

1162 CD 2020

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IN THE  
**Commonwealth Court of Pennsylvania**

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

Appeal of: Nichole Zicarelli

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APPEAL FROM THE ALLEGHENY COUNTY COURT OF COMMON PLEAS  
MEMORANDUM AND ORDER DATED NOVEMBER 18, 2020  
GD-20-011654

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**APPELLEE'S BRIEF**

**ALLEGHENY COUNTY BOARD OF ELECTIONS**

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Andrew F. Szefi  
County Solicitor  
Pa. I.D. #83747  
[Andrew.Szefi@AlleghenyCounty.US](mailto:Andrew.Szefi@AlleghenyCounty.US)

Virginia Spencer Scott  
Assistant County Solicitor  
Pa. I.D. #61647  
[Virginia.Scott@AlleghenyCounty.US](mailto:Virginia.Scott@AlleghenyCounty.US)

Frances M. Liebenguth  
Assistant County Solicitor  
Pa. I.D. #314845  
[Frances.Liebenguth@AlleghenyCounty.US](mailto:Frances.Liebenguth@AlleghenyCounty.US)

ALLEGHENY COUNTY LAW DEPARTMENT  
300 Fort Pitt Commons  
445 Fort Pitt Boulevard  
Pittsburgh, PA 15219  
Tel.: (412) 350-1173

*Counsel for Appellee*

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## 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 Education\*, 535 Pa. 32, 634 A.2d 170, 171-72 \(1993\)](#). 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\*, 370 Pa. 564, 88 A.2d 787, 788 \(1952\)](#) (observing that county elections 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 533, 536-57 \(Pa. Com. Pl. 1967\)](#) ("[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."), *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 burden of proof is upon the challenger to establish the truth of her averment in support of her challenge by the fair preponderance of the credible evidence before the board of elections. Absent such proof, the ballot shall be sustained. [\*Appeal of Petrucci\*, 38 Pa. D & C.2d 675, 677 \(C.P. Luzerne Cnty. 1965\)](#). Election Code should be liberally construed so as not to

deprive, *inter alia*, electors of their right to elect a candidate of their choice.” [Pa. Democratic Party v. Boockvar, — Pa. —, 238 A.3d 345,356 \(2020\).](#)

### STATEMENT OF QUESTIONS INVOLVED

1. Does a candidate on the ballot have standing to challenge a decision of the Allegheny County Board of Elections under [25 Pa. Stat. § 3157\(a\)](#) where she has not been “aggrieved.”

2. Does the Election Code require the Allegheny County Board of Elections to disqualify mail-in ballots submitted by qualified electors who signed their ballot’s out envelopes but did not handwrite a date, where no other fraud or irregularity has been alleged, and where the ballot has been received before 8:00 p.m. on November 3, 2020, a date of receipt has otherwise been supplied on the outer envelope?

3. Where a candidate is challenging the qualifications of an elector by the appropriate deadline set forth in the Election Code, may that candidate bring a challenge to qualifications under [25 Pa. Stat. §3157](#), where that statute provides no right to challenge qualifications.

## SUMMARY OF ARGUMENT

Ms. Zicarelli has filed this statutory appeal challenging the decision of the AC BOE to accept certain mail-in ballots<sup>1</sup> cast by voters in Allegheny County in the 2020 General Election. The Court should see Ms. Zicarelli's Petition for what it is – an attempt to disenfranchise 2,349 Allegheny County voters by preventing the counting of lawfully cast mail-in ballots simply because they do not contain a date penned by the elector on the outer envelope. There is no suggestion or evidence to show that these ballots are fraudulent. All challenged ballots contain a unique bar code located on the outer envelope that links that ballot to the Statewide Uniform Registry of Electors (the "SURESystem") which, in turn, contains information specific to that voter, including the date the ballot was received by the AC BOE. Furthermore, the date does appear elsewhere on the outer envelopes for all of these ballots. Many, if not most, of the ballots were received through the U.S. Postal Service and have a U.S.P.S. postmark. All of these ballots have a time and date stamp affixed by the AC BOE. All also of these ballots are recorded in the SURESystem with a date and time record.

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<sup>1</sup> Petitioner has challenged undated mail-in ballots. Accordingly, the AC BOE will limit its response to mail-in ballots while noting that the same arguments are applicable to absentee ballots.

By its express terms, the Election Code requires that a declaration be "sufficient" - not perfect. As a matter of law, a mail-in ballot that contains a signed declaration is "sufficient" and must therefore be counted, even if the declaration is missing a written date by the elector. Furthermore, even if the statutory meaning of a "sufficient" declaration were ambiguous, that ambiguity would have to be resolved in favor of the voter and the right to vote.

## ARGUMENT

### **A. Petitioner Does Not Have Standing to Appeal the Decision of the BOE**

Petitioner Nicole Zicarelli, in her capacity as a Republican candidate for State Senate from the 45th Senatorial District, brings this appeal pursuant to [25 Pa.Stat. § 3157\(a\)](#). (Petition ¶2.) [Section 3157\(a\)](#) of the Election Code provides:

Any person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election. . . may appeal therefrom within two days after such order or decision shall have been made. . . setting forth why he feels that an injustice has been done, and praying for such order as will give him relief.

[25 Pa. Stat. § 3157\(a\)](#). Ms. Zicarelli's Petition must be denied as a matter of law because she has failed to plead how she has been aggrieved by the AC BOE's decision to count 2,349 legally cast ballots that do not have a date written by the



elector on the outer envelope. Ms. Zicarelli is unable to satisfy this necessary element of her appeal.

Of the 2,349 ballots, only 313 are in the 45<sup>th</sup> Senatorial District. (See Affidavit attached as Exhibit “A.”) Thus, 2,036 ballots Ms. Zicarelli is seeking to challenge are outside her District. It is beyond dispute that she does not have standing to challenge those ballots and the challenge to them should be withdrawn immediately so AC BOE can proceed with counting them.

Additionally, the 2,349 ballots consist of both absentee and mail-in ballots. It has not presently been ascertained what number of these ballots are absentee as opposed to mail-in. However, it is known that Ms. Zicarelli’s appeal is only for the mail-in ballots. (*See* Zicarelli Petition generally.) Thus, the actual number of ballots Ms. Zicarelli has preserved an appeal on is less than 2,036.

Furthermore, the 313 ballots consist of a mix of absentee and mail-in ballots. Thus, the actual universe of ballots Ms. Zicarelli has preserved a challenge for is some number less than 313 ballots. Of this universe of ballots less than 313, Ms. Zicarelli lacks standing to challenge these ballots as well, but for a different reason.

As of the day of this filing, Ms. Zicarelli is losing her race against Jim Brewster by 30 votes.<sup>2</sup> None of the ballots without an elector-supplied date (2,349

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<https://results.enr.clarityelections.com/PA/Allegheny/106267/web.264614/#!/detail/0012>

ballots) have been opened, taken out of their secrecy envelope, or included in the current count. Neither Ms. Zicarelli nor anybody else knows for whom these electors cast their vote. Furthermore, the relief requested by Ms. Zicarelli, that these votes not be counted, will in actuality give her no relief. As stated before, Ms. Zicarelli is losing her race. If the 313 ballots (or the 2,349 ballots) are not counted, she will still be losing the election by 30 votes.

The term ‘person aggrieved’ does not include one who may be aggrieved in his feelings because he believes that the action ... is unjust, but means one whose legal rights are infringed and who by the decree complained of will suffer injury; and the right of appeal is conferred upon only those persons who are aggrieved in this legal sense by the order, judgment, or decree from which the appeal is taken.

[Appeal of Harner, 62 Pa. D. & C. 56, 59 Dauph. 185 \(1948\)](#) (Where if all votes reported by a precinct for one candidate were counted and all reported for his opponent were rejected, opponent would still win election, candidate was not a person “aggrieved” by count in precinct and had no standing to appeal from a recount.).

Ms. Zicarelli lacks standing to bring this Petition and it should be denied.

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<https://results.enr.clarityelections.com/PA/Westmoreland/107156/web.264614/#/summary>

**B. This Issue Has Already Been Decided in Sister Courts of Common Pleas**

In an order issued on November 13, 2020, the Philadelphia Court of Common Pleas addressed the exact same issue Ms. Zicarelli brings to this Court – whether mail-in ballots that lack an elector-supplied date must be rejected. The Philadelphia Court of Common Pleas said “No.”<sup>3</sup> The Montgomery County Court of Common Pleas addressed the issue of whether the same provision of the code at issue here, [25 Pa. Stat. §3150.16\(a\)](#), requires an elector to write in their address on the declaration in order for their ballot to be counted. The court found that the omission should not, and will not, disqualify a voter from participating in this election. The Philadelphia and Montgomery Courts’ Opinion and Orders are collectively attached as Exhibit “B.”

The Philadelphia and Montgomery Courts’ legal reasoning and holding is applicable to the present case and should be accepted.

**C. Petitioner’s Challenge is Untimely**

***1. Election Code Does Not Allow for Challenges at Canvassing Stage***

The crux of Ms. Zicarelli’s argument is that the requirement that a declaration be dated by the elector is a necessary safeguard against fraud. (Petition

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<sup>3</sup> The plaintiffs in the Philadelphia case have appealed the decision to the Commonwealth Court. *In re Canvass of Absentee & Mail in Ballots*, No. 1136 C.D. 2020. Ms. Zicarelli has asked to intervene in that proceeding.

¶46.) More specifically, Ms. Zicarelli argues that a date written by the elector under the signature is necessary to establish that the elector is (a) qualified to cast the enclosed ballot; and (b) the voter did not already vote in the election for which the ballot was issued. (Petition ¶48.)

When the General Assembly instituted no-excuse mail-in voting in Act 77 in 2019, it explicitly front-loaded the anti-fraud protections in the mail-in and absentee ballot application process. As Ms. Zicarelli indicates, the General Assembly enacted no excuse mail-in voting with certain safeguards to ensure the integrity of the electoral process and to prevent fraud, but contrary to Ms. Zicarelli's suggestion, completing the blank for "date" and was not among those anti-fraud measures. (Petition ¶¶ 9,10.) Instead, the General Assembly relied on the substantial requirements in the Act of Mar. 14, 2012 (P.L. 195, No. 18), 2012 Pa. Legis. Serv. Act. 2012-18 (H.B. 934), requiring proof of identification in order for an elector to vote by mail. Under the Election Code, a voter must submit "proof of identification," *i.e.*, personally identifying information such as a driver's license or social security number, each time they apply for a mail-in ballot. [25 Pa. Stat. §3150.12b\(a\)](#), [25 Pa. Stat. §2602\(z.5\)](#). The Board of Elections, upon receipt of any application of a qualified elector then determines the qualifications of the applicant by verifying the proof of identification and comparing the information provided on the application with the information contained on the applicant's permanent registration card. [25](#)

[Pa. Stat. §3150.12b\(a\)](#). Furthermore, the elector on their application, must provide their address, how long they have lived at the address, and must sign a declaration attesting that they are eligible to vote in the upcoming election and that all information provided in their application is true and correct. [25 Pa. Stat. §3150.12](#); Exhibit. B *Pennsylvania Application for Mail-In Ballot*. All of these measures are taken each time an elector applies for a mail-in ballot to assure they are qualified electors rendering a date written in by the elector on the envelope meaningless in preventing fraud in this respect.

What Ms. Zicarelli is attempting to do here, is challenge the qualifications of 2,349 electors because they did not write a date on their outer envelope. The Election Code strictly prohibits this type of challenge. In an effort to streamline the canvassing process, the General Assembly removed all grounds for watchers or overseers to challenge the sufficiency of the information on a ballot<sup>4</sup>, and limited grounds for challenge to “*only*” whether a voter was a “*qualified elector*.” [25 Pa.](#)

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<sup>4</sup> The local election board “announce[d] the name of the elector,” as it would do for in-person voters, and “any watcher” could then “challenge any absentee elector” upon any one of three possible grounds: (1) that the elector “is not a qualified elector”; (2) that the elector “was within the municipality of his residence” on election day while the polls were open, unless he was in military service or he obtained the ballot because of illness or physical disability preventing his personal appearance at the polling place; or (3) that, where the elector obtained the ballot because of illness or physical disability, the elector was, in fact, able to appear personally at the polling place while the polls were open. [25 PS § 3146.8\(e\)](#) (deleted text).

[Stat. §3150.12b\(a\)\(3\) \(emphasis added\)](#). The time for challenging the qualifications of electors has come and gone as challenges must have been made to the AC BOE prior to five o'clock p.m. on the Friday before the election, October 30<sup>th</sup>. [25 Pa. Stat. §3150.12b\(a\)\(3\)](#).

There is no allegation in Ms. Zicarelli's Petition that any of the ballots at issue here were challenged using the process provided by the General Assembly by the deadline of October 30. Moreover, Ms. Zicarelli has not plead a single fact which would support her accusation that any one of these voters, let alone 2,349 of them, were not qualified to exercise their right to vote in this election. Ms. Zicarelli cannot sidestep these provisions by using an appeal under Section 3157 as a "back door" and improper means to challenge the qualifications of 2,349 voters.

## ***2. Section 3157 Gives No Right to Challenge Individual Mail-In Ballots***

Section 3157 provides for judicial review of decisions of a county board regarding computation or canvassing of election returns. [25 Pa. Stat. §3157](#). Interpreting it to allow challenges to the sufficiency of declarations on individual mail-in ballots would undermine the Legislature's goal of eliminating such challenges. The Supreme Court of Pennsylvania recently considered a similar argument concerning whether Act 77 authorized Boards of Elections to perform signature-matching with respect to mail-in and absentee ballot declarations, and

found it did not. [\*In re Nov. 3, 2020 Gen. Election, No. 149 MM 2020, 2020 WL 6252803, at \\*14 \(Pa. Oct. 23, 2020\)\*](#). As the Court explained, when the General Assembly passed Act 77 establishing no excuse mail-in voting in 2019, it simultaneously reduced the grounds for challenges and eliminated time-of-canvassing challenges to mail-in and absentee ballots entirely. [\*Id.\*](#); *see also* [\*Id.\*](#) (explaining that “[p]resumably, in expanding voting by mail, the legislature sought to streamline the process for canvassing such ballots, perhaps to avoid undermining the expansion effort by eliminating the prospect that voters – including a potentially large number of new mail-in voters – would be brought before the board or the courts to answer third-party challenges”).

Ms. Zicarelli’s unsubstantiated challenges to the qualifications of 2,349 voters are untimely and improperly brought through a section 3157 appeal that does not provide for the challenge of individual mail-in ballots. Her petition must be denied.

**D. Section 3150.16(a) Date Provision is Directory Not Mandatary**

The Election Code sets forth, as a general rule, the following instructions for mail-in ballots:

- (a) General rule.**--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 Pa. Stat. §3150.16\(a\)](#) (*emphasis added*). The election code vests the AC BOE with the duty to determine the "sufficiency" of the declaration of a mail in ballot. During pre-canvassing of mail-in ballots, the relevant county board "shall examine the declaration on the envelope of each ballot," [25 Pa. Stat. § 3146.8\(g\)\(3\)](#), and if the board determines that "the declaration is sufficient," the board "shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed." *Id.* Any ballots cast by electors whose applications have been challenged are set aside unopened, but all other ballots that have been verified under subsection (g)(3) "shall be counted." [25 P.S. § 3146.8\(g\)\(4\)](#).

Ms. Zicarelli's appeal is premised on the presumption that the date written under the signature is necessary to establish that the elector is (a) qualified to cast the enclosed ballot; and (b) the voter did not already vote in the election for which the ballot was issued. [25 P.S. § 3150.14\(b\)](#). Ms. Zicarelli's central argument is that the Election Code's general rule calling for the declaration to be dated by the elector



is a necessary safeguard against fraud and so under the framework established most recently by [\*Pa. Democratic Party v. Boockvar\*, — Pa. —, 238 A.3d 345, \(2020\)](#) – that directive is mandatory – such that failure to strictly comply renders the ballot invalid.

Ms. Zicarelli’s attempt to equate this challenge to [\*Pa. Democratic Party v. Boockvar\*](#) is misplaced. There, the Pennsylvania Supreme Court found the requirement that a mail-in or absentee voter’s ballot “shall then be placed in the [security envelope]” was mandatory because “the Legislature signaled beyond cavil that ballot confidentiality up to a certain point in the process is so essential as to require disqualification” where the security envelope was missing. [\*Pa. Democratic Party — Pa. —, 238 A.3d at 380\*](#). This holding was based on more than the presence of the word “shall.” Instead, to determine ballots lacking a security envelope are subject to cancellation, the Court relied on the fact that omission of a secrecy ballot “defeats th[e General Assembly’s] intention” to maintain secrecy during the canvassing process. [\*Id.\*](#) There is no such indication in Section 3416.6 or elsewhere that omitting a written date on the outer envelope frustrates the intentions of the Election Code to prevent fraud or maintain secrecy during the canvassing process.

Ms. Zicarelli’s reliance on the word “shall” does not change the analysis. The use of the word “shall,” on its own, does not make a statutory phrase mandatory.

Technical non-compliance with the Election Code’s mandates, including instances where the Election Code states that an elector “shall” complete the ballot in a certain manner, “should not be used to make the right of the voter insecure” and will not be used to invalidate a ballot. [Pa. Democratic Party — Pa. —, 238 A.3d at 373](#), (specifically referring to a requirement that a ballot be signed in blue or black ink would not serve to invalidate a ballot), *quoting* [Appeal of James, 377 Pa. 405, 105 A.2d 64, 65-66 \(1954\)](#).

[Pa. Democratic Party](#) is limited to circumstances where a requirement serves important anti-fraud purposes or is otherwise integral to the canvassing process. It is well settled Pennsylvania law that, while Election Code imperatives designed to prevent fraud will 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 \(Pa. Commw. Ct. 2007\) \(citing Shambach v. Bickhart, 845 A.2d 793, 798 \(Pa. 2004\)\)](#). The presence of a written date is not crucial for fraud prevention, and not critical to the canvassing process, and should therefore not be held mandatory so as to disenfranchise voters.

**1. *A signed declaration is “sufficient” under the law***

Ms. Zicarelli’s contention that a date penned by an elector on the outer envelope is necessary to prevent fraud is not grounded in reality. First off, although

seemingly obvious, it is important to note that Ms. Zicarelli has conceded that that the 2,349 ballots in question contain a *signed* declaration by the elector. (Petition ¶15.) In other words, the 2,349 electors have signed their names on the declaration and attested that they are qualified to vote in this election and that they have not already voted in this election. Ms. Zicarelli is now attempting to challenge the signatures of these electors by averring that “the date is essential to determine the validity of the signature.” (Petition ¶50.) The Supreme Court, in finding that signature analysis of mail-in ballots is prohibited, correctly points out that “at no time did the Code provide for challenges to ballot *signatures*,” which is what Ms. Zicarelli is attempting to do here. [\*In re Nov. 3, 2020 Gen. Election, No. 149 MM 2020, A.3d\*](#), [2020 WL 6252803](#) at \*14 (Pa. Oct. 23, 2020).

### **Voter's declaration**

I hereby declare that I am qualified to vote from the below stated address at this election; that I have not already voted in this election; and I further declare that I marked my ballot in secret. I am qualified to vote the enclosed ballot. I understand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand I may only vote by provisional ballot at my polling place, unless I surrender my balloting materials, to be voided, to the judge of elections at my polling place.

**Voter, sign or mark here**

Furthermore, the Secretary of the Commonwealth, who is vested with the duty to specify the contents of the declaration and envelope,<sup>5</sup> has provided guidance to the county boards of elections on the issue of an elector's obligations in executing the form of declaration that she has been charged with creating. The Secretary's Guidance issued on September 11, 2020 supports the conclusion that an elector does not need to write the date on the outer envelope declaration in order for their vote to

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<sup>5</sup> (a) Form of declaration and envelope.--The form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain, among other things, 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\(a\)](#) *Envelopes for official mail-in ballots, Additional envelopes.*

be counted. All that is required is the voters' signature. The Secretary's Guidance provides:

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...***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.***

(Attached hereto as Exhibit "C" is a true and correct copy of the September 11, 2020 Guidance). The Secretary's guidance only specifically requires that the declaration on the return envelope be signed and only specifically instructs a ballot not be counted when the Voter Declaration is blank.

Ms. Zicarelli's reliance on Commonwealth Court cases regarding the signing of nomination petitions for the proposition that "[t]he date is essential to determine the validity of the signature" and where the Election Code requires an elector to record the date of signing, failure to do so is a fatal defect that will result in the voter's signature being struck is misplaced. [\*In re Nomination Petition of Brown\*, 846 A.2d 783, 787 \(Pa. Cmwlth. 2004\)](#) and [\*In re Morrison-Wesley\*, 946 A.2d 789, 795](#)

[\(Pa. Cmwlth. 2008\)](#). The act of signing nomination petitions is governed by a separate and distinct section of the Election Code, [25 Pa.Stat. § 2868](#). This section of the Code not only sets forth the manner in which an elector must sign a nomination petition, but also the time a petition is allowed to be circulated.

No nomination petition shall be circulated prior to the thirteenth Tuesday before the primary, and 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.Stat. § 2868](#). It logically follows that in a situation where an elector fails to record the date of signing on a nomination petition, that voter's signature will be stricken because the date is vital to show that the petition was only circulated within the time prescribed by the statute. In the instant matter, the AC BOE has numerous safeguards in place to assure that the ballots at issue have been timely received, that the elector is qualified to vote, and that the elector has not voted twice. Accordingly, contrary to what Ms. Zicarelli argues in her petition, a date written on the voter declaration does not validate the elector's signature in the way it seemingly would for a signature on a nomination petition.

Furthermore, the section of the Code applicable to the signing nomination petitions specifically sets forth that no signature shall be counted without the date affixed, a penalty that is noticeably absent from the section of the Election Code at issue in this matter. There is no provision that states, "no ballot shall be counted

unless it bears a declaration with a signature with date affixed.” If the Legislature wanted mail-in ballots accompanied by a declaration without a date penned by the elector "to not be counted" it knew how to say so. To further illustrate the Legislature’s ability to write this consequence into the Election Code, we can turn to [25 Pa. Stat. § 3146.8\(g\)\(4\)\(ii\)](#). Here the legislature says: "If any of the inner envelopes 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.***" Similarly, in §3146.8, the legislature says that if an elector fails to provide proof of valid identification within the prescribed time, “***then the absentee ballot or mail-in ballot shall not be counted.***” [25 Pa. Stat. § 3146.8\(h\)\(3\)](#) (emphasis added). This Court should not read in an invalidation provision where the Legislature declined to include one. [In re Nov. 3, 2020 Gen. Election, No. 149 MM 2020, 2020 WL 6252803, at \\*14 \(Pa. Oct. 23, 2020\)](#) ("It is not our role under our tripartite system of governance to engage in judicial legislation and to rewrite a statute in order to supply terms which are not present therein, and we will not do so in this instance."). Ms. Zicarelli’s argument that the date is essential to determine the validity of the signature on the declaration is flawed and without reason.



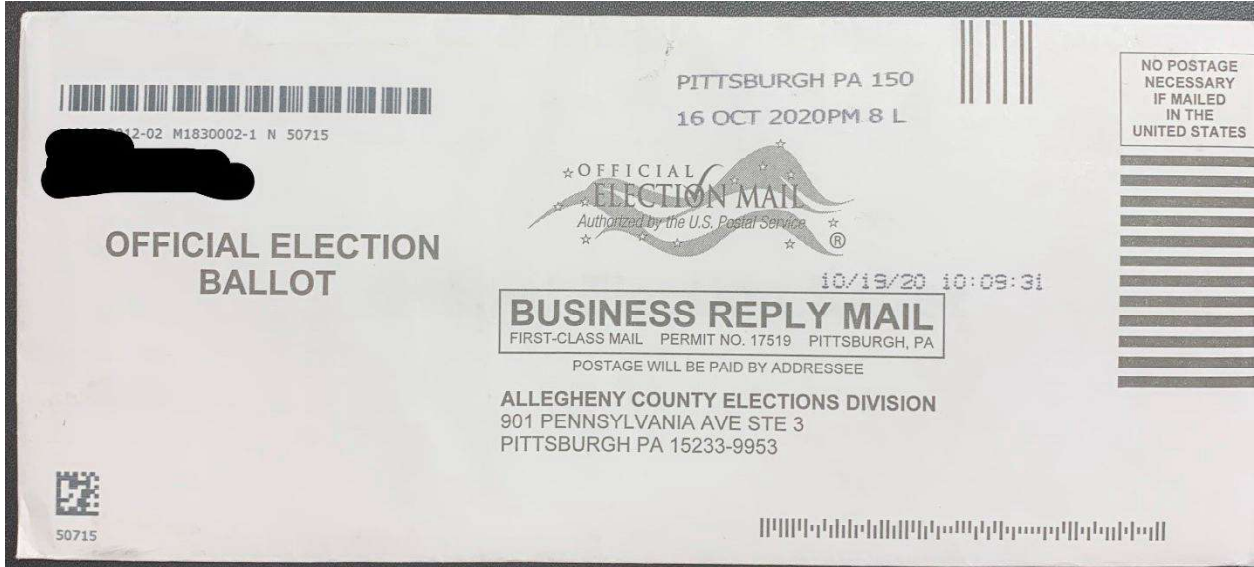
**2. *There are numerous safeguards in place to prevent fraud***

The only logical reason a date on the outer envelope would be of importance is to ascertain that the ballot was delivered to the AC BOE before the deadline for return of mail-in ballots. The AC BOE can reasonably determine that a voter declaration is sufficient even though it lacks a handwritten date. All 2,349 ballots subject to this appeal arrived at the Allegheny County Elections warehouse before 8:00 p.m. on Election Day. Thus, there is no danger that any of the ballots was untimely, or fraudulently back-dated. Further, it is clear that the declaration had to have been signed within a narrow period of time. Counties began mailing ballots out to voters no earlier than mid-September 2020, when the Pennsylvania Supreme Court resolved a dispute over who would appear on the ballot. [\*In re Scroggin\*, 237 A.3d 1006 \(Pa. 2020\)](#),

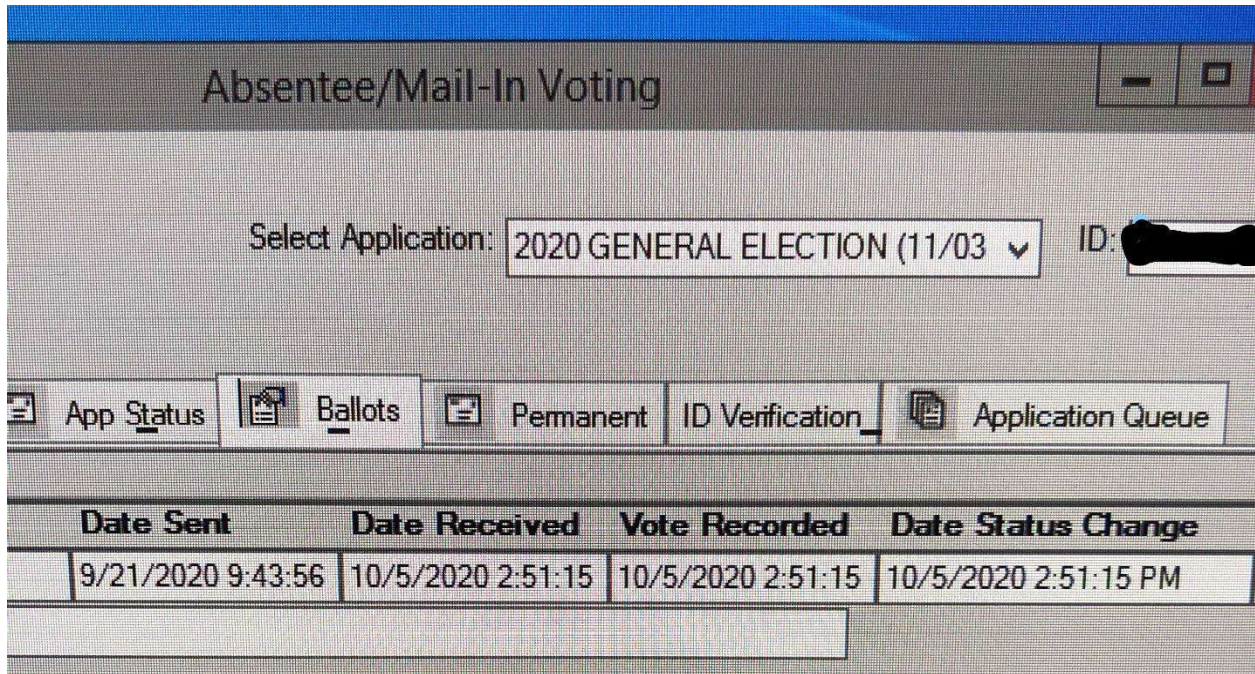
The AC BOE has an accurate record of the date every mail-in ballot returned to it. This record satisfies any reasonable statutory purpose that may exist in [25 P.S. § 3150.16\(a\)](#) for a date. An elector's failure to provide the date him/herself does not indicate that the ballot has been tampered with, or that fraud has occurred. Nor does the elector's failure to date the outer envelope indicate the elector did not intend to cast a ballot – given the elector completed the ballot, signed the declaration, and delivered the ballot to the AC BOE.



On September 11, 2020 the Secretary of the Commonwealth issued, Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes (“Guidance”) (Exhibit C.) In compliance with the Guidance, the AC BOE has processes in place to record the date all mail-in ballots are received. The AC BOE has stored and maintained returned ballots in a secure location. As set forth in the Guidance, the BOE has stamped the date it received returned ballots on the outer envelope.



The AC BOE has recorded the receipt of returned ballots in the SURE system.



Additionally, some number of ballots received by the BOE that were delivered by the U.S. Postal Service also have a date stamped on them as to when they were deposited in the U.S Postal Service. See first image *supra*.

The U.S. Postal Service stamp has been recognized and accepted in this jurisdiction as a reliable date for establishing when something is mailed. See e.g. [Smith v. Pennsylvania Bd. Of Probation and Parole, 546 Pa. 115, 120, 683 A.2d 278 \(1996\)](#) (holding under Appellate Rules of Civil Procedure U.S. Postal Service date on first class mail serves as date received by prothonotary); [E.B.S. v. Unemployment Comp. Bd. of Review, 150 CmwltH 10, 13, 614 A.2d 332 \(1992\)](#) date of initiation of appeal is reliably set as the date mail is stamped by the U.S. Postal Service; [34 Pa.Code § 101.82](#) (U.S. Postal Date Stamp is reliable and accepted for establishing date of filing).

Similarly, to quell Ms. Zicarelli's concerns with respect to an elector attesting that they have not already voted, the AC BOE has processes in place to ensure no voter is able to vote twice in the election. Printed on the outer envelope of every mail-in ballot is a unique nine-digit bar code (see upper-left corner of first image, *supra*) that links the outer envelope to the voter's registration file contained in the SURESystem. The correspondence ID on the envelope is unique to each mail-in voter and each issuance of a ballot to a voter. Once a correspondence ID has been returned in the SURESystem, 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 SURESystem, the correspondence ID on the cancelled ballot will become invalid. If the same barcode is subsequently scanned, the SURESystem will not allow the returned ballot to be marked as being approved for counting.

Moreover, those electors who have applied for, approved, and voted by mail-in ballot are not eligible to vote at a polling place on election day as per the following relevant portion of the Election Code:

- (1) Any elector who receives and votes a mail-in ballot under section 1301-D shall not be eligible to vote at a polling place on election day. The district register at each polling place shall clearly identify electors who have received and voted mail-in ballots as ineligible to vote at the polling place, and district election officers shall not permit electors who voted a mail-in ballot to vote at the polling place.

(2) An elector who requests a mail-in ballot and who is not shown on the district register as having voted may vote by provisional ballot under section 1210(a.4)(1).

(3) Notwithstanding paragraph (2), an elector who requests a mail-in ballot and who is not shown on the district register as having voted the ballot may vote at the polling place if the elector remits the ballot and the envelope containing the declaration of the elector to the judge of elections to be spoiled and the elector signs a statement subject to the penalties of [18 Pa.C.S. § 4904](#) (relating to unsworn falsification to authorities) which shall be in substantially the following form:

I hereby declare that I am a qualified registered elector who has obtained an absentee ballot or mail-in ballot. I further declare that I have not cast my absentee ballot or mail-in ballot, and that instead I remitted my absentee ballot or mail-in ballot to the judge of elections at my polling place to be spoiled and therefore request that my absentee ballot or mail-in ballot be voided.

[25 Pa. Stat. §3150.16\(b\)](#). Ms. Zicarelli has come forth with no evidence or facts in her petition to show that the safeguards in place have failed or that any one of the 2,349 electors voted twice or were not qualified to vote in this election. Her Petition must be denied.

### ***3. The electors followed instructions given by the AC BOE***

Finally, the instructions - by way of a checkbox reminder on the outer envelope provided by the AC BOE with each mail-in ballot clearly advised the voter with respect to the final steps of the voting by mail process. The instructions do not



indicate that the voter must date the declaration on the outer envelope. The checklist on the outer envelope only asks to verify that you have done two things:

1. Did you sign the voter's declaration in your own handwriting?
2. Did you put your ballot inside the secrecy envelope and place it in here?

Did you...

Sign the voter's declaration in your own handwriting?

Put your ballot inside the secrecy envelope and place it in here?

**FOR COUNTY ELECTION USE ONLY**

**To be Completed by Voter Unable to Sign their Declaration Because of Illness or Physical Disability:**

I hereby declare that I am unable to sign my declaration for voting my ballot without assistance because I am unable to write by reason of my illness or physical disability. I have made or received assistance in making my mark in lieu of my signature.

**Voter, mark here.**

\_\_\_\_\_

Date (MM/DD/YYYY) \_\_\_\_\_

Witness, address (street) \_\_\_\_\_

Witness, address (city, zip code) \_\_\_\_\_

Witness sign here \_\_\_\_\_

Nowhere does it say you must fill out the date in order for your ballot to be counted.

Mail-in voters most certainly relied on these instructions, when those voters completed their mail in ballot. Such voter reliance is completely reasonable, particularly when the voter's address is already pre-printed on that outer envelope. The innocent voter should not be punished by the nullification of her vote, where her reliance on these instructions was entirely reasonable. [\*In re Recount of Ballots Cast in General Election on November 6, 1973\*, 457 Pa. 279, 288-89 \(1974\)](#). ("The invalidation of a ballot where the voter has complied with all instructions communicated to him and in the absence of any evidence of improper influence having been exerted, invalidation would necessarily amount to an unreasonable encroachment upon the franchise and the legislative enactment should not be interpreted to require such a result. To rule otherwise would unnecessarily condition the right to vote upon the proper discharge of the responsibility of an election official over whom the voter has no control."); [\*Appeal of Fairview Assocs., Inc.\*, 61 Pa. Cmwlth. 404,407,433 A.2d 929,931 \(1981\)](#). (holding that "the clear public policy favoring access to the voting franchise militates in favor of a conclusion that the public should reasonably be expected to rely on statements from Board of Election employees acting in their official capacities" and affirming decision to permit electors to file additional signatures on their petition *nunc pro tunc* where electors had attempted to verify the incorrect information they had received from the Board

by contacting it at a later date, and received the same incorrect information from the Board, the electors' reliance on the statements of employees was reasonable).

**E. The AC BOE Did Not Abuse Its Discretion or Make an Error of Law**

The procedural technicality at issue in this case is similar to the types of minor mistakes that Pennsylvania courts have long held should not result in ballots being stricken. [\*Shambach v. Bickhart\*, 845 A.2d 793, 798-799 \(2004\)](#) (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); [\*Weiskerger Appeal\*, 447 Pa. 418, 290 A.2d 108, 109 \(1972\)](#) (holding that the elector's failure to mark the ballot with the statutorily enumerated ink color does not render the ballot invalid unless there is a clear showing that the ink was used for the purpose of making the ballot identifiable or otherwise indicating fraud).

Here, the voters followed all instructions provided to them by the AC BOE. They signed a declaration stating that they were eligible to vote, had not already voted, and had filled out their ballot in secrecy. 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 missing date has no impact on the AC BOE's ability to ascertain the voter's right to vote, nor does it have any impact on the secrecy or sanctity of the ballot. The

AC BOE's decision to count ballots that were signed by the voter but merely lacked a written date on the declaration form is consistent with the Election Code and the recent applicable case law. Nothing in the Election Code or decisional authority requires the AC BOE to invalidate the votes of qualified electors who fail to write a date on the voter declaration form.

Finally, the AC BOE is mindful that the "Election Code should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice." [Pa. Democratic Party, 238 A.3d at 356.](#)

Election laws will be strictly enforced to prevent fraud, but ordinarily will be construed liberally in favor of the right to vote. All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor. Where the elective franchise is regulated by statute, the regulation should, when and where possible, be so construed as to insure rather than defeat the exercise of the right of suffrage. Technicalities should not be used to make the right of the voter insecure. No construction of a statute should be indulged that would disfranchise any voter if the law is reasonably susceptible of any other meaning.

[Appeal of James, 377 Pa. 405, 105 A.2d 64, 65-66 \(1954\).](#) Moreover, the purpose and objective of the Election Code is to "obtain freedom of choice, a fair election and an honest election return." *Id.*, quoting [Perles v. Hoffman, 419 400, 213 A.2d 781, 783 \(1965\).](#) A fundamental rule regarding interpretation of election ballots, is that "ballots containing mere minor irregularities should only be stricken for compelling reasons." [Pa. Democratic Party 238 A.3d at 379.](#) quoting [Shamback v. Bickhart, 577 Pa. 384, 845 A.2d 793, 795 \(2004\).](#) Thus, to the extent there is any



ambiguity in whether mail-in ballots with signed declarations but some minor, unimportant omission must be counted, the ambiguity must be resolved in favor of the voter.

Furthermore, Ms. Zicarelli's requested interpretation of state law would likely result in 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\(a\)\(2\)\(B\)](#).

### CONCLUSION

For the foregoing reasons, Respondent Allegheny County Board of Elections respectfully requests that the Court deny the Petition for Review of the Decision by the Board submitted by Petitioner Nicole Zicarelli.

Respectfully submitted,

/s/ Andrew F. Szefi  
Andrew F. Szefi  
County Solicitor

PA ID # 83747

ALLEGHENY COUNTY LAW  
DEPARTMENT

Firm No. 057  
300 Fort Pitt Commons Building  
445 Fort Pitt Boulevard  
Pittsburgh, PA 15219  
(412) 350-1120  
aszefi@alleghenycounty.us

*/s/ Virginia S. Scott*

Virginia S. Scott  
Assistant County Solicitor  
PA ID # 61647

ALLEGHENY COUNTY LAW DEPARTMENT

Firm No. 057  
300 Fort Pitt Commons Building  
445 Fort Pitt Boulevard  
Pittsburgh, PA 15219  
(412) 350-1173  
Virginia.scott@alleghenycounty.us

*/s/ Frances M. Liebenguth*

Frances M. Liebenguth  
Assistant County Solicitor  
PA ID # 314845

ALLEGHENY COUNTY LAW DEPARTMENT

Firm No. 057  
300 Fort Pitt Commons Building  
445 Fort Pitt Boulevard  
Pittsburgh, PA 15219  
(412) 350-1120

Frances.liebenguth@alleghenycounty.us

**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 19, 2020

By: */s/ Virginia Spencer Scott*  
Virginia Spencer Scott

**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 19, 2020

By: */s/ Virginia Spencer Scott*  
Virginia Spencer Scott

**CERTIFICATE OF SERVICE**

I, Virginia Spencer Scott, 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 19, 2020

By: */s/ Virginia Spencer Scott*  
Virginia Spencer Scott