

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA

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S. WULKO

IN RE: CANVASS OF ABSENTEE AND
MAIL-IN BALLOTS OF NOVEMBER 3,
2020 GENERAL ELECTION

STATUTORY APPEAL

No. _____

(Election Appeal)

**NOTICE OF APPEAL VIA PETITION
FOR REVIEW OF DECISION BY THE
PHILADELPHIA COUNTY BOARD OF
ELECTIONS**

**FILED ON BEHALF OF PETITIONER,
DONALD J. TRUMP FOR PRESIDENT,
INC.**

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**NOTICE OF APPEAL VIA PETITION FOR REVIEW OF DECISION BY THE
PHILADELPHIA COUNTY BOARD OF ELECTIONS REGARDING 533 BALLOTS
DESCRIBED AS CATEGORY 5**

NOW COMES Donald J. Trump for President, Inc. and Elizabeth J. Elkin (the “Petitioners”), pursuant to Section 3146.8 and 3157(a) of the Pennsylvania Election Code, 25 P.S. §§ 3146.8 & 3157(a), by their undersigned counsel, hereby file this notice of appeal via a petition for this Court to review and reverse the decision of the Philadelphia County Board of Elections in denying Petitioners’ objection to the counting of statutorily prohibited absentee and mail-in ballots cast by Voters of Philadelphia County, Pennsylvania, in the November 3, 2020 General Election. In support thereof, Petitioners state as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this statutory appeal and venue is proper in this Court pursuant to Section 3157 of the Election Code, 25 P.S. § 3157(a).

PARTIES

2. Petitioner Donald J. Trump for President, Inc. (hereinafter, the “Trump Campaign”), is the principal committee for the reelection campaign of Donald J. Trump, the 45th

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

3. Petitioner Elizabeth J. Elkin is a properly qualified and duly registered voter of the Commonwealth of Pennsylvania and Philadelphia County. She resides at the address of 2037 Naudain Street, Philadelphia, PA. She voted in the November 2020 General Election.

4. Respondent Philadelphia County Board of Elections (“Board”) is responsible for overseeing the conduct of elections in Philadelphia County, including but not limited to the administration of the pre-canvass and canvass sessions of the Board during which absentee and mail-in ballots are opened, reviewed and counted, which is required to be done in accordance with the Election Code. Its principal place of business is located at Philadelphia City Hall, Room 142, 1400 John F. Kennedy Boulevard, Philadelphia, PA 19107.

5. Respondents Lisa M. Deeley, Al Schmidt and Omar Sabir are the members of the

Philadelphia County Board of Elections. These Respondents are being sued in their official capacity as members of the Philadelphia County Board of Elections. Their official address is Philadelphia City Hall, 1400 John F. Kennedy Boulevard, Philadelphia, PA 19107.

FACTS AND PROCEDURAL BACKGROUND

6. Codified Sections 3146.1 – 3146.9 of the Pennsylvania Election Code provides for the voting by electors through official absentee ballots in any primary or election held in the Commonwealth of Pennsylvania. *See* 25 P.S. §§ 3145.1-3146.9.

7. Section 3145.6 specifically addresses how an absentee elector shall complete their absentee ballot, while section 3146.6a details the assistance permitted in voting by certain absentee electors. *See* 25 P.S. §§ 3145.6 and 3146.6a.

8. In Pennsylvania, absentee voting has been held to be “an extraordinary procedure” in which the “ordinary safeguards of a confrontation of the voter by the election officials and watchers for the respective parties and candidates at the polling place are absent.” *Canvass of Absentee Ballots of April 28, 1964, Primary Election*, 34 Pa.D.&C.2d 419, 420 (C.C.P. Phila. 1964). Although it is “a salutary feature in our democratic processes of government,” *Absentee Ballots Case (No. 1)*, 245 A.2d 258, 261 (Pa. 1968); absentee voting is a privilege that is “fraught with evils and frequently results in voided votes.” *Decision of County Board of Election*, 29 Pa.D.&C.2d 499, 504 (C.C.P. Lebanon 1964). Thus, it has been recognized by the Pennsylvania courts that “the provisions of the law regarding absentee voting must be strictly construed and the rights created thereunder not extended beyond the plain and obvious intention of the act.” *Decision of County Board of Election*, 29 Pa.D.&C.2d at 504; *see also In re: April 10, 1984 Election of E. Whiteland Twp., Chester Co.*, 483 A.2d 1033, 1035 (Pa. Commw. Ct. 1984); *Canvass of Absentee Ballots of April 28, 1964, Primary Election*, 34

Pa.D.&C.2d at 421.

9. On October 31, 2019, the Pennsylvania General Assembly enacted Act 77. *See* Act 2019-77 (S.B. 421), § 8, approved October 31, 2019, eff. October 31, 2019. Act 77 made significant changes to Pennsylvania's elections, including the adoption of no excuse mail-in voting for all qualified electors. *See, e.g.*, 25 P.S. §§ 3150.11-3150.17.

10. In extending the right to vote to include absentee voting and now no-excuse mail-in voting, the Pennsylvania General Assembly has properly provided in the Pennsylvania Election Code various safeguards to insure that the exercise of the absentee and mail-in voting privilege is not abused either directly or indirectly, inadvertently or maliciously. *See* 25 P.S. §§ 3146.1-9 (voting by qualified absentee electors) and 3150.11-3150.18 (voting by qualified mail-in electors).

11. The public has a strong interest in ensuring that the election is conducted in a free and fair manner and that all duly qualified and properly registered voters have equal and adequate opportunity to vote, whether they vote in person, by absentee or mail-in ballot.

12. On November 3, 2020, a general election was held in which Petitioner Donald J. Trump for President, Inc. was a candidate and Elizabeth J. Elkin was a registered voter who did in fact cast her vote.

13. The November 3, 2020 general election was the first general election following the enactment of Act 77 in 2019 which made significant changes to Pennsylvania's elections, including the adoption of no excuse mail-in voting for all qualified electors. *See, e.g.*, 25 P.S. §§ 3150.11-3150.17. Presumably knowing of all the risks associated with mail-in voting, the General Assembly enacted no excuse mail-in voting with certain restrictions designed to ensure the ballot's secrecy and to prevent fraud. One of those restrictions, for example, forbidding

third-party delivery, was replicated in Act 77 and was confirmed by the Pennsylvania Supreme Court as recently as September 17, 2020. *See* 25 P.S. § 3150.16(a); *Crossey v. Boockvar*, No. 108 MM 2020, 2020 Pa. LEXIS 4868, at *4 (Pa., Sept. 17, 2020) (“It has long been the law of this Commonwealth, per 25 P.S. § 3146.6(a), that third-person delivery of absentee ballots is not permitted. Act 77 adds a substantially identical provision for mail-in ballots, which we likewise conclude forbids third-party delivery of mail-in votes.”) (citations omitted).

14. In *Pa. Democratic Party v. Boockvar*, 2020 WL 5554644, 2020 Pa. LEXIS 4872 (Pa., Sept. 17, 2020), the PA Supreme Court declared that absentee and mail-in ballots cast in violation of Election Code’s mandatory requirements are void and cannot be counted. *Id.*, 2020 Pa. LEXIS 4872, at *66-*74.

15. At issue in this appeal is Section 3146.6(a) of the Election Code, which states in pertinent part:

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

25 P.S. § 3146.6(a)

16. Act 77 duplicated this section for mail-in ballots, as codified at 25 P.S. § 3150.16(a):

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

25 P.S. § 3150.16(a)

17. The requirements set forth in Election Code Sections 3146.6(a) and 3150.16(a) are mandatory. *See* 25 P.S. §§ 3146.6(a) & 3150.16(a). Those sections mandate that the elector fold the ballot, enclose it, and secure it in the smaller envelope on which is printed "Official Election Ballot," and then place the inner secrecy envelope into the second envelope on which is printed the form of declaration of the elector, the elector's local election district, and the address of the elector's county board of election. Accordingly, the PA Supreme Court ruled that a mail-in or absentee ballot that is not enclosed in the statutorily-mandated inner secrecy envelope must be disqualified and not counted. 2020 Pa. LEXIS 4872, at *73.

18. The law is clear that during the counting at any pre-canvass and/or canvass meeting of absentee and mail-in ballots, those ballots which suffer from the following deficiencies are void and may not be counted: (i) without inner secrecy envelopes, (ii) with inner secrecy envelopes that have marks, text, or symbols which identify the elector, the elector's political affiliation or the elector's candidate preference, and/or (iii) with the declaration envelopes not filled out, dated, and/or signed. 25 P.S. §§ 3146.6(a) & 3150.16(a).

19. Under 25 P.S. § 3146.8, ballots challenged by 5:00 p.m., on the Friday before the

election (in this case October 30, 2020) are to be set aside and not counted as part of the pre-canvass or canvass. *See* 25 P.S. § 3146.8(g)(4).

20. Under 25 P.S. § 3146.8(d), “[whenever it shall appear by due proof that any absentee elector or mail-in elector who has returned his ballot in accordance with the provisions of this act *has died prior to the opening of the polls on the day of the primary or election, the ballot of such deceased elector shall be rejected* by the canvassers but the counting of the ballot of an absentee elector or a mail-in elector thus deceased shall not of itself invalidate any nomination or election. 25 P.S. § 3146.8(d)(emphasis added).

21. Under 25 P.S. § 3146.8(g)(3) and (h), the ballots of absentee and/or mail-in voters whose identification has not been verified by election officials are not to be counted during any pre-canvass and canvass meeting. 25 P.S. § 3146.8(g)(3) and (h).

22. At the November 9, 2020 Meeting of the Philadelphia City Commissioners, Board of Elections employee stated that he had subjected absentee and mail in ballots to a “secondary review.” There is no authority in the Pennsylvania Election Code for a “secondary review” of absentee and mail in ballots after those ballots are rejected during the canvass.

23. On November 9, 2020, the Philadelphia County Board of Elections held a hearing as to the subject statutorily prohibited absentee and mail-in ballots. Attached hereto and made part hereof as Exhibit A is a true and correct copy of the Transcript of the Hearing.

24. All three individually named Respondents, the Commissioners, presided over the hearing and participated in the Board’s decision.

25. At the hearing before the Philadelphia County Board of Elections, Garrett Dietz presented the results of his “secondary review” of mail in and absentee ballots in several categories, which he stated were received by the Board of Elections prior to the close of the polls

on Election Day.

26. The Philadelphia County Board of Elections then voted to “COUNT” or “NOT COUNT” each category of ballot.

27. Mr. Dietz advised the Commissioners of a category of ballots that numbered 553 that he described as those “Ballots in this category were complete with signature, date and street address and are missing the printed name of the voter.” Mr. Dietz described these ballots as Category 5. See Exhibit A, page 8. The Commissioners voted to count these 553 ballots.

28. It is believed and therefore averred that by mistake, error, defiance of the Pennsylvania Election Code or other irregularity, the Philadelphia County Board of Elections has improperly construed the Pennsylvania Election Code to permit the counting of the 553 absentee and mail in ballots at issue in this appeal, which are void as a matter of law and should be prohibited from being counted pursuant to 25 P.S. §§ 3146.6(a) 25 P.S. § 3150.16(a).

29. The November 9, 2020 decision of the Board which counted the aforementioned 553 of statutorily prohibited absentee and mail-in ballots constitutes an abuse of discretion and involve errors of law.

30. The Philadelphia County Board of Elections is not empowered to re-write the Election Code or adopt rules, regulations, instructions or decisions that are inconsistent with the Election Code. *See* 25 P.S. § 2642.

31. It is undisputed that the 533 aforementioned ballots were not completed by the voters pursuant to the written requirements of the Pennsylvania Election Code.

32. Accordingly, the decision of the Philadelphia County Board of Elections voting to count the absentee and mail-in ballots as outlined above is based on a clear error of law and must be reversed.

33. This Notice of Appeal via Petition for Review has been timely made.

WHEREFORE, Petitioners respectfully request this Honorable Court to enter an order that reverses the decision of the Philadelphia County Board of Elections and directs that the 533 ballots as described in Exhibit A, page 7 and 8 known as Category 5 not be counted in the November 3, 2020 General Election, and for such other and further relief as provided by the Pennsylvania Election Code and/or as this Court deems just and appropriate.

Dated: November 10, 2020

Respectfully submitted,

/s/ Linda A. Kerns

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VERIFICATION

I, Linda A. Kerns, Esquire hereby swear or affirm that I am counsel of record for Petitioners in the within action; that the verification of the Petitioners could not be obtained within the time allowed for filing this Petition; and that the facts contained in the attached Petition are true and correct based on information supplied to be by others.

This statement is made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: November 10, 2020

/s/ Linda A. Kerns
Linda A. Kerns, Esquire

CERTIFICATE OF COMPLIANCE

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.

/s/ Linda A. Kerns
Linda A. Kerns, Esquire

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ORDER OF COURT

AND NOW, to-wit, this _____ day of November, 2020, upon consideration of Petitioners' Notice of Appeal via Petition for Review and finding that an error of law occurred, it is hereby ORDERED, ADJUDGED and DECREED that the decision of the Philadelphia Board of Elections in counting 533 statutorily prohibited absentee and mail-in ballots of voters described as "Ballots in this category were complete with signature, date and street address and are missing the printed name of the voter" described as "Category Five" is reversed. The identified absentee and mail-in ballots were not completed / returned / filled out correctly by the electors in accordance with the Pennsylvania Election Code; thus, they are invalid, void and cannot be counted.

BY THE COURT:

_____ J.