

**IN THE SUPREME COURT OF PENNSYLVANIA**

Docket No. \_\_\_\_ MM \_\_\_\_

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**IN RE: CANVASS OF ABSENTEE AND/OR MAIL-IN BALLOTS OF  
NOVEMBER 3, 2020 GENERAL ELECTION; PETITION OF DONALD J.  
TRUMP FOR PRESIDENT, INC. *ET. AL.***

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**BUCKS COUNTY BOARD OF ELECTIONS' APPLICATION TO THE  
COURT TO EXERCISE EXTRAORDINARY JURISDICTION OVER  
COMMONWEALTH COURT CASE DOCKETED AT \_\_\_\_ CD \_\_\_\_,  
APPEAL OF DECISION BY BUCKS COUNTY COURT OF COMMON  
PLEAS, NO 2020-05786**

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## **I. INTRODUCTION**

This case concerns the appeal of Donald J. Trump for President, Inc. (the “Campaign”) of the Bucks County Board of Elections’ decisions to count 1,995 absentee and mail-in ballots that were timely cast by eligible Bucks County voters and received by the Bucks County Board of Elections (the “Board”) on or before Election Day at 8:00 p.m. Although the Campaign admits and stipulates that the voters that cast the ballots are qualified, registered electors and that no fraud or impropriety was involved with the casting of these ballots, and that the voters all affixed their signature to their ballot-return envelopes, the Campaign claims that these 1,995 ballots should not be counted because the voters (a) failed to handwrite their name, street address, date, or some combination thereof on the ballot-return envelope or (b) enclosed their ballot in a secrecy envelope that, at some point, became unsealed. The Bucks Court of Common Pleas upheld the Board’s decisions to count these ballots on November 19, 2020, but the Campaign filed an appeal to the Commonwealth Court on November 20, 2020, docket number pending. The statutory deadline for the Board to certify the election results to the Secretary of the Commonwealth is only one day away.

Extraordinary jurisdiction is appropriate here for two reasons. First, the Campaign’s contention that various technical deficiencies related to ballot-return envelopes and seals of secrecy envelopes mean that votes should be discarded raises

important and novel issues of statutory interpretation that will impact the rights of not only 1,995 Bucks County voters, but of voters throughout the Commonwealth in this and future elections. Second, if this Court does not exercise extraordinary jurisdiction over this case, the Board is concerned that there will be insufficient time for the instant appeal to wind its way through the ordinary appellate process, and that unsettled litigation may impact its certification of votes after it certifies those results on November 23<sup>rd</sup>.

## **II. STATEMENT OF JURISDICTION**

For the reasons discussed below, the Court has jurisdiction to take this case through its Extraordinary Jurisdiction. *See* 42 Pa.C.S. § 726; Pa.R.A.P. 3309.

## **III. STATEMENT OF QUESTIONS INVOLVED**

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

Suggested answer: Yes.

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

Suggested answer: No.

3. Does the Election Code require county boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors whose ballots were enclosed but not fully sealed in the secrecy envelope, where no fraud or irregularity has been alleged?

Suggested answer: No.

#### **IV. STATEMENT OF THE CASE**

On November 7, 2020, during the course of its publicly advertised canvass meeting, and in the presence of any and all interested Authorized Representatives who were provided an opportunity to present argument, the Board met pursuant to 25 P.S. § 3146.8(g)(3) to determine whether certain declarations on the outer envelopes of certain ballots were “sufficient.” *See* Court’s Exhibit 1, Joint Stipulation of Facts, pg. 4. Authorized Representatives were present at the meeting. *Id.* 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. *Id.* at Exhibit B. The Board did not accept the following:

- 110 outer envelopes that lacked an elector’s signature;
- 13 outer envelopes which reflected a different voter’s name than what was printed on the envelope’s label;
- 708 ballots that were not included within secrecy envelopes; and
- 21 ballots that were included within secrecy envelopes that bore markings thereon that identified the voter, the voter’s political affiliation, or candidate preference.

The Board did accept the following for counting, computation, and tallying, pursuant to 25 P.S. § 3146.8(g):

- 1,196 ballots within outer envelopes that bore either no date or a partial handwritten date;
- 644 ballots within outer envelopes that bore either no handwritten name and/or printed address;
- 86 ballots within outer envelopes that bore a partial handwritten address;
- 69 ballots that were completely enclosed within privacy envelopes that were unsealed; and
- 7 ballots that were within privacy envelopes that bore markings which did not identify the voter, a political affiliation or candidate preference.<sup>1</sup>

The Board also directed the Board staff to further research 246 outer envelopes that reflected addresses different than what was reflected on the envelope's label.<sup>2</sup>

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<sup>1</sup> The Campaign withdrew this challenge to the 7 ballots at the hearing on November 17, 2020.

<sup>2</sup> As a result of the staff's research, the Board voted to accept 182 of the 246 ballots with "mismatched addresses" on the outer envelope, at a public meeting on November 13, 2020. This decision was based upon the fact that the voters had provided to the Board a secondary mailing address for their mail-in or absentee ballot, upon their application for same. Accordingly, at the hearing for the instant matter on November 17, 2020, the Campaign withdrew its challenge to the 246 ballots within outer envelopes bearing "mismatched" addresses. The trial court erroneously addressed this challenge in its Memorandum Opinion and Order, despite the fact that the Campaign had withdrawn the challenge on the record.

At no point did any of the Authorized Representatives object to the commingling of partially dated declarations with undated declarations. N.T. 11/17/20, pgs. 82-93. On November 9, 2020, the Campaign appealed the Board's November 7, 2020 decisions to the Bucks County Court of Common Pleas. The appeal was assigned to the Honorable Robert O. Baldi. The Campaign does not allege fraud and does not allege that the ballots were untimely. *See* Court's Exhibit 1, Joint Stipulation of Facts, pg. 6-7. Instead, the Campaign claims that counting these ballots would violate the Election Code.

On November 19, 2020, after a hearing on the merits of the Campaign's appeal, the Bucks County Court of Common Pleas affirmed the Board's determination that the ballots at issue should be counted. The Campaign appealed to the Commonwealth Court on November 20, 2020. The Board is required to certify their election results on Monday, November 23, 2020.

This appeal is one of several similar appeals filed in the Commonwealth by the Campaign. To the Appellee's knowledge, similar appeals were filed in Allegheny, Philadelphia, and Montgomery County against their respective county boards of elections. This Court has granted applications to hear the appeals filed with regard to these issues in Allegheny and Philadelphia County.

## **V. BASIS FOR EXTRAORDINARY JURISDICTION**

This case presents questions of significant importance that directly affect thousands of individual voters in Bucks County. Whether the Board must disqualify the ballots of 1,995 Bucks County voters for minor technical omissions related to their ballot declarations and secrecy envelope seals is of crucial importance to the county's ability to accurately certify its election results.

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

Should this case proceed through the traditional appeal process, it could result in a scenario where the Board becomes unreasonably hindered in its ability to certify these 1,995 ballots before the appellate process is completed in full. Given the importance of the issues at stake, the losing party will likely seek review in this Court. In the meantime, important deadlines will have passed by. The Election Code requires Boards, with some exceptions, to certify the results of the November 3

election to the Secretary of the Commonwealth no later than November 23, 2020. 25 P.S. § 2642. Ultimately, the Pennsylvania “Election Code reflects a clear intention of the General Assembly to expeditiously resolve election disputes . . .” *In re 2003 Election for Jackson Twp. Sup’r*, 840 A.2d 1044, 1046 (Pa. Commw. Ct. 2003) (citing *In re Petition of Jones*, 346 A.2d 260 (Pa. 1975)); *see also Id.* (“The integrity of the election process requires immediate resolution of disputes.”). The Election Code provides several different “procedures and associated requirements” for challenging whether a ballot should be counted and disputing “the accuracy of a vote count,” *Rinaldi v. Ferrett*, 941 A.2d 73, 76 (Pa. Commw. Ct. 2007), but none of these procedures should be construed to frustrate the overall purpose of the Election Code to “prompt[ly] certify[] the vote.” *In re 2003 Election for Jackson Twp. Sup’r*, 840 A.2d 1044, 1046 (Pa. Commw. Ct. 2003). This overarching principle of interpretation provides further justification for this Court to exercise its extraordinary jurisdiction here.

## **VI. ARGUMENT**

Upon exercising extraordinary jurisdiction over this case, this Court should affirm the decisions of the Bucks County Court of Common Pleas. The Election Code clearly delegates the authority to the Board to render “sufficiency determinations” as to ballot declarations in 25 P.S. §3146.8(g)(3)(“If the county board . . . is satisfied that the declaration is sufficient . . .” the board shall commence

count, compute and tally the votes.). *See* 25 P.S. §3146.8(g)(3) and (4). The Court of Common Pleas was required to affirm the decisions of the Board of Elections unless it found an abuse of discretion or error of law. *See Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952) (observing that county election boards have “plenary powers in the administration of the election code”); see also *Appeal of Petrucci*, 38 Pa. D & C.2d 675, 677 (C.P. Luzerne Cnty. 1965) (“The court, in reviewing the rulings of the board, may reverse the board of elections only for a mistake of law or for a clear abuse of discretion, including a capricious disregard of the testimony.”). The Bucks County Court of Common Pleas made no finding that the Board had abused its discretion or an error of law had occurred.

Here, the Campaign admits and stipulates that the Bucks County voters who cast the ballots involved were registered voters, qualified to vote by absentee or mail-in ballot. *See* Court Exhibit 1, Joint Stipulation of Facts, pg. 6. The Campaign admits and stipulates that none of the ballots involved were cast by, or on behalf of, a deceased person. *Id.* The Campaign admits that there is no evidence of any misconduct, fraud or impropriety in connection with the challenged ballots. *Id.*

Rather, the Campaign asserts that these voters, at worst, made technical mistakes in filling out their voter declarations or sealing their secrecy envelopes and, therefore, that they should be disenfranchised. But these 1,995 voters took the following steps to cast their votes: They submitted an application to vote by mail or

absentee ballot, therein providing their name, address, driver's license number and/or social security number, and date of birth. N.T. 11/17/20, pg. 65. Their applications were individually reviewed by the Board and approved. *Id.* at 66. The voters then completed the ballots they received in the mail from the Board, and properly placed and enclosed their ballots inside two envelopes. These voters also all affixed their signature to their ballot envelope, on the declaration, declaring that they were "qualified to vote." Court Exhibit 1, Joint Stipulation of Facts, pg. 6, and Exhibit G. These 1,995 voters, despite mail delays, successfully returned their ballots to the Board on or before Election Day. Court Exhibit 1, Joint Stipulation of Facts, pg. 7. The Board made no error of law in determining that the technical omissions made by these 1,995 voters should not result in disenfranchisement.

Nothing in the Election Code requires the Board to set aside ballots that are missing handwritten names, street addresses, and/or dates on the voter declaration. Nowhere in the Code is a requirement that a ballot envelope declaration include an address or the voter's printed name.

The Election Code defers to the Secretary of the Commonwealth to determine the form, substance, and guidance surrounding the declarations on absentee and mail-in ballots. *See* 25 P.S. § 3146.4; *see also* 25 P.S. 3150.14(b). Further, and most importantly, the Election Code allows for the Board, upon verification of the proof

of a voter's identification, to determine the sufficiency of the declarations on absentee and mail-in ballots. *See* 25 P.S. § 3146.8(g)(3).

The Secretary's Guidance directed the Board to do the following when reviewing declarations on absentee and mail-in ballots:

- (1) Examine the voter's declaration;
- (2) Compare the information on the outer envelope with the information registered in the Absentee and Mail-in Voters File; and
- (3) Set aside and not count ballots *only if the voter's declaration is blank and/or not signed.*

See Court Exhibit 1, Joint Stipulation of Facts, Exhibit A. Thus, upon review of the Election Code and the Guidance of the Secretary of the Commonwealth, it is clear that a ballot should not be set aside and not counted where the declaration on the ballot's outer envelope bears at least a signature and the voter's information is verified by the Board.

Here, each of the at-issue ballots bore the elector's signature, and none of the declarations at-issue ballots were "blank." Further, the at-issue ballots each bore the elector's pre-printed name and address on the outer envelope, approximately 1 inch below the space allocated for the elector to print their name. The Board placed this information upon the ballot when sending it to the requesting elector. Many of the ballots which the Campaign challenges bear the elector's signature and handwritten printed address, or a partial address, but not their handwritten printed name.

However, in this case, their name is already on the declaration twice – once in the form of the signature and once in the form of the label. There is no compelling reason to invalidate an elector’s ballot for failure to provide their name a 3<sup>rd</sup> time on his or her declaration.

Regarding those declarations with no date or a partial date, each of these ballots were mailed to electors no later than October 7, 2020. Further, each of these ballots were received by the Board on or before November 3, 2020, and there is no possibility that the ballot was completed at any time other than in that window of time. Court Exhibit 1, Joint Stipulation of Facts, pg. 6-7. It is clear that the declarations must have been signed within a narrow period of time. The date of signing has no role in the Board’s comparison of the voter declaration to the applicable voter list, and a Board can reasonably determine that a voter declaration is sufficient even though it lacks a handwritten date. *Cf. Montgomery v. Ruxton Health Care, IX, LLC*, No. 06-24, 2006 WL 3746145, at \*3 (E.D. Va. Dec. 15, 2006) (collecting authority) (explaining that even though 28 U.S.C. § 1746 states that unsworn declarations should be “dated,” “undated declarations are acceptable ... when extrinsic evidence demonstrates the approximate date or ‘the period’ in which the declarations were executed”); *Pieszak v. Glendale Adventist Med. Ctr.*, 112 F. Supp. 2d 970, 999 (C.D. Cal.2000) (finding § 1746 satisfied where extrinsic evidence indicated the month in which the document was signed); *Hollyfied v.*

*Tullos*, No. 18-1738, 2018 WL 3475376, at \*2 (E.D. La. July 19, 2018) (collecting authority). Failure to include the date or including only a partial was nothing more than a procedural oversight by the elector; as previously noted, the Petitioners do not allege any fraud or provide any evidence of fraud in relation to any of the perceived deficiencies being challenged here.

The procedural mistakes at issue in these cases are similar to the types of minor mistakes that Pennsylvania courts have held should not result in ballots being stricken. *See Shambach v. Bickhart*, 845 A.2d at 798-99 (Pa. 2004); *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972). Here, the voters successfully maintained the secrecy of their ballot by enclosing their ballot within the inner secrecy envelope. They signed a declaration stating that they were eligible to vote, had not already voted, and had filled out their ballot in secret. They took the necessary steps to mail or deliver their ballot such that it was received by the Board on or before Election Day. The Board verified the proof of identification for each elector regarding the each at-issue ballot and determined that the at-issue declarations were sufficient. Accordingly, the Board properly accepted the ballots with the at-issue declarations. The electors at issue simply made errors in failing to fill out, by hand, one or more pieces of information in the voter declaration form. But these pieces of information have no impact on the Board's ability to ascertain the voter's right to vote, nor do they have any impact on the secrecy or sanctity of

the ballot. As held by this Court, “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.” *See Appeal of James*, 105 A.2d 64, 66 (Pa. 1954).

Recent decisional authority confirms that some elements of a mail-in ballot are so essential to the secrecy and integrity of ballots that even inadvertent mistakes by voters will render a ballot invalid. *See, e.g., Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020). In line with these decisions, the Board voted not to count 708 ballots that were sent to the Board without an inner secrecy envelope, 110 ballots that did not include a declaration signature, 13 ballots on which the handwritten declaration information did not match the voter information contained on the label affixed to the declaration envelope, and 21 ballots where the voter indicated upon their secrecy envelope their identity, political affiliation or candidate preference. Court Exhibit 1, Joint Stipulation of Facts, pg. 5.

The voter omissions at issue here, however, are failures to follow directory, rather than mandatory, language in the Election Code and are therefore not grounds for disqualification. And even if the Board could discard ballots under these provisions, it is not at all clear that they must, as Section 3146.8(g) dictates that it is within the Board’s discretion to determine whether the voter’s declaration is

“sufficient” or insufficient. *See* 25 P.S. §3146.8(g)(3). The Board appropriately made those determinations and found these 1,995 voters sufficiently filled out their voter declarations. The Campaign failed to produce any factual evidence that these determinations were in error. The Campaign has further failed to demonstrate how the Board’s sufficiency determinations and decision to count these ballots is “based on a clear error of law.”

This Court should deny the Campaign’s appeals because they misconstrue the Election Code’s directions to mail-in and absentee voters as bars to the franchise itself, such that anything short of perfect compliance prevents the Boards from counting the voter’s ballots. *See* 25 P.S. §§ 3146.6(a) 25 P.S. § 3150.16(a). The omissions the Campaign points to – missing names, dates, or addresses on the outer envelopes and not fully sealed secrecy envelopes – do not disqualify a ballot because these directions do not carry the penalty of cancellation for noncompliance. Only “mandatory” requirements subject a ballot to cancellation, and these 1,995 ballots offend no mandatory requirements of the Election Code. Pennsylvania courts have consistently held that noncompliance with directions in the Election Code, as opposed to mandates carrying penalties, are not grounds for cancelling a ballot. Generally speaking, “[w]hile both mandatory and directory provisions of the Legislature are meant to be followed, the difference between a mandatory and directory provision is the consequence for noncompliance: a failure to strictly adhere

to the requirements of a directory statute will not nullify the validity of the action involved.” *See JPay, Inc. v. Dep't of Corr. & Governor's Office of Admin.*, 89 A.3d 756, 763 (Pa. Commw. Ct. 2014) (internal citation omitted). In the Election Code context, in *In re Luzerne Cnty. Return Bd.*, this Court found that an absentee voter’s ballot filled out in red ink did not disqualify the otherwise valid ballot—despite the code providing that “any ballot that is marked in blue, black, or blue-black ink...*shall* be valid and counted.” 290 A.2d at 109 (emphasis added). *See also Bickhart*, 845 A.2d at 803 (holding that although the Election Code provides that an elector may cast a write-in vote for any person not printed on the ballot, a write-in vote for a candidate whose name, in fact, appears on the ballot is not invalid where there is no evidence of fraud and the voter's intent is clear). The Election Code does not provide a “consequence for non-compliance” for the failure to date a mail-in ballot, or to include a printed name next to a signature. *See JPay*, 89 A.3d at 763. Therefore, while these expectations are “directory,” they do not rise to the level of “mandatory” such that failure to comply completely nullifies the act of voting. The Code’s use of the word “shall” does not change the analysis because “shall,” on its own, does not make a statutory phrase mandatory as opposed to directory.

Below, the Campaign argued that the use of the word “shall” in the statute renders all requirements set forth in Election Code mandatory and thusly requiring the disqualification of ballots for the most minor of omissions. This argument fails

with even a cursory examination. The Election Code provides that the elector “shall” mark their ballots only in “black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen.” In light of this Court’s holding in *In re Luzerne County*, 290 A.2d 108 (Pa. 1972), it is clear that a failure to strictly follow these directory instructions does not invalidate a ballot. The Election Code also provides that the elector “shall . . . then fold the ballot.” Following the Campaign’s logic, a ballot that was stuffed, rather than folded into its security envelope would be subject to invalidation; likewise with a ballot filled-out in red pen. Instead, this Court should affirm the Court of Common Pleas and find the direction to voters that they “shall fill out, date and sign the declaration” on their absentee and mail-in ballots in Sections 3146.6(a) and 3050.16(a) is directory, because it does not correspond to a penalty laid out elsewhere in the Code.<sup>3</sup> The Board’s decisions to count ballots that were signed by the voter but merely lacking one or more other pieces of handwritten information on the voter declaration form are consistent with the Election Code and this Court’s prior decisions. Nothing in the Election Code or decisional authority requires the Board to invalidate the votes of qualified electors

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<sup>3</sup> To the extent there exists ambiguity on whether the Election Code penalizes omissions like those at issue here, the Secretary of State’s interpretation detailed in the guidance issued on September 11, 2020—directing county boards of elections to count these ballots—is entitled to deference. *Crown Castle NG East LLC v. Pennsylvania Pub. Util. Comm’n*, 234 A.3d 665 (Pa. 2020). The Secretary’s guidance provides: “If the Voter’s Declaration on the return envelope is signed and the county board is satisfied that the declaration is sufficient, the mail-in or absentee ballot should be approved for canvassing unless challenged in accordance with the Pennsylvania Election Code.” See Court Exhibit 1, Joint Stipulation of Facts, Exhibit A.

who fail to fully “fill out” the voter declaration form. As indicated above, there is no authority mandating that the Board invalidate a ballot that contains an error or omission with respect to filling out or dating the declaration.

The Campaign is likely to cite a recent, unreported Commonwealth Court decision to support its position that voters whose outer envelopes lack a date should be disenfranchised. *See In Re: 2,349 Ballots in the 2020 Gen. Election*, No. 1162 C.D. 2020, \*1 (Pa. Commw. Ct. Nov. 19, 2020) (Brobson, J., Memorandum Opinion). Therein, the Commonwealth Court concluded that “fill out, date, and sign,” as set forth in the Election Code, constitutes mandatory language, as supported by the presence of “shall.” *Id.* at \*10. The Commonwealth Court further concluded county boards of elections are required to disenfranchise voters who fail to date their ballots as such votes are “invalid as a matter of law.” *Id.* at \*12.

As already presented above, the Board argues that the language directing voters to “date” the declaration is directory rather than mandatory. In the interest of judicial economy, the Board will not reiterate those arguments here. For the above-mentioned reasons, the Commonwealth Court incorrectly concluded that the at-issue statutory language is mandatory here. However, an additional aspect of the Commonwealth Court’s determination warrants scrutiny.

In support of the conclusion that undated outer envelopes contain ballots “invalid as a matter of law,” the Commonwealth Court stressed the “obvious and

salutary purpose behind the requirement that a voter date the declaration.” *In Re: 2,349 Ballots* at \*12. In particular, the Commonwealth Court noted the following:

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.

*Id.*

Boiled down to its essence, the “obvious and salutary purpose” of the date requirement amounts to an assurance that a voter (a) voted only once and (b) timely submitted their mail-in or absentee ballot. The concerns alleviated by the date requirement’s “purpose” are answered for here. It is stipulated that there is no evidence of fraud in connection to the at-issue ballots. Further, the Board presented evidence that voters whose ballots are at issue were qualified, eligible voters who voted only once and timely submitted their ballots before November 3, 2020. Accordingly, the concerns raised by the Commonwealth Court in connection with the “purpose” behind the date requirement are alleviated here where outer envelopes did not, in fact, bear dates. Thus, the date requirement is not needed to verify that a voter voted only once or timely submitted a ballot.

Under the Commonwealth Court’s analysis, “[t]he 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.” *In Re: 2,349 Ballots*

*in the 2020 Gen. Election*, No. 1162 C.D. 2020, \*MHW – 4 (Pa. Commw. Ct. Nov. 19, 2020) (Wojcik, J., dissenting). Judge Wojcik’s dissent in *In Re: 2,349 Ballots* rightfully pointed out that where there is no fraud and where it is established that a voter voted only once and timely submitted their ballot, an elector’s vote should be accepted. *Id.* (finding that only blank or unsigned declarations should lead to votes being discarded). Judge Wojcik’s dissent also rightfully compared the dispute regarding the date requirement to be analogous to the “shall” ink requirement in *In re Luzerne Cnty. Return Bd.* where this Court “construed the Election Code liberally so as to not disenfranchise Pennsylvania voters over a technicality.” *Id.* at \*MHW – 5.

Finally, with regard to the 69 ballots at issue where the ballots were fully enclosed within unsealed secrecy envelopes, the Board respectfully considers the guidance in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020). Therein, the Court recognized the “inescapable conclusion that a mail-in ballot *not enclosed* in the statutorily-mandated secrecy envelope must be disqualified.” *Id.* In consideration of the Court’s recognized conclusion, a distinguishable situation exists where the mail-in ballot was fully *enclosed* within the secrecy envelope but where the adhesive sealant – for whatever reason – had become detached.

Here, all of the challenged ballots at issue in this category were fully enclosed within the secrecy envelope, and the privacy of the ballots were maintained. However, the adhesive sealants for these ballots were detached. Because the Board had no ability to determine whether these envelopes became unsealed through no fault of the electors, the Board decided to accept these ballots. The Board also took into consideration that the privacy of these ballots was not compromised, and that they were still sealed within an outer envelope. Further, in accordance with the recognized conclusion in *Boockvar*, the ballots were fully enclosed within the secrecy envelope and were not bound by authority to be disqualified. Accordingly, the Board properly accepted the ballots fully enclosed but not sealed within their secrecy envelopes.

Ultimately, this Court has the final word on these novel questions of state law, and a prompt exercise of that power is necessary to avoid the disruption that would occur if these cases were allowed to work their way through the typical appeal process. A final ruling on all of these issues is critical to the Board accurately certifying their election results. Due to the public importance of the issues presented and the need for immediate resolution, the Board respectfully requests this Court to assume extraordinary jurisdiction over this matter and resolve the legal issues concerning whether the Election Code requires the Board to disqualify ballots containing minor, technical omissions, specifically:

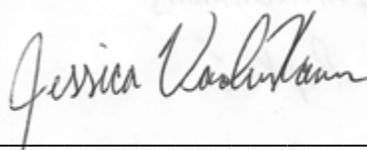
- (a) a missing or partial inclusion of a date on the declaration envelope,
- (b) a missing handwritten name and/or handwritten address on the declaration envelope,
- (c) a partial handwritten address on the declaration envelope; and
- (d) ballots enclosed, but not fully sealed, within secrecy envelopes.

**VII. CONCLUSION**

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

Date: November 22, 2020

Respectfully submitted,  
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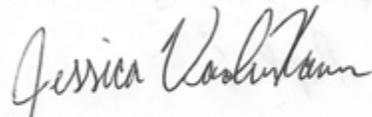
*Attorneys for Respondent,  
Bucks County Board of Elections*

## CERTIFICATIONS

This 22<sup>nd</sup> day of November, 2020, I certify that:

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

***Word Count.*** I certify that this brief contains 5,022 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate I have relied on the word count of the word-processing software system used to prepare this brief. The undersigned verifies that the preceding Application does not contain or reference exhibits filed in the Commonwealth Court under seal. Therefore, the preceding Application does not contain confidential information.



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Jessica L. VanderKam, Esquire