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IN THE SUPREME COURT OF PENNSYLVANIA

IN RE NOVEMBER 3, 2020 GENERAL ELECTION Petition of Kathy Boockvar, Secretary of the Commonwealth of Pennsylvania	No. 149 MM 2020

ANSWER OF THE PENNSYLVANIA ALLIANCE FOR RETIRED AMERICANS

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INTRODUCTION

The Pennsylvania Alliance for Retired Americans is an intervenor-defendant in *Trump for President, et al. v. Boockvar, et al.*, No. 20-966 (W.D. Pa.). In that case, it has urged the federal district court to reject the efforts of the Republican National Committee, Donald J. Trump for President, Inc., and several Republican Congressman (the "Republicans") to graft a new signature match law onto Pennsylvania's existing Election Code. The Alliance now joins Secretary Boockvar's petition to this Court to invoke its King's Bench powers to resolve this issue of critical importance.

"This isn't golf: there are no mulligans." *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1258 (N.D. Fla. 2016). "[O]nce the election occurs, there can be no do-over." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). The litigation in *Trump for President* has revealed disagreement among the counties over whether signature matching is permitted, and the Republicans' position in that case has sowed further confusion. The Secretary's petition gives this Court an opportunity to deal with this contested issue before it comes back to haunt the Commonwealth in the days following the election.

STATEMENT OF SUPPORT FOR THE PETITION

I. Exercise of King's Bench powers is appropriate in this case.

There is an epidemic in this country of rejected mail ballots. Over half a million mail ballots were rejected in the spring primaries: those ballots represent

hundreds of thousands of voters who were disenfranchised. Many of these rejections are the result of signature match laws such as the one Republicans seek to invent under Pennsylvania law. But Pennsylvania's election laws, which requires election officials to confirm the information on a mail-in or absentee ballot application or ballot return envelope, do not include a signature matching requirement. 25 P.S. § 3146.2b(c) (absentee applications); 25 P.S. § 3150.12b(a) (mail-in applications); 25 P.S. § 3146.8(g)(3) (ballots). In fact, those statutes do not even mention signature matching.

That is likely because laws that task lay election officials with "matching" the signature on a ballot return envelope or application with registration records are inherently flawed and result in the arbitrary rejection of a large number of validly cast ballots. As Dr. Linton Mohammed explains in his attached declaration, even individuals trained in signature matching make significant errors when forced to operate "under the conditions that most signature matching occurs in the contest of elections." Mohammed Decl. ¶ 36. Thus, when *lay* officials are made responsible for performing signature matching, they are "highly likely to make" errors. *Id.* ¶ 38.

Lay officials routinely fail to account for the many reasons individuals' signatures naturally vary, which causes them to reject ballots erroneously far more often than they accept a ballot erroneously. *Id.* ¶¶ 39–42. A voter's signature varies for a host of reasons such as her health, the time of day, her level of concentration,

nervousness, the writing instrument she uses, her stance, the surface she uses, and her level of stress. *Id.* ¶ 42. And because certain subgroups of voters—such as younger voters and voters for whom English is a second language—tend to experience wider signature variation, lay officials erroneously reject those voters' ballots at a significantly higher rate. *Id.* ¶¶ 31–33, 43–45.

Even when election officials are trained in signature matching, they still tend to reject valid ballots erroneously because election-related signature matching involves too few samples. Although proper signature matching "require[s] multiple specimen signature for comparison with a questioned signature," election officials normally have just one sample, which itself is usually inadequate because it was captured digitally. *Id.* ¶¶ 48–51.[1] Nor are they given adequate equipment for inspecting signatures. *Id.* ¶¶ 52–53.

Fortunately, the Supreme Court of Pennsylvania has recourse against the Republicans' attempt to subject Pennsylvanians to this inherently flawed system. By exercising its King's Bench powers to confirm that the relevant statutes mean what they say—absentee or mail-in ballots or ballot applications may not be trashed based on the amateur divination of election workers poring over undotted *i*'s and crookedly

[1] For example, many voters in Pennsylvania have signatures imported from the PennDot database, which often are of poor quality.

crossed *t*'s—this Court can inoculate the "free and equal election" demanded by Pennsylvania's Constitution against this latest peril. *See* Pa. Const. Art. I, § 5.

The Court may exercise its King's Bench authority under 42 P.S. § 502 "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). "[T]he power of King's Bench allow[s] the Court to innovate a swift process and remedy appropriate to the exigencies of the event." *In re Bruno*, 101 A.3d 635, 672 (Pa. 2014). That power contemplates controversies just like this one, where a political party is seeking to enforce an imaginative reading of the Election Code in federal court just before voting begins. But this Court is the authoritative arbiter of state law, and so this Court must provide timely resolution of the dispute to ensure the Secretary of State, 67 county election boards, hundreds of candidates and their affiliated parties, and millions of Pennsylvania voters—including those represented by the Alliance—understand and abide by the appropriate procedures for the imminent election.

II. This Court should grant the requested declaratory relief.

The Secretary asks this Court to entertain two related questions: (1) whether county election boards can reject absentee or mail-in ballots, or applications for the same, based on the untrained determination of a county election official that the

signature on the application or ballot return envelope does not match the voter's signature in their voter registration records; and (2) whether third-party observers, namely individuals who represent political parties and candidates, may challenge an absentee or mail-in ballot, or application for the same, based on their untrained judgment that the signature does not match. The Secretary urges this Court to answer "no" to both. The Alliance agrees for the following reasons.

A. The Secretary is correct that Pennsylvania law does not require or permit an absentee or mail-in ballot or application to be rejected based on signature matching.

The Pennsylvania Election Code is clear: county election boards do not have authority to reject voted absentee or mail-in ballots or ballot applications based on signature matching. As the Alliance explains below, this conclusion is compelled by all applicable principles of statutory construction, ranging from the plain meaning of the language adopted by the General Assembly to the principle that statutes should be construed to avoid significant constitutional questions.

1. *The statutory text is clear and unambiguous: signature matching is neither required nor permitted.*

The purpose of statutory interpretation is to "ascertain and effectuate the intent of the General Assembly." *A.S. v. Penn. State Police*, 143 A.3d 896, 903 (Pa. 2016) (citing 1 Pa. C.S. § 1921(a)). The starting point of the Court's analysis is the plain language of the statute. *See id*. When the statutory text is clear and unambiguous, the Court's inquiry stops. *See id*.; *see also* 1 Pa. C.S. § 1921(b) ("When 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.").

The statutes at issue here, 25 P.S. § 3146.8(g), 25 P.S. § 3146.2b, and 25 P.S. § 3150.12b, are clear and unambiguous—signature matching is *not* part of the comprehensive regime the General Assembly has constructed when absentee and mail-in voters request and vote their ballots. In fact, nowhere do these three statutes even *mention* signature matching, much less require it. Instead, the statutes require the county board of elections to determine the qualifications of an applicant by "verifying the proof of identification and comparing the information" on the application to the voter's registration. 25 P.S. § 3146.2b(c) (absentee applications); 25 P.S. § 3150.12b(a) (mail-in applications); 25 P.S. § 3146.8(g)(3) (ballots).

The use of the word "comparison" in the statute clearly and directly relates to "the *information*" provided by the application, it does *not* authorize the comparison of *signatures*. The plain and ordinary meaning of "information" is "knowledge obtained from investigation, study, or instruction," "facts," and "data." *See* Information, Merriam-Webster Online, Definition 1(a)(1), (3), https://www.merriam-webster.com/dictionary/information.

Signatures, on the other hand, do not function as an identifier under the Pennsylvania Election Code. Instead, a voter signs a *declaration* on the application

or ballot return envelope.[2] Thus, the signature's purpose is familiar to anyone who has ever signed a contract, oath, or affirmation: to memorialize that the signer makes certain promises and is bound to certain terms.

The remainder of the Pennsylvania Election Code shows that, if the General Assembly had wanted to require signature comparison, it would have said so explicitly. The General Assembly has imposed signature matching requirements in some parts of the Election Code, *see* 25 P.S. § 3050(a.3)(2) (election officers "*shall compare the elector's signature* on his voter's certificate with his signature in the district register" and, if the signature "appears to be genuine," the voter will be allowed to vote); *see also* 25 Pa. C. S. A. § 1402(f), but not here despite having twice amended the vote by mail laws in the past two years. Basic canons of construction direct courts to presume that the legislature has "act[ed] intentionally when it uses particular language in one section of a statute but omits it in another." *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1058 (2019). Because the General Assembly

[2] For example, the mail-in ballot application includes the following declaration:

> I declare that I am eligible to vote by mail-in ballot at the forthcoming primary or election; that I am requesting the ballot of the party with which I am enrolled according to my voter registration record; and that all of the information which I have listed on this mail-in ballot application is true and correct.

Pennsylvania Application for Mail-In Ballot, available at https://www.votespa.com/Register-to-Vote/Documents/PADOS_mailInapplication.pdf.

chose to include a signature comparison requirement only in other sections of the Election Code, the Court should "resist the suggestion to read that language" into 25 P.S. § 3146.8(g)(3).

2. *Reading a signature match regime into the existing statute would create significant constitutional concerns.*

If the Republicans imaginative reading of the statute is correct, and Pennsylvania law requires signature matching, then what the Commonwealth is left with is a statute that allows counties to reject lawfully cast ballots while providing no standard for when signatures should be rejected and offering no cure process for voters whose ballots are wrongfully rejected. Each county would be left "to apply its own standards and procedures for executing the signature-match requirement, virtually guaranteeing a crazy quilt of enforcement of the requirement from county to county." *Dem. Exec. Committee v. Lee*, 915 F. 3d 1312, 1320 (11th Cir. 2019). A signature match regime designed in this manner would be patently unconstitutional. Indeed, courts across this country have struck down similar laws as an infringement on the right to vote or a violation of due process. *Id.*[3]

[3] *See also Frederick v. Lawson*, No. 1:19-cv-1959-SEB-MJD, 2020 U.S. Dist. LEXIS 150995, at 2 (S.D. Ind. Aug. 20, 2020) (permanently enjoining Indiana election officials from rejecting any absentee ballot because of perceived signature mismatch absent adequate notice and cure procedures to the affected voter); *League of Women Voters of N.J. et al. v. Tahesha Way*, No. 20-cv-05990, Dkt. 34 (E.D.N.J. June 17, 2020) (granting preliminary injunction and ordering New Jersey election officials to allow voters to cure absentee ballots with missing or mismatched

This backdrop informs the statutory analysis in two ways. First, the General Assembly passed Act 77, which does not include a signature match law, in October 2019. That closely followed a rash of cases striking down signature match laws. *See Lee*, 915 F.3d at 1315; *Martin v. Kemp*, 341 F. Supp. 3d 1326 (N.D. Ga. 2018), *appeal dismissed sub nom. Martin v. Sec'y of State of Georgia*, No. 18-14503-GG, 2018 WL 7139247 (11th Cir. Dec. 11, 2018); *Saucedo v. Gardner*, 335 F. Supp. 3d 202 (D.N.H. 2018); *LULAC v. Pate*, No. CVCV056403, 2019 WL 6358335 (Ia. Dist. Ct. Sept. 30, 2019). This Court must presume that the General Assembly knew about the constitutional concerns raised by these decisions and did "not intend to violate the Constitution of the United States or of this Commonwealth" in its legislation. 1 Pa. C.S. § 1922(3); *id.* § 1921(c)(6) (directing courts to consider the "consequences of a particular interpretation").

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signatures for sixteen days after Election Day); *Self Advocacy Sols. N.D. v. Jaeger*, No. 3:20-CV-00071, 2020 U.S. Dist. LEXIS 108854 (D.N.D. June 5, 2020) (holding North Dakota's cure procedures for absentee ballots violated due process and ordering North Dakota's election officials to allow voters six days after Election Day to cure their absentee ballot); *Martin*, 341 F. Supp. 3d at 1342 (granting preliminary injunction directing Georgia election officials to implement cure process for signature matching); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 222 (D. N.H. 2018) (declaring signature match law unconstitutional because it did not include a cure process); *see also League of Women Voters of the United States et al. v. Kosinski*, et al., No. 1:20-cv-05238, Dkt. 37 (S.D.N.Y. Sept. 17, 2020) (consent decree requiring New York election officials to provide five days for voters to cure absentee ballot after voter is notified of the need to cure the ballot).

Second, the canon of constitutional avoidance urges interpreting the statute to not include a signature matching law. *Commonwealth v. Veon*, 637 Pa. 442, 433, 455 (2016); *see also* 1 Pa. C.S. § 1922(3). The canon of constitutional avoidance is a well-established tool that courts use to interpret statutory texts. Under the doctrine, "when a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Veon*, 637 Pa. at 443 (citation omitted); *accord Clark v. Martinez*, 543 U.S. 371, 381 (2005). It is already the case in Pennsylvania that "statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor." *In re James Appeal*, 377 Pa. 405, 105 A.2d 54, 65–66 (1954). But this principle is especially true here where a contrary interpretation of the statute—one that imposes a signature matching regime—would raise serious constitutional concerns.

B. The Secretary is correct that Pennsylvania law does not allow third party challenges to ballots for signature mismatch.

The Secretary is also correct that absentee and mail-in ballots themselves cannot be challenged for signature mismatch for one obvious reason: they cannot be challenged at all.[4]

[4] Absentee and mail-in ballot applications *are* subject to third party challenges. But those challenges are governed by the very same statutes, just discussed, which do not provide for signature matching. *See* 25 P.S. § 3146.2b (absentee applications); 25 P.S. § 3150.12b(a) (mail-in applications).

Section 3146.8 governs the canvassing of absentee and mail-in ballots, and previously included an explicit challenge process for ballots. Prior to March 2020, Section 3146.8(g) provided an unambiguous right for third parties to challenge an absentee or mail-in ballot. *See* 25 P.S. § 3146.8(g)(2)-(3) (2019) ("Representatives shall be permitted to challenge any absentee elector or mail-in elector in accordance with the provisions of paragraph (3)" and "the county board . . . shall give any candidate representative or party representative present an opportunity to challenge any absentee elector or mail-in elector").

When the General Assembly passed Act 12 of 2020, however, it deleted this language, thereby deliberately removing any opportunity to challenge voted absentee and mail-in ballots. Act of Mar. 27, 2020, P.L. 41, No. 12 ("Act 12"). Section 3146.8(g)(4) now directs that [a]ll absentee ballots which have not been challenged under section [3146.2b] and all mail-in ballots which have not been challenged under [3150.12b] . . . ***shall be counted and included with the returns of the applicable election district*** . . ."") (emphasis added).[5] The two provisions referenced in Section 3146.8(g)(4)—sections 3146.2b and 3150.12b only allow

[5] Mail-in and absentee ballots are still issued to voters before, and sometimes after, their applications are challenged. In those instances, the ballot itself will be set aside while the challenge to the application is pending. 25 P.S. § 3146.8(g)(5)-(7). Thus, some parts of the Election Code still refer to challenging a "ballot." 25 P.S. § 3146.8(f). In light of the clear statutory history, however, those references should be understood to refer to the ballot associated with a challenged application.

challenges to absentee and mail-in ballot ***applications*** and require that such challenges be entered no later than 5 p.m. on the Friday before the election. This Court has already held the word "shall" will not be interpreted as "anything less than mandatory." *Penn. Dem. Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *25 (Pa. Sept. 17, 2020). And the same applies here. Presumably, the General Assembly concluded that allowing challenges to applications, which play a gatekeeper function in absentee and mail-in voting, provided adequate protections against the rare occurrence of voter fraud, while still ensuring that election results are known in a timely manner. This unambiguous language and statutory history make clear that the General Assembly did not intend to include a challenge process for voted absentee and mail-in ballots.

This reading of the statute is consistent not only with the text and statutory history but with the legislative history as well. Act 12 was introduced to ensure the timely resolution of the election results in Pennsylvania and avoid the pitfalls of the 2000 General Election in Florida, and the Iowa Primary this year, where results were delayed several weeks. Second consideration of SB 422 (Act 12), Remarks From House Journal, March 24, 2020 https://www.legis.state.pa.us/WU01/LI/HJ/2020/0/20200324.pdf#page=21.[6] A

[6] Representative Kevin Boyle explained, "And furthermore, in relation to the change of canvassing, I know some members, particularly on the other side of the aisle, had

challenge process for mail in and absentee ballots, of course, threatens to delay election results significantly, especially when layered on top of an application challenge process.

CONCLUSION

The task before this Court is urgent: the hourglass measuring time until the election is quickly running out of sand. To prevent bedlam and confusion—and the potential disenfranchisement of a large swath of Pennsylvania voters in a hotly contested election—every stakeholder and participant requires clear and certain guidance from this Court. Fortunately, the task is uncomplicated because the statutes are clear. The Pennsylvania Alliance for Retired Americans respectfully requests this Court to assume jurisdiction under its King's Bench power and declare that the Election Code does not permit absentee or mail-in applications or ballots to be challenged or rejected based on signature analysis.

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wondered why we are doing that. I think it can best be described that we do not want to be Iowa. We do not want to be the Iowa Democratic Party in February in 2020 during their caucuses. And we do not want to be Florida back in 2000. When we have our election, whether it is the primary or the general election permanently, we do not want a delay of several weeks before there is actually a result. I do not think any of our constituents want that, and I do not think any Americans want to see that because in 2020 Pennsylvania is supposed to be a critical swing State. So no matter whether you support the Democratic nominee or the Republican nominee, I think as Pennsylvanians and Americans we should be able to agree that we want the winner to be known in a timely manner."

Dated: October 7, 2020

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