

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1161 C.D. 2020

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

Appeal of Nicole Zicarelli

Appeal of the November 18, 2020 Memorandum and Order of the Court of
Common Pleas of Allegheny County, GD 20-011654

**BRIEF OF APPELLEE-INTERVENORS THE PENNSYLVANIA DEMOCRATIC
PARTY AND JAMES BREWSTER**

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BRIEF OF PENNSYLVANIA DEMOCRATIC PARTY APPELLEES

The Pennsylvania Democratic Party and James Brewster (collectively, the “Democratic Party Appellees”) submit this brief in opposition to Nicole Zicarelli’s (“Zicarelli”) appeal of the November 18, 2020 Memorandum and Order of the Court of Common Pleas of Allegheny County (the “Appeal”).

I. INTRODUCTION

The Democratic Party Appellees seek a fair and free election, where eligible voters may vote and have the certainty that their votes will count. For that reason, the Democratic Party Appellees opposed Zicarelli’s statutory appeal, which asked the Court of Common Pleas of Allegheny County to reverse the decision of the Allegheny County Board of Elections (the “Board”) to accept and canvass 2,349 ballots that did not contain a handwritten date below the voter declaration on the outer envelope (the “2,349 Ballots”).

It is undisputed that the 2,349 voters who Zicarelli seeks to disenfranchise properly applied to vote by mail by the deadline; received their mail-in ballots; voted their mail-in ballots; both signed and printed their name and address on the outer envelope; and then returned the ballot to the Board on time. Each of the 2,349 Ballots at issue here was processed in the Statewide Uniform Registry of Electors (“SURE”) system and was time-stamped when it was timely delivered to the Board on or before November 3, 2020. The only asserted “deficiency” with the

2,349 Ballots is that the voter did not include a handwritten date below the voter declaration on the outer envelope.

As the Board recognized with its November 12, 2020 determination, which the lower court affirmed on November 18, 2020, Zicarelli can offer no compelling reason for rejecting the 2,349 Ballots at issue. The relief she requests – the disenfranchisement of these 2,349 voters over a minor technical defect – would contravene the Pennsylvania Election Code and both state and federal law.

Democratic Party Appellees ask this Court to **affirm** the lower court’s decision and to allow the Board to canvass the lawfully voted 2,349 Ballots.

II. STATEMENT OF THE CASE

A. Description Of Democratic Party Appellees

The Democratic Party Appellees were Intervenor-Respondents in *Zicarelli v. Allegheny County Board of Elections*, No. GD-20-011654 (C.P. Allegheny Cty. 2020), and in that capacity, they have a vested interest in and are directly affected by Zicarelli’s Appeal here. The Democratic Party Appellees include the Pennsylvania Democratic Party, which has associational standing on behalf of its members and candidates to ensure fair and free elections. *See Orloski v. Davis*, 564 F. Supp. 526 (M.D. Pa. 1983) (holding that the Pennsylvania Democratic Party has standing in matters affecting election procedure). The individual Appellee is James Brewster (“Brewster”), who currently represents the 45th District in the

Pennsylvania State Senate (“Senate”). He is a registered voter in the Commonwealth and is the Democratic Party’s nominee in the 2020 General Election for the seat he currently holds in the State Senate.

Zicarelli, the Republican candidate for the 45th District in the Senate, currently trails Brewster in the race by a small number of votes. This Court’s ruling as to whether the 2,349 Ballots should be counted could impact the result of the election in Pennsylvania’s 45th Senate District.

B. Provisions Of The Election Code At Issue

With respect to both absentee and mail-in ballot outer envelopes, the Election Code states that “the elector shall ... fill out, date and sign the declaration printed on such envelope.” 25 P.S. §§ 3146.6 (absentee ballots) and 3150.16 (mail-in ballots). The Election Code further provides: “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 elector shall cast his/her vote and either mail or deliver in person the ballot to the county board of election. 25 P.S. § 3150.16(a).

C. The Statewide Registry of Electors (“SURE”) System

Electors who choose to vote by mail must first place their completed ballot in an inner secrecy envelope, which is then placed in an outer envelope that contains the voter’s declaration. A unique nine-digit barcode is located on the

same side of the outer envelope as the voter's declaration. The barcode links the outer envelope to the voter's registration file contained in the SURE system.

Before Election Day, the Pennsylvania Secretary of State issued guidance to the county boards of elections about the examination of absentee and mail-in envelopes, generally, and about the declaration, specifically. *See* Pennsylvania Dep't of State, *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes* (Sept. 11, 2020) (hereinafter the "Guidance"), attached hereto as Exhibit A. The Guidance instructed the county boards of elections to stamp the date of receipt of the ballot-return on the outer envelope. *See* Ex. A, Guidance, at 2. The Guidance further instructed county boards of elections to record the receipt of absentee and mail-in ballots daily in the SURE system. *Id.*

To record a mail-in ballot as returned, according to the Guidance, the county board of elections staff must scan the nine-digit barcode on the outside of the envelope. *Id.* If the county board of elections cancels a ballot issuance record in the SURE system (e.g. voided to reissue a replacement ballot), the corresponding identification on the cancelled ballot will become invalid. *Id.* If the same barcode is subsequently scanned, the SURE system will not allow the returned ballot to be marked as being approved for counting. *Id.*

D. November 10, 2020 Decision Of The Allegheny County Board of Elections To Canvass The 2,349 Ballots

The 2020 General Election was conducted on November 3, 2020. In Allegheny County, the Board received an estimated 350,000 mail-in ballots, of which 2,349 contained a signed declaration without a handwritten date on the outer envelope.

On Tuesday, November 10, 2020, the Board conducted a special virtual meeting for the consideration of submitted ballots for the November 3, 2020 election, during which it considered whether the 2,349 Ballots should be canvassed in accordance with Section 3146.8 of the Election Code. At that meeting, with a 2-1 vote, the Board found that the 2,349 Ballots should be canvassed and directed the Manager of the Elections Division to proceed with the canvassing of those ballots.

E. The Lower Court's November 18, 2020 Decision, Affirming The Board's Decision To Canvass The 2,349 Ballots

On November 12, 2020, Zicarelli filed a Petition for Review in the Nature of a Statutory Appeal (the "Petition for Review") and asked the Court of Common Pleas of Allegheny County to reverse the Board's determination that it is appropriate to accept, canvass, and compute the 2,349 Ballots. The lower court held oral argument on Zicarelli's Petition for Review on November 17, 2020.

On November 18, 2020, the lower court issued its Memorandum and Order, holding that the Board had not abused its discretion in deciding to count the 2,349

Ballots. As the lower court recognized, the completion of a date under the declaration on the outer envelope is directive, not mandatory. *Zicarelli v. Allegheny County Board of Elections*, No. GD-20-011654 (C.P. Allegheny Cty. 2020). The court noted that because Zicarelli had not alleged any fraud in connection with the 2,349 Ballots, “a technical omission on an envelope should not render a ballot invalid.” *Id.* Further, the court held, “the lack of a written date on an otherwise qualified ballot is a minor technical defect that does not render it deficient.” *Id.*

III. SUMMARY OF ARGUMENT

Even if the Election Code permitted challenges to mail-in and absentee ballots,¹ the lower court correctly determined that the 2,349 Ballots should be counted because the completion of a handwritten date below the voter declaration on the outer envelope is directive, not mandatory.

IV. ARGUMENT

A. The Board’s Decision Properly Construes The Election Code Against The Disenfranchisement Of Voters

The lower court correctly held that the Board’s determinations were neither an abuse of discretion nor an error of law. *See Appeal of McCracken*, 370 Pa. 562,

¹ The Pennsylvania Supreme Court recently confirmed that the current Election Code “provides no mechanism for time-of-canvassing challenges by candidate or party representatives.” *In re Nov. 3, 2020 Gen. Election*, --- Pa. ----, --- A.3d ----, 2020 WL 6252803, at *14 (2020).

565, 88 A.2d 787, 788 (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 Cty. 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.”).

It is the “longstanding and overriding policy in this Commonwealth to protect the elective franchise,” *Shambach v. Bickhart*, 577 Pa. 384, 392, 845 A.2d 793, 798 (2004) (citations omitted). Thus, “[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,” *Petition of Ross*, 411 Pa. 45, 48, 190 A.2d 719, 720 (1963).

At issue here are the provisions of the Election Code that require, with respect to both absentee and mail-in ballot outer envelopes, that “the elector **shall** ... fill out, date and sign the declaration printed on such envelope.” 25 P.S. §§ 3146.6 (absentee ballots) and 3150.16 (mail-in ballots) (emphasis supplied). The Election Code also provides that, 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 elector shall cast his/her vote and either mail or deliver in person the ballot to the county board of election. 25 P.S. § 3150.16(a). The Election Code’s clear purpose in requiring a date on the ballot is to ensure that only timely votes are counted.

All of the 2,349 Ballots at issue here were processed in the statewide SURE system and time-stamped when they were timely delivered to the Board on or before November 3, 2020. For any mail-in ballot outer envelope without a date, or with a plainly incorrect date (e.g. the voter’s birthdate), the Board could use the SURE system to supplement that information. The Board thus properly held that, with the supplemental information from the SURE system, the 2,349 Ballots were dated as having been timely delivered and that the absence of a handwritten date on the outer envelope should not result in the disenfranchisement of a voter. The lower court properly affirmed that determination, recognizing the “longstanding and overriding policy” of this Commonwealth “to protect the elective franchise.”

Zicarelli did not and cannot challenge that the fact that the Board received the ballots on or before Election Day. The “deficiency” that Zicarelli identified is that the electors did not date the outer envelope, which can only be described as the epitome of a technicality. There is no reason – much less a compelling one – to disenfranchise 2,349 voters for a minor technicality where the validity of the ballot and the validity of its timeliness cannot be questioned.

B. The “Shall” Language At Issue Is Discretionary And Not Mandatory And Should Be Construed In Favor Of Enfranchisement

The same Election Code provisions at issue here also both provide that an elector “shall” use pencil or blue, black or blue-black ink when marking a ballot.

In re Luzerne Cty. Return Bd., 447 Pa. 418, 421, 290 A.2d 108, 109 (1972). In that case, the Pennsylvania Supreme Court held that the purpose underlying the limitation on marking ballots in certain colors was to ensure that individual ballots were not identifiable. *Id.* In the absence of any indication that the ballots at issue had been marked in a different color for the purpose of making the ballot identifiable or otherwise indicating fraud – and notwithstanding the use of “shall” in the black or blue-black ink provision – the Court recognized that the ballots marked with red or green ink must be counted. *Id.*

Treating the “shall” in the ink color provisions as directive and not mandatory language and allowing the counting ballots marked with red or green ink is consistent with Pennsylvania’s longstanding default position of encouraging the franchise of the voter. *See, e.g., Shambach*, 845 A.2d at 798 (citing the “longstanding and overriding policy in this Commonwealth to protect the elective franchise” and noting that “although election laws must be strictly construed to prevent fraud, they ‘ordinarily will be construed liberally in favor of the right to vote.’” (citations omitted)); *see also Luzerne Cty. Return Bd.*, 290 A.2d at 109 (“Our goal must be to enfranchise and not to disenfranchise [the electorate].”). Moreover, “the power to throw out a ballot for minor irregularities should be sparingly used, and it should be done only for very compelling reason.” *In re*

Duquesne Appeals from Cty. Bd. of Elections, 39 Pa. D. & C.2d 545,557 (Pa. Com. Pl. 1965).

In one of its most recent decisions regarding the language of the Election Code, this Court considered whether the word “shall” with respect to mail-in ballots missing an inner secrecy envelope was directory or mandatory. *See Pennsylvania Democratic Party v. Boockvar*, --- Pa. ----, 238 A.3d 345, 378–80 (2020). The Court held that, because of the existence of other statutory language directly addressing secrecy envelopes,² read *in pari materia*, the requirement that a ballot could not be “naked” was mandatory. *See id.* at 379–80. The Court reasoned that, because clothed ballots with indicia of candidate support had to be discarded, then, logically, naked ballots would also have to be discarded. *Id.*

The Court’s decision in *Pa. Democratic Party* is limited to circumstances where an Election Code provision serves important anti-fraud purposes or is otherwise integral to the canvassing process. It is well settled Pennsylvania law that, although imperatives in the Election Code that are designed to prevent fraud are to be construed strictly, other requirements are to be “construed liberally in favor of the right to vote.” *Rinaldi v. Ferrett*, 941 A.2d 73, 80 (Pa. Commw. Ct.

² *See* 25 P.S. § 3146.8(g)(4)(ii) (“If any of the envelopes on which are printed, stamped or endorsed the words ‘Official Election Ballot’ contain any text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.”)

2007) (citing *Shambach*, 845 A.2d at 798 (2004)). The presence of a handwritten date on the outer envelope is not crucial for fraud prevention, particularly where the SURE system confirms the actual date of receipt of the ballot. The handwritten date is also not critical to the canvassing process. Thus, as the Board and the lower court properly held, these “shall” provisions in the Code thus should not be held mandatory where to do so would disenfranchise voters.

For the same reasons that this Court held in *Luzerne* that a ballot marked with red or green ink should be counted, a mail-in ballot contained in an outer envelope without a handwritten date must be counted. The Code does not include any additional statutory language to read *in pari materia* with the date requirement. Further, unlike a mail-in ballot with a missing an inner secrecy envelope, a voter’s marked ballot with a missing handwritten date on the outer envelope raises no issues of confidentiality.

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. *Luzerne*, 290 A.2d at 109. (“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.”).

C. The 2,349 Ballots Present No Issues Of Timeliness Or Fraud

Timeliness is not in dispute here – the ballots at issue were received by November 3 and were thus clearly signed before Election Day. Using the SURE system, the Board identified the exact date on which (i) the mail-in ballot was sent to the voter and (ii) the voter returned the mail-in ballot. If the SURE system reflected a return date on or before November 3, 2020, the mail-in ballot would have been timely received. Accordingly, there is no purpose served – much less a weighty purpose – that would justify disenfranchising 2,349 voters who timely and legally cast their ballots for the candidate of their choice.

Here, Zicarelli offers no suggestion that the failure to include a date here was an effort to commit voter fraud – which would be impossible on the facts here. As the Board and the lower court recognized, the date on which the Board received each of the 2,349 mail-in ballots at issue was recorded in the SURE System. Disenfranchising voters based on a minor technicality,³ when the date on which every one of these 2,349 voters returned their mail-in ballot was readily

³ Zicarelli’s requested interpretation of state law may well 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).

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.

As this Court has very recently held, reconfirming well-settled Pennsylvania law, election laws should be construed liberally in favor of voters, and that “[t]echnicalities should not be used to make the right of the voter insecure.” *Pa. Democratic Party*, 238 A.3d at 373 (citing *Appeal of James*, 377 Pa. 405, 408, 105 A.2d 64, 66 (1954)). “Ballots containing mere minor irregularities should only be stricken for compelling reasons.” *Shambach*, 845 A.2d at 798.

The Democratic Party Appellees ask this Court to interpret and enforce the Election Code by affirming that undated ballots may be counted as the Board and the court below so held, and by further affirming that the decision to do so lies within the sound discretion of the Board pursuant to established precedent. *See Appeal of McCracken*, 88 A.2d at 788 (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 at 677 (“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.”).

Because the Board knows the exact period when the mail-in ballot envelope could have been signed, and such period would be a valid time to sign the mail-in

ballot envelope, no date is necessary. The 2,349 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.”). The skirmishing over these issues must end so that Allegheny County’s election results can be certified. Pennsylvania’s default position to encourage enfranchisement, not disenfranchisement, makes clear that the Board properly determined that the 2,349 Ballots must be counted and the lower court properly affirmed the Board’s decision.

V. CONCLUSION

For the foregoing reasons, the Democratic Party Appellees ask this Court to affirm the decision of the Court of Common Pleas of Allegheny County and to allow the Allegheny County Board of Elections to canvass the 2,349 lawfully voted ballots.

Respectfully submitted,

By /s/ Clifford B. Levine

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Dated: November 19, 2020
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1161 C.D. 2020

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

Appeal of Nicole Zicarelli

PROPOSED ORDER

AND NOW this ___ day of November, 2020, upon consideration of the Petition of Nicole Zicarelli and the responses thereto, this Court hereby GRANTS the Petition and declares as follows:

The November 18, 2020 Order of the Court of Common Pleas of Allegheny County dismissing the Petition of Nicole Zicarelli and affirming the decision of the Allegheny County Board of Elections is AFFIRMED.

BY THE COURT:

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2020, I caused the foregoing to be electronically filed and to be served on counsel of record for Plaintiffs and Defendants listed on the docket via the Court's ECF system.

/s/ Clifford B. Levine

EXHIBIT A

TLP: WHITE



**GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND
MAIL-IN BALLOT RETURN ENVELOPES**

Date: September 11, 2020

Version: 1.0

EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES

1 BACKGROUND:

The Pennsylvania Election Code describes processes that a qualified voter follows to apply for, receive, complete and timely return an absentee or mail-in ballot to their county board of election. These processes include multiple secure methods used by the voter's county board of election to verify that the qualified voter's absentee or mail-in application is complete and that the statutory requirements are satisfied. These include voter identification verification confirmed by either a valid driver's license number, the last four digits of the voter's social security number or other valid photo identification, and unique information on the application including the voter's residence and date of birth. Before sending the ballot to the applicant, the county board of elections confirms the qualifications of the applicant by verifying the proof of identification and comparing the information provided on the application with the information contained in the voter record. If the county is satisfied that the applicant is qualified, the application must be approved. This approval shall be final and binding, except that challenges may be made only on the grounds that the applicant was not a qualified voter, and those challenges must be made to the county prior to five o'clock p.m. on the Friday prior to the election.

Once the qualified voter's absentee or mail-in application is approved, the voter is mailed a ballot with instructions and two envelopes. The outer envelope includes both a unique correspondence ID barcode that links the envelope to the qualified voter's application and a pre-printed Voter's Declaration that the voter must sign representing that the voter is qualified to vote the enclosed ballot and has not already voted. This Guidance addresses the examination of the Voter's Declaration on the ballot return envelope. This Guidance assumes that the voter has satisfactorily completed the steps described above as to application for, receipt and return of an absentee or mail-in ballot.

2 RECORDING THE DATE, RETURN METHOD AND BALLOT STATUS FOR RETURNED BALLOTS:

County boards of elections should have processes in place to record the date, return method, and ballot status for all voted ballots received. County boards of elections must store and maintain returned ballots in a secure location until the ballots may be pre-canvassed or canvassed.

The county board of elections should stamp the date of receipt on the ballot-return. County boards of elections should record the receipt of absentee and mail ballots daily in the SURE system. To record a ballot as returned, the staff should scan the correspondence ID barcode on the outside of the envelope. The correspondence ID on the envelope is unique to each absentee or mail-in voter and each issuance of a ballot to a voter. Once a correspondence ID has been returned in the SURE system, it cannot be returned again. Further, if a ballot issuance record is cancelled by the county board of elections (e.g. voided to reissue a replacement ballot) in the SURE system, the correspondence ID on the cancelled ballot will become invalid. If the same barcode is subsequently scanned, the SURE system will not allow the returned ballot to be marked as being approved for counting.

The county boards of elections should record the date the ballot is received (not the date that the returned ballot is processed). In the event a county board of elections is entering the ballot on a date other than the date the ballot was received, the county personnel should ensure that the SURE record reflects the date of receipt, rather than the date of entry, since by default, SURE will automatically populate both the 'Date Received' and 'Vote Recorded' fields with the current date and time unless users manually correct the date to reflect the date received.

3 EXAMINATION OF DECLARATION ON BALLOT RETURN ENVELOPES:

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

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

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

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

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

The Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections.

Version	Date	Description	Author
1.0	9.11.2020	Initial document release	