnessed by one adult person in substantially the following form:

I hereby declare that I am unable to sign my declaration for voting my mail-in ballot without assistance because I am unable to write by reason of my illness or physical disability. I have made or received assistance in making my mark in lieu of my signature.

(Mark)

(Date)

(Complete Address of Witness)

(Signature of Witness)

re November 3, 2020 General Election, No. 149 MM 2020, 2020 WL 6252803, at *14 (Pa. Oct. 23, 2020) (citing *Sivick v. State Ethics Commission*, No. 62 MAP 2019, 2020 WL 5823822, at *10 (Pa. Oct. 1, 2020)) (holding, *inter alia*, that the Election Code does not require signature comparison).

The instructions by the Board accompanying each absentee or mail-in ballot do not inform the voter that their address is required or that its omission will invalidate their ballot. The instructions state “Be sure that you **sign** and **date** your [return] envelope.” Exhibit A, Stipulated Facts, filed 11/9/20 (emphasis in original). Underneath that instruction, it is stated “***Please Note: Your ballot cannot be counted without a signature on the return envelope.***” *Ibid*. The instructions do not state that a ballot will be not be counted without an address on the outer declaration envelope. Additionally, the checkbox reminder on the top of the outer envelope only asks the elector if they have signed the declaration in their own handwriting and if they have put their ballot inside the secrecy envelope and placed it in the outer envelope. It would be patently improper and unfair to invalidate a ballot where a voter reasonably relies upon lawful voting instructions by their election board.⁵ *In re Recount of Ballots Cast in General Election on November 6, 1973*, 325 A.2d 303, 308-309 (Pa. 1974) (“[T]he invalidation of a ballot where the voter has complied with all instructions communicated to him and in the absence of any evidence of improper influence having been exerted, invalidation would necessarily amount to an unreasonable encroachment upon the franchise and the legislative enactment should not be interpreted to require such a result.”) (holding that votes must be counted where electors failed to remove, as explicitly required by the Election Code, a perforated corner containing identifying information where “[t]here was no direction on

⁵ The court is aware that “erroneous guidance from the Department or county boards of elections cannot nullify the express provisions of the Election Code.” *In re Scroggin*, 237 A.3d 1006, 1021 (Pa. Sept. 17, 2020). However, the court finds that requiring an elector to “fill out” their address on the outer envelope is not expressly stated in the Election Code. The Board’s instructions to voters is consistent with the requirements of the Election Code.

the face of the ballot instructing the voter of the need to remove that particular portion before casting the ballot”).

Petitioners urge the court to construe “fill out” in Sections 3146.6(a) and 3150.16(a) to mean “fill out your address in order for your vote to be counted.” The Election Code does not explicitly state as such and the court will not add language to the statute imposing a voting condition which the Legislature did not specifically include. Even if one assumes, *arguendo*, that the address requirement may be required, 556 of 592 challenged ballots include the electors’ addresses on the outer declaration envelopes (266 of which contain both the electors’ pre-printed addresses and hand-written/typed mailing labels on the return addresses of the outer envelope, 243 of which contain the electors’ pre-printed addresses, and 47 of which contain the electors’ hand-written/typed mailing labels on the return addresses of the outer envelope). The remaining 36 ballots contain a bar code which links the outer envelope to the voter’s registration file contained in the Statewide Uniform Registry of Electors system (validating their addresses) provided to state election officials earlier in 2020.⁶ By signing and dating the declaration, the elector has declared they are “qualified to vote the enclosed ballot.”⁷

⁶ In order to vote by absentee or mail-in ballot, an elector must submit an application where he or she must attest to their address at least annually or for each election. *See* 25 P.S. § 3150.12(g)(1) (“A mail-in ballot application mailed to an elector under this section [permanent mail-in voting list], which is completed and timely returned by the elector, shall serve as an application for any and all primary, general or special elections to be held in the remainder of that calendar year and for all special elections to be held before the third Monday in February of the succeeding year.”); 25 P.S. § 1350.12(b)(1)(ii) (requiring an application for mail-in ballot to contain the length of time the elector has been a resident of the voting district); 25 P.S. § 3146.2(e.1); 25 P.S. § 3146.2(b). There is no similar requirement for an in-person voter. While an in-person voter could vote at the polls without having submitted their address for many years, a mail-in or absentee elector can only receive a ballot if they have provided an address and attested to its accuracy as set forth above.

⁷ 25 P.S. § 2811 – Qualifications of Electors – states that every citizen of the Commonwealth at least eighteen years of age, if properly registered, shall be entitled to vote if the elector possesses the following qualifications:

- (1) He or she shall have been a citizen of the United States at least one month.
- (2) He or she shall have resided in the State ninety days immediately preceding the election.

Voters should not be disenfranchised by reasonably relying upon voting instructions provided by election officials which are consistent with the Election Code. There is a “longstanding and overriding policy in this Commonwealth to protect the elective franchise.” *Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *9 (citing *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004)). “[A]lthough election laws must be strictly construed to prevent fraud, they ordinarily will be construed liberally in favor of the right to vote.” *Ibid.* “[B]allots containing mere minor irregularities should only be stricken for compelling reasons.” *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004). The Supreme Court has recognized that “marking a ballot in voting is not a matter of precision engineering but of an unmistakable registration of the voter’s will in substantial conformity to the statutory requirements.” *Id.* at 799 (citing *Appeal of Gallagher*, 41 A.2d 630, 632-33 (Pa. 1945)).

Petitioners’ concerns about a voter’s address are legitimate. A voter’s address is a core qualification to vote. It is true that 36 of the outer envelopes in this case do not contain any written or pre-printed indicia of the voter’s address. This omission should not, and will not, disqualify a declared, qualified voter from participating in this election – particularly where the bar code confirms the recently declared address of the mail-in voter with the state registry and where no claim of fraud or improper influence is alleged.

IV. CONCLUSION

The Election Code does not require a voter to provide their address on the declaration envelope. The Montgomery County Board of Elections properly was satisfied, in accordance with section 3146.8(g)(3), that the voters’ declarations are “sufficient.” The court finds that the Board

(3) He or she shall have resided in the election district where he or she shall offer to vote at least thirty days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within thirty days preceding the election.

properly overruled Petitioners' objections to all 592 challenged ballots. These ballots must be counted.

Accordingly, based upon all of the foregoing, the court denies Plaintiffs' petition for review and will enter the accompanying order.

BY THE COURT:



RICHARD P. HAAZ, J.

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COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION

DONALD J. TRUMP FOR PRESIDENT, INC.,	:	
et al.,	:	
<i>Plaintiffs/ Petitioners</i>	:	NO. 2020-18680
	:	
v.	:	
	:	
MONTGOMERY COUNTY BOARD OF	:	
ELECTIONS,	:	
<i>Defendant/ Respondent</i>	:	
	:	
DEMOCRATIC NATIONAL COMMITTEE, et al.	:	
<i>Intervenor</i>	:	

ORDER

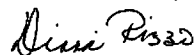
AND NOW, this 13th day of November, 2020, upon consideration of the Petition for Review of Decision by the Montgomery County Board of Elections filed on behalf of Petitioners Donald J. Trump for President, Inc., Republican National Committee, Heidelbaugh for Attorney General, Inc., Garrity for PA, and Daniel J. Wissert, and the responses in opposition thereto filed by Respondent Montgomery County Board of Elections, Intervenor Democratic National Committee, *Amici Curiae* on behalf of the NAACP-Pennsylvania State Conference, Common Cause Pennsylvania, League of Women Voters of Pennsylvania, and the Black Political Empowerment Project, it is hereby **ORDERED and DECREED** that said Petition for Review is **DENIED**. The Montgomery County Board of Elections is **ORDERED** to count the 592 ballots which are the subject of the petition.

BY THE COURT:



RICHARD P. HAAZ, J.

This Memorandum and Order has been e-filed on 11/13/20.
Copies sent via Prothonotary to the parties of record.
Michael Kehs, Esq., Andrea Grace, Esq., Michael Jorgensen, Court Administration, Civil Division



Secretary

EXHIBIT A

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1. I have read the manuscript and agree with the authors that the manuscript should be published in its current form.



- FOIA b(7), (D) - Information withheld because disclosure of the information requested would reasonably be expected to result in the identification of confidential sources of the FBI. (b)(7)(D) - Information withheld because disclosure of the information requested would reasonably be expected to result in the identification of confidential sources of the FBI.

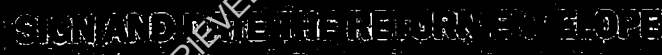


EXHIBIT B

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EXHIBIT C

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EXHIBIT D

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