

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Consolidated Cases: 1140 CD 2020, 1139 CD 2020, 1138 CD 2020, 1137 CD
2020, and 1136 CD 2020

DONALD J. TRUMP FOR PRESIDENT, INC. et al,

Petitioners,

v.

PHILADELPHIA COUNTY BOARD OF ELECTIONS, et al.,

Defendants,

DNC SERVICES CORP. / DEMOCRATIC NATIONAL COMMITTEE,

Intervenor-Defendant.

**APPELLEE DNC SERVICES CORP./DEMOCRATIC NATIONAL
COMMITTEE'S BRIEF IN OPPOSITION TO PETITION FOR REVIEW
OF DECISION**

On appeal from the November 13, 2020 Final Orders of the Philadelphia Court of Common
Pleas, Consolidated case numbers 201100874, 201100875, 201100876, 201100877, 201100878

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INTRODUCTION

In an attempt to disenfranchise more than 8,000 registered and qualified voters who timely cast their votes in the midst of an ongoing pandemic, Donald J. Trump for President, Inc., and Elizabeth J. Elkin (collectively “Petitioners”) filed five appeals asking the Court of Common Pleas to invalidate absentee and mail-in ballots submitted by Philadelphia County electors solely because they arrived in outer envelopes that lacked a handwritten name, address, date, or some combination thereof. The trial court denied all five appeals, holding that the Philadelphia County Board of Elections (the “Board”) did not abuse its discretion or commit an error of law in counting the challenged ballots because the Board’s decision complied with the Election Code and judicial decisions interpreting the Code. *See* Court of Common Pleas Orders (attached as Exhibit A).¹ The trial court was correct, and its decisions should be affirmed.

The Board correctly accepted the ballots at issue here. Petitioners’ challenges are based on immaterial technicalities, none of which provide reason to invalidate ballots and disenfranchise the voters who cast them. There is no statutory requirement that voters print their name or address on the outer envelope containing

¹ The same day, the Court of Common Pleas in Montgomery County reached the same result on a similar challenge to ballots contained in outer envelopes that lacked a handwritten address or date. *Donald J. Trump for President, Inc., et al. v. Montgomery Cnty. Bd. of Elections*, No. 2020-18680 (November 13, 2020 Memorandum and Order denying petition for review).

the ballot. Nor is there any statutory requirement that ballots be voided for lack of a printed name, address, or date, particularly where—as here—there is no allegation of fraud, much less any evidence of it. At the hearing before the Court of Common Pleas, Petitioners *admitted* that the ballots were cast by lawful voters, that they were cast and received on time, and that there was no fraud or other impropriety. Yet, based *solely* on minor technicalities with the ballot envelopes, Petitioners ask this Court to invalidate 8,329 ballots. To do so would contravene the Election Code, this Commonwealth’s precedent, and federal law. This Court should affirm the lower court’s ruling and the Board’s decision.

STATEMENT OF JURISDICTION

As explained below, this Court lacks jurisdiction over this appeal because the General Assembly has lodged exclusive jurisdiction in the Pennsylvania Supreme Court. *See* 42 Pa. C.S. § 722(2).

SCOPE AND STANDARD OF REVIEW

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 county board’s decision only for an abuse of discretion or error of law. *See Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952) (observing that county election boards

have “plenary powers in the administration of the election code”); *see also In re City of Wilkes-Barre Election Appeals*, 44 Pa. D. & C.2d 535, 536–37 (Pa. Com. Pl. 1967) (“[W]e may reverse the board of elections only for a mistake of law or for a clear abuse of discretion including a capricious disregard of the testimony.”); *In re Duquesne Appeals from Cnty. Bd. of Elections*, 39 Pa. D. & C.2d 545, 547 (Pa. Com. Pl. 1965) (confirming an “appeal [from the county election board] is not a de novo proceeding”).

Given the “longstanding and overriding policy in this Commonwealth to protect the elective franchise,” *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004), “[t]he 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). Accordingly, “ballots containing mere minor irregularities should only be stricken for compelling reasons.” *Shambach*, 845 A.2d at 798.

STATEMENT OF QUESTIONS INVOLVED

1. Whether the Pennsylvania Supreme Court has exclusive jurisdiction of this appeal where the issues pertain to the regularity of the electoral process and the action creates uncertainty as to the rightful occupant of public office.

The court below did not address this question.

2. Whether a qualified elector's vote must be canceled where the elector failed to handwrite his or her name or complete address on the outer envelope of an absentee or mail-in ballot, even where there is no requirement in the Election Code to do so and where the elector's name and address are otherwise identifiable from the envelope.

The court below correctly answered this question in the negative.

3. Whether a qualified elector's vote must be canceled where the elector failed to handwrite the date on the outer envelope of an absentee or mail-in ballot, even where there is no dispute that the ballot was submitted before Election Day.

The court below correctly answered this question in the negative.

STATEMENT OF THE CASE

I. Background on absentee and mail-in application and voting procedure.

A. Absentee and mail-in application procedure.

Electors of the Commonwealth of Pennsylvania may choose to cast their votes in any primary or general election by absentee or mail-in ballots. In both instances, electors must submit applications for such ballots to the county board of elections. In submitting such applications, electors must supply the address at which they are registered to vote and 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."

Before sending an absentee or mail-in ballot to the elector, the county board of elections must confirm the elector's qualifications and verify that the elector's

address inputted on the application matches the elector's registration. That occurred here, and Petitioners do not claim otherwise.

Upon the county board of elections' approval of the application, the elector is provided balloting materials that include: 1) the ballot; 2) instructions as to how the elector is to complete and return 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 the board.

B. Balloting materials, elector declaration, and the voting procedure.

The balloting materials sent to electors by the county board of elections include an outer envelope with a pre-printed voter's declaration. The elector's name and address are pre-printed on a label affixed approximately one inch below the voter's declaration. Also pre-printed on the same side of the outer envelope 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. After receiving a mail-in or absentee ballot envelope, the board scans the unique nine-digit bar code on the envelope linking to the SURE system.

The General Assembly delegated to the Secretary of State the authority to determine the form of the voter declaration for absentee and mail-in ballots. On September 11, 2020, the Secretary of State issued Guidance Concerning

Examination of Absentee and Mail-in Ballot Return Envelopes (“9.11.20 Guidance,” attached as Exhibit B).

II. Procedural history.

A. The Board’s decision.

On November 9, 2020, the Board met to determine, pursuant to 25 P.S. § 3146.8(g)(3), whether certain ballots were “sufficient.” The Board made findings and decisions with respect to nine different categories of ballots, accepting some categories for canvassing and excluding others. Specifically, the Board voted *not* to accept:

- 472 ballots where the outer envelope lacked a signature and any other handwritten information;
- 225 ballots where the outer envelope was not signed by the voter;
- 112 ballots where the individual who completed the declaration appeared different than the individual who was assigned the ballot; and
- 4,027 ballots that were not submitted in a secrecy envelope.

B. The challenged ballots.

Petitioners challenge ballots accepted by the Board in the following categories. In each category, the issue identified is the only alleged irregularity:

- 1,211 ballots that lack a handwritten date, address, and printed name on the back of the outer envelope (but are signed). *See* Case ID 201100874, Pet. ¶ 27.
- 1,259 ballots that lack only a handwritten date on the back of the outer envelope (but are signed and contain other information, including handwritten name and address). *See* Case ID 201100875, Pet. ¶ 27.
- 533 ballots that lack only a handwritten name on the back of the outer envelope (but are signed and dated and contain a handwritten address). *See* Case ID 201100876, Pet. ¶ 27.
- 860 ballots that lack only a handwritten address on the back of the outer envelope (but are signed and dated and contain a handwritten name). *See* Case ID 201100877, Pet. ¶ 27.
- 4,466 ballots that lack only a handwritten name and address on the back of the outer envelope (but are signed and dated). *See* Case ID 201100878, Pet. ¶ 27.

C. Factual admissions.

1. No fraud, misconduct, impropriety, or undue influence.

During oral argument before the Philadelphia Court of Common Pleas on November 13, 2020, Petitioners' counsel, Linda A. Kerns, admitted that Petitioners neither allege, nor is there evidence of, any fraud, misconduct, impropriety, or undue

influence in connection with the challenged ballots. *See* Hearing Tr. at 13–14 (attached as Exhibit C).

2. No missing signatures or naked ballots.

Petitioners do not allege, nor is there any evidence, that the Board counted any ballots without signatures on the outer envelope or counted “naked ballots” (ballots that did not arrive in a secrecy envelope). The transcript of the Board’s meeting confirms that those ballots were not counted. Board Tr. at 13 (attached as Exhibit D).

3. Each ballot was in an outer envelope displaying the elector’s address.

Petitioners’ counsel conceded that each ballot was contained in an outer envelope that had on its face the elector’s address affixed to the envelope. Ex. C, Hearing Tr. at 32–33.

4. No ineligible voters, deceased voters, or impersonations.

Petitioners’ counsel admitted there is no evidence that any of the electors were ineligible to vote in the election and they are not challenging the eligibility of the electors who cast the challenged ballots. Petitioners’ counsel further admitted that Petitioners do not allege, and there is no evidence, that any of the challenged ballots were cast by, or on behalf of, a deceased person or cast by someone other than the electors whose signatures are on the outer envelopes. *Id.* at 18, 35–38.

5. The ballots were timely cast and received.

Petitioners conceded that each of the challenged ballots was timely received by the Board before 8:00 p.m. on Election Day, November 3, 2020. *Id.* at 13–14.

III. The Court of Common Pleas Decision.

The Court of Common Pleas subsequently denied each appeal. The Court emphasized that the outer envelope contains a checklist that directs the elector to sign the declaration, and the checklist makes no mention of supplying a date or any other information. *See* Ex. A. Further, the Court determined that the term “fill out” in the Election Code’s instruction that voters “fill out, date and sign the declaration” is an ambiguous term. *Id.* (quoting 25 P.S. §§ 3146.6(a), 3150.16(a)). Considering Petitioners’ factual concessions and guided by the Election Code’s instruction that the Court’s consideration of appeals from county boards of elections shall “make such decree as right and justice may require,” the Court denied each petition. *Id.* (quoting 25 P.S. § 3157(b)). This appeal followed.

SUMMARY OF ARGUMENT

At the threshold, the Pennsylvania Supreme Court has exclusive jurisdiction over this case because the issues pertain to the regularity of the electoral process and the action creates uncertainty as to the rightful occupant of public office. On the merits, the Board did not abuse its discretion in rejecting the attempted challenges at issue. First, there is no statutory requirement that voters print their full name or address on the outer envelopes. Second, a lack of flawless technical compliance with

the statutory directives does not require disenfranchisement where, as here, there is no such statutorily mandated consequence, it is undisputed that the ballots were timely cast and submitted, and the directive to add a date to the envelope serves no compelling purpose that would be undermined by the lack of a date.

ARGUMENT

I. This Court lacks jurisdiction to hear appeals related to the regularity of the electoral process.

The DNC agrees with Philadelphia County that this appeal should be transferred to the Supreme Court of Pennsylvania.² The Legislature has lodged “exclusive jurisdiction” in the Pennsylvania Supreme Court “of appeals from final orders of the courts of common pleas” in cases related to the “right to public office.” 42 Pa. C.S. § 722(2). The Supreme Court has interpreted this class of cases to include challenges to the “regularity” of the electoral process. *Commw. v. Spano*, 701 A.2d 566, 567 (Pa. 1997) (citing *Appeal of Bowers*, 269 A.2d 712 (Pa. 1970)). While the Commonwealth Court occasionally maintains jurisdiction in some election cases under its authority to hear appeals of “election procedures” under 42 Pa. C.S. § 762(a)(4)(i)(C), the Supreme Court has made clear that it maintains exclusive

² Notably, the Board has asked the Pennsylvania Supreme Court to exercise jurisdiction over this matter by filing an application for extraordinary relief. The Court has accepted jurisdiction. *See* Supreme Court docket, attached as Exhibit E.

jurisdiction in election cases where time is of the essence.³ As the Court explained in *Spano*, “[w]hen the results of an election are challenged, the occupancy of a key public office is left uncertain until the legal contest is decided by the courts. For as long as the contest goes on, there is uncertainty over who is the rightful occupant of that office and no policy can be made.” 701 A.2d at 567. “In such cases, the public interest in having a functioning representative government demands that the contest be terminated as expeditiously as possible. *Therefore appeals come directly to this court*, not because we have more expertise, but because the answer will be final.” *Id.* (emphasis added).

As a result, while the Supreme Court and Commonwealth Court each sometimes accept jurisdiction over cases involving election contests, *compare In re Reading Sch. Bd. Election*, 634 A.2d at 171, with *Dayhoff v. Weaver*, 808 A.2d 1002, 1006 (Pa. Commw. Ct. 2002), the Supreme Court’s claim to jurisdiction must govern. Here, the election certification process is on a tight timeline: the Board must receive the computation of ballots by *today*, November 18th, *see* 25 P.S. § 3154(f), and the Board must certify the results to the Commonwealth by November 23, 2020,

³ A third statute, 25 P.S. § 3157(b), which purports to prohibit any elections appeals from the courts of common pleas, is dead letter according to settled precedent. *See In re Reading Sch. Bd. Election*, 634 A.2d at 171; *Dayhoff*, 808 A.2d at 1006.

see 25 P.S. § 2642(k).⁴ Transfer to the Supreme Court would help resolve this dispute on the necessary timeline, which is why the General Assembly has vested it with exclusive jurisdiction over this appeal.

II. There is no statutory basis to invalidate ballots that comply with all statutory instructions.

Nothing in the Election Code requires that voters handwrite their names and addresses on the outer envelope—particularly where that information is pre-printed on the envelope less than an inch away. Nevertheless, Petitioners seek to invalidate thousands of votes on those grounds. But Petitioners may not add mandatory voting procedures that are not prescribed in law, and the Board did not err by refusing to invalidate votes that complied with every statutory instruction. *See Appeal of McCracken*, 88 A.2d at 788; *In re City of Wilkes-Barre Election Appeals*, 44 Pa. D. & C.2d at 536–37; *In re Duquesne Appeals from Cnty. Bd. of Elections*, 39 Pa. D. & C.2d at 547. Petitioners’ claims have no merit.

The Board correctly denied Petitioners’ challenge to ballots with no printed name or address because the Election Code does not require voters to include this information. The relevant statutes instruct that, after marking the ballot, “[t]he

⁴ This Court can take judicial notice of the fact that the Philadelphia Board of Elections did indeed reconvene to accept the computation of the vote last night, November 17, at a meeting held at 10:00pm. *See Reconvening of the Return Board for the 2020 General and Special of November 3, 2020, Nov. 17, 2020*, available at https://www.philadelphiavotes.com/en/home/item/1891-reconvening_board_for-the_2020_general_election.

elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.” 25 P.S. § 3146.6(a) (absentee ballots); 25 P.S. § 3150.16(a) (same instructions for mail-in ballots). The statute thus does not expressly require voters to handwrite their names or addresses on their declarations.

Notably, the General Assembly did impose such a requirement elsewhere in the same section when addressing voters who are unable to sign their declaration due to illness or physical disability. *That* provision requires that a witness not only sign the declaration but also provide his or her “complete address.” 25 P.S. § 3146.6(a)(3); *accord* 25 P.S. § 3150.16(a.1). That the General Assembly included this statutory requirement in another provision “clearly demonstrate[s] that it knows how to impose such a requirement when it wishes to do so.” *Whitfield v. United States*, 543 U.S. 209, 216 (2005); *see In re Nov. 3, 2020 Gen. Election*, No. 149 MM 2020, 2020 WL 6252803, at *14 (Pa. 2020) (noting that the legislature’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”). Petitioners thus ask this Court to read into the statute a requirement that the General Assembly did not impose. But, as the Supreme Court recently explained, courts should not “judicially rewrite” the Election Code by imposing requirements

“where the legislature has, in the exercise of its policy judgment, seen fit not to do so.” *In re Canvassing Observation*, No. 30 EAP 2020 (Pa. Nov. 17, 2020) (slip op. at 17); *see also Sivick v. State Ethics Comm’n*, No. 62 MAP 2019, 2020 WL 5823822, at *10 (Pa. Oct. 1, 2020) (observing that “[i]t is axiomatic that we may not add statutory language where we find the extant language somehow lacking” and that “[u]nder the doctrine of *expressio unius est exclusio alterius*, the inclusion of a specific matter in a statute implies the exclusion of other matters”).

Petitioners suggest that the Court should read the requirement in sections 3146.6(a) and 3150.16(a) that the voter “fill out” the declaration as imposing a rule that a voter must handwrite his or her name and address on the declaration. But as the court below properly determined, the term “fill out” is ambiguous. *See, e.g., Ex. A* at 2. Where an election statute is ambiguous, it applies the “longstanding” interpretive principle that “election laws . . . ordinarily will be construed liberally in favor of the right to vote.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 360–61 (Pa. 2020). Additionally, the General Assembly has delegated authority to the Secretary of State to interpret this aspect of the Election Code, and the Secretary has interpreted it not to require the handwritten information that Petitioners suggest. The General Assembly expressly authorized the Secretary to “prescribe[]” the “form of [the] declaration,” requiring only that it include “a statement of the elector’s qualifications, together with a statement that the elector has not already voted in the

primary or election.” 25 P.S. § 3150.14(b). Pursuant to this authority, the Secretary promulgated the declaration form at issue here and issued guidance to the county boards of elections about how to determine whether voters “fill[ed] out” the form. *See Ex. B, 9.11.20 Guidance*. The Secretary’s guidance instructs that ballot return envelopes must be set aside and not counted if the declaration is “blank,” but otherwise, “[i]f the Voter’s Declaration on the return envelope is signed and *the county board is satisfied that the declaration is sufficient*, the mail-in or absentee ballot should be approved for canvassing.” *Id.* at 3 (emphasis added). The Board here acted pursuant to the Secretary’s reasonable interpretation of the statute, rejecting hundreds of ballots that were not “sufficient” but accepting those ballots that were signed by voters whose name and address were printed on the outer envelope. Petitioners offer no reason to adopt their reading of the phrase “fill out” rather than the Secretary’s reasonable one. *See Colville v. Allegheny Cnty. Ret. Bd.*, 926 A.2d 424, 430 (Pa. 2007).

Petitioners do not dispute that each outer envelope at issue here includes a declaration signed by the voter. Nor do they dispute that the voter’s name and address are already embedded in the outer envelope itself—pre-printed near the declaration and in the unique barcode on every envelope. The only potential deficiency with these envelopes is the lack of a complete *handwritten* name and address below the voter’s signature. But given that such information is already

printed on the envelope, and that the checklist makes no mention of the name or address, a voter could reasonably conclude that it was unnecessary to also handwrite such information. Because a name and address are not specified in statute; because the Secretary has made clear that an outer envelope must be set aside only if the declaration is blank; and because the county board otherwise determines whether the declaration is sufficient, the court below was correct to conclude that Board did not abuse its discretion in deciding that the ballots inside these envelopes should be counted.

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

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

Even were the omission of this information inconsistent with the instructions given to voters, which it is not, Pennsylvania law is clear that not every failure to comply with an instruction in the Election Code is grounds to reject a ballot. As the Supreme Court explained earlier this year, “[w]hile both mandatory and directory provisions of the Legislature are meant to be followed, the difference between a

mandatory and directory provision is the consequence for non-compliance: a failure to strictly adhere to the requirements of a directory statute will not nullify the validity of the action involved.” *Pa. Democratic Party*, 238 A.3d at 378 (quoting *JPay, Inc. v. Dep’t of Corr. & Governor’s Office of Admin.*, 89 A.3d 756, 763 (Pa. Commw. Ct. 2014)); see *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108 (Pa. 1972) (holding the statutory instruction that voters shall mark their ballot in blue, black, or blue-back ink is not mandatory).

“The power to throw out a ballot for minor irregularities . . . must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons.” *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945); see also *In re Duquesne Appeals from Cnty. Bd. of Elections*, 39 Pa. D. & C.2d at 557 (same). An imperfect envelope nonetheless may be sufficient; omission of limited and immaterial information does not represent a compelling reason requiring the voter who voted the ballot to be disenfranchised. See *Shambach*, 845 A.2d at 799 (“[M]arking a ballot in voting is not a matter of precision engineering but of an unmistakable registration of the voter’s will in substantial conformity to the statutory requirements.”). Because the statutory requirements at issue here are directory, not mandatory, the extreme remedy of disenfranchisement is neither required nor appropriate.

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

The General Assembly has provided no instruction—explicitly or implicitly—that ballots shall not be counted if they are contained in an outer envelope that lacks a handwritten date, name, or address. No other section of the Election Code would be undermined or defeated if the ballots at issue were counted, and voiding these ballots would serve no compelling state interest.

The General Assembly specified elsewhere in the Election Code particular instances in which an absentee ballot must be rejected:

- i.) The ballot of a deceased elector “shall be rejected by the canvassers,” 25 P.S. § 3146.8(d), and “set aside,” *id.* § 3146.8(g)(3).
- ii.) If the secrecy envelope contains any marking that identifies the elector’s identity, political affiliation, or candidate preference, “the envelopes and the ballots contained therein shall be set aside and declared void.” *Id.* § 3146.8(g)(4)(ii).
- iii.) Where the eligibility of an elector has been challenged, the elector’s ballot “shall be placed unopened in a secure, safe and sealed container” until the challenge is resolved. *Id.* § 3146.8(g).

None of these three issues is implicated here. Petitioners expressly disclaim any challenge related to whether an elector is deceased or ineligible to vote, *see* Ex. C, Hearing Tr. at 18, 34; they likewise do not allege that any secrecy envelopes

contain identifying markings. Thus, the ballots at issue here do not fall within any of the discrete categories of invalid ballots that the Legislature has instructed not be counted.⁵

The “fill out, date, and sign” requirement is in this way distinguishable from the secrecy-envelope requirement that the Pennsylvania Supreme Court concluded was mandatory in *Pennsylvania Democratic Party*. In that case, the Court relied not merely on the fact that the statute directed the voter to take a particular action (there, use a secrecy envelope), but the fact that the statute elsewhere required that, if the election board found that the integrity of a secrecy envelope had been compromised, it should “set aside” that envelope and the ballot within it. 238 A.3d at 378; *see* 25 P.S. § 3146.8(g)(4)(ii). This statutory provision, when “read *in pari materia*” with the provision requiring the use of the secrecy envelope in the first instance, “ma[d]e clear the General Assembly’s intention that . . . it should not be readily apparent who the elector is, with what party he or she affiliates, or for whom the elector has voted,”

⁵ Comparison with a separate section of the Election Code lends further support for the fact that the General Assembly knows how to require information such as a date when it intends to. Because dated signatures on candidate nominating petitions are essential to determining whether and which signatures are valid under the statutory scheme governing these petitions—unlike for absentee and mail-in ballots, which can be voted as soon as they are issued, one cannot lawfully sign a nominating petition *prior* to a particular date—the General Assembly provided, “*no signature shall be counted unless it bears a date affixed not earlier than the thirteenth Tuesday nor later than the tenth Tuesday prior to the primary.*” 25 P.S. § 2868 (emphasis added). There is no parallel consequence for a missing date, name, or address in the statutes governing absentee and mail-in ballots.

and that any contravention of that goal required (as § 3146.8(g)(4)(ii) made clear) the invalidation of the ballot. *Pa. Democratic Party*, 238 A.3d at 378; accord *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1232 (Pa. 2004) (emphasizing the General Assembly’s commitment to votes “remain[ing] secret and inviolate” in interpreting ban on third-person delivery as mandatory, not directory). Only after considering multiple sections of the Election Code regarding secrecy envelopes—and how ballot secrecy is “protected expressly by Article VII, Section 4 of th[e] Court’s state charter”—did the Court conclude that the General Assembly had “signaled beyond cavil that ballot confidentiality . . . is so essential as to require disqualification.” *Pa. Democratic Party*, 238 A.3d at 379-380 (emphasis added). By contrast, no provision of the Election Code here demonstrates that the General Assembly similarly considered a handwritten name, date, or address so essential that their omission requires—or even could plausibly be read to contemplate—the invalidation of ballots.

No “weighty interest” analogous to ballot secrecy, *Pa. Democratic Party*, 238 A.3d at 380, is implicated here. An envelope that lacks a handwritten name, date, or address but that was unquestionably cast by the elector and was timely is not analogous to a ballot submitted by a deceased or otherwise unqualified voter, and the omission plainly does not jeopardize the privacy of the vote. Nor would counting these ballots render the statutory scheme meaningless or absurd. Additional indicia

on the outer envelope of the voter's identity may be useful insurance for the unlikely but conceivable situation where the SURE system's barcode fails to scan, just as a dated signature may be relevant evidence where the timeliness of a ballot is in dispute. But where, as here, neither the identity of the elector nor the timeliness of the ballot is in any doubt—and Petitioners have explicitly represented that neither fact is contested here—no legislative purpose would be served by invalidating the lawful votes of eligible voters.⁶ Thus, there is no basis here for the judiciary to take the legislative pen and add to the circumscribed reasons that a ballot may be set aside, especially where deferring to statutory silence does not defeat the General Assembly's obvious intentions or defeat a compelling state interest. Because the General Assembly has not instructed otherwise, the Board did not abuse its discretion by deciding that these votes should be counted.

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

The statutory instructions do not direct voters to write their name and address on the outer envelope, but even if that were required, there would be no compelling reason to disenfranchise voters who fail to print their full name and address under the declaration because this information already is available on the outer envelope.

⁶ *Amicus curiae's* speculation (at page 10 of her brief) about double voting is completely irrelevant to this appeal, as Petitioners have conceded that all the ballots at issue were cast by eligible voters, and there are no allegations of double voting.

First, outer envelopes contain, on the same side as the voter's declaration, a unique nine-digit barcode that links the outer envelope to the voter's registration file contained in the SURE system, and the specific voter's information—including name and address—is visible when scanned. *See* Ex. B, 9.11.20 Guidance, *supra*, at 2. Further, the voter's address is pre-printed on the outer envelope. Petitioners admit that none of the contested ballots lacked these indicia of the voter's identity. Ex. C, Hearing Tr. at 32–33.

The fact that the voter's name and address are readily identifiable would make throwing out these ballots a grave injustice. Disenfranchising voters who fail to input their name and address below their signature serves no “weighty interest,” and there is no “concrete provision” that would be rendered ineffective if these ballots were counted. *Cf. Pa. Democratic Party*, 238 A.3d at 380. Indeed, whatever the interest is in having the voter's name and address identifiable from the outside of the ballot—likely an identification mechanism to prevent double voting—it is met here because the voter's name and address are identifiable in at least one (and more often multiple) ways from the outside of every ballot envelope.

This case is analogous to *Wieskerger Appeal*, 290 A.2d at 109, where the Supreme Court held that failure to complete a ballot in pencil or certain color of ink was not a basis to invalidate the ballot. As in *Wieskerger*, Petitioners offer no suggestion that the failure to include a complete name and address here was an effort

at committing voter fraud, and such an attempt would be virtually impossible given that the voter's name and address are identifiable in at least one way on the outer envelope of each of these ballots. Disenfranchising voters based on this minor technicality, when every voter's name and address are still readily identifiable to the Board, would be directly contrary to the "longstanding and overriding policy in this Commonwealth to protect the elective franchise." *Shambach*, 845 A.2d at 798.

Further (and relatedly), Petitioners' requested interpretation of state law would lead to a violation of federal law by asking the state to deny the right to vote for immaterial reasons. Nobody acting under color of state law may deny anyone the right to vote "in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). Here, the SURE barcode provides a readily available means to determine that all ballots at issue were cast by voters "qualified under State law to vote in such election" by allowing the Board and the state to readily confirm each voter's name and address along with other information. The handwritten name and address under the declaration are not

material to determining whether an individual is qualified to vote, and not allowing these votes to count would violate federal law.⁷

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

The purpose of the date on the outer envelope, when read in context with the rest of the election code, is apparent. Under Pennsylvania law, a ballot must be voted before 8:00 p.m. the day of the primary or election to be counted. 25 P.S. § 3150.16(a). Thus, the date serves the purpose of allowing election officials to confirm that the ballot was timely voted. In this case, a handwritten date is not necessary for such confirmation, as Petitioners crucially admit that the ballots at issue in this case were received before 8:00 p.m. on Election Day. Moreover, the receipt date of the ballots is verifiable. The County Board “stamp[s] the date of receipt on the ballot-return” and “record[s] the date the ballot is received” in the

⁷ By requiring the post hoc invalidation of ballots cast by eligible voters, Petitioners’ proposed interpretation of the Election Code would raise serious federal constitutional concerns. *See Griffin v. Burns*, 570 F.2d 1065, 1075 (1st Cir. 1978) (finding the retroactive invalidation of ballots cast in an officially-endorsed manner amounted to a constitutional violation); *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 98 (2d Cir. 2006) (affirming injunction prohibiting Board from certifying elections without tallying certain absentee ballots when election officials “at least arguably [] misled voters”). Accordingly, if there is any ambiguity in the statute, it should be construed to avoid such constitutional questions. *See Commonwealth v. Veon*, 150 A.3d 435, 443 (Pa. 2016) (“[W]hen 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.” (citation omitted)).

SURE system. *See* Ex. B, 9.11.20 Guidance, *supra*, at 2. The date stamp provides an objective indicator of timeliness that renders any handwritten date superfluous. Thus, there can be no doubt that the 2,349 challenged ballots were timely cast and should be counted. *Pa. Democratic Party*, 238 A.3d at 356 (“[T]he Election Code should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice.”).

Although the statute provides that electors shall date the declaration, that directive is not mandatory. The Supreme Court has made clear that “[i]n construing election laws while we must strictly enforce all provisions to prevent fraud our overriding concern at all times must be to be flexible in order to favor the right to vote. Our goal must be to enfranchise and not to disenfranchise.” *Wieskerger Appeal*, 290 A.2d at 109. The directive to date the declaration is much like the directive to use blue or black ink in marking one’s ballot—it serves a purpose, but when that purpose has been met without strict compliance, the votes should be counted. *Id.* (“The proper interpretation of this portion of the statute considering the occasion for its enactment, the mischief to be remedied, and the policy to liberally construe voting laws in the absence of fraud, is that the ballot is valid unless there is a clear showing that the ink used was for the purpose of making the ballot identifiable.”). *Id.*⁸

⁸ For this reason, a voter’s failure to comply with the requirement that he or she “date” the declaration may logically carry different consequences than a failure to

CONCLUSION

For the foregoing reasons, the DNC respectfully requests this Court affirm the Court of Common Pleas and deny the Petition for Review of Decision.

comply with the requirement that he or she “sign” the declaration. A voter’s failure to date a declaration—at least in the context of an absentee or mail-in ballot—may be remedied by clear evidence that the vote was timely cast. A voter’s failure to sign the declaration at all, by contrast, renders the declaration void.

Dated: November 18, 2020

Respectfully submitted,

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**CERTIFICATION PURSUANT TO PENNSYLVANIA RULE OF
APPELLATE PROCEDURE 127**

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

Date: November 18, 2020

By: /s/ Michael R. McDonald
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**CERTIFICATION PURSUANT TO PENNSYLVANIA RULE OF
APPELLATE PROCEDURE 2135(d)**

I certify that this brief's word count is 6,317 and, accordingly, complies with the limitations set forth in Pennsylvania Rule of Appellate Procedure 2135.

Date: November 18, 2020

By: /s/ Michael R. McDonald
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CERTIFICATE OF SERVICE

I, Michael R. McDonald, certify that on this day, I caused a true and correct copy of the foregoing brief to be served on counsel for Petitioners and Defendants via this Court's electronic filing system.

Date: November 18, 2020

By: /s/ Michael R. McDonald
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