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IN THE SUPREME COURT OF PENNSYLVANIA

IN RE NOVEMBER 3, 2020 GENERAL ELECTION

No. 149 MM 2020

**BRIEF OF THE BUCKS, CHESTER, MONTGOMERY, AND
PHILADELPHIA COUNTY BOARDS OF ELECTIONS IN
SUPPORT OF SECRETARY BOOCKVAR'S POSITION**

Pursuant to this Court’s Order dated October 14, 2020, Respondents the Bucks, Chester, Montgomery, and Philadelphia County Boards of Elections submit this brief in support of Secretary Boockvar’s position that the Election Code does not authorize county boards of elections to reject absentee or mail-in ballots based on a signature-matching analysis.

I. INTRODUCTION

As explained by Secretary Boockvar, and as recently held by Judge Ranjan of the United States District Court for the Western District of Pennsylvania, *see Donald J. Trump for President, Inc. v. Boockvar*, No. 20-966, --- F. Supp. 3d ----, 2020 WL 5997680 (W.D. Pa. Oct. 10, 2020), the statement in the Secretary’s recent guidance that the “Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis”¹ is correct. This is apparent on the face of the Code itself: “the plain language of the Election Code imposes no requirement for signature comparison for mail-in and absentee ballots and applications.” *Trump*, 2020 WL 5997680, at *53. Moreover, allowing boards of elections to reject ballots based on an inherently subjective signature-matching analysis by election officials, who are “unstudied and untested in signature verification,” would raise grave constitutional concerns—particularly because the Election Code does not require that counties provide voters whose

¹ *See* Application for Invocation of King’s Bench Power dated October 4, 2020, at 8.

ballots are rejected because of such perceived deficiencies with notice and an opportunity to cure. *See id.* at *57, 62-63; accord *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, --- A.3d ----, 2020 WL 5554644, at *34 (Pa. Sept. 17, 2020) (Wecht, J., concurring) (observing that, as “recognized by numerous tribunals in recent years,” “[s]ignature comparison is a process fraught with the risk of error and inconsistent application, especially when conducted by lay people,” and these “risks of inconsistency and arbitrariness ... may implicate constitutional guarantees ... including due process and equal protection principles”); *see also id.* at *20 (opinion of the Court) (“we conclude that the Boards are not required to implement a ‘notice and opportunity to cure’ procedure for mail-in and absentee ballots that voters have filled out incompletely or incorrectly”).

This brief focuses on additional evidence of legislative intent that has not been closely examined in the parties’ submissions or judicial opinions to date—namely, the history of the Election Code itself. As shown below, this history strongly supports the conclusion that the Code does not authorize a signature-matching analysis for absentee or mail-in ballots.

II. ARGUMENT

“The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.” 1 Pa. Cons. Stat. § 1921(a).

“[T]he plain language of a statute is in general the best indication of the legislative intent that gave rise to the statute.” *In re Adoption of J.A.S.*, 939 A.2d 403, 405 (Pa. 2007). In cases where statutory text is reasonably susceptible of different constructions, a number of principles and canons guide the Court’s interpretation. One such principle is that, “if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties and the other of which would not, [courts] adopt the latter construction.” *Wolf v. Scarnati*, 233 A.3d 679, 696 (Pa. 2020) (quoting *Commonwealth v. Herman*, 161 A.3d 194, 212 (Pa. 2017)); *see also Krenzelak v. Krenzelak*, 469 A.2d 987, 991 (Pa. 1983) (citing 1 Pa. Cons. Stat. § 1922(3)). In addition, “when the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters,” the statutory history, *i.e.*, “[t]he former law, if any, including other statutes upon the same or similar subjects.” 1 Pa. Cons. Stat. § 1921(c)(5).

A. The Text and Structure of the Election Code Support the Secretary’s Position

As Judge Ranjan recognized, “nowhere does the plain language of the [Election Code] require signature comparison as part of the verification analysis of the ballots.” *Trump*, 2020 WL 5997680, at *54. The Republican Intervenors here, some of whom were Plaintiffs in *Trump*, purport to divine a signature-matching requirement from the Code, *see* Republican Intervenors’ Answer to Secretary

Boockvar’s Application for Invocation of King’s Bench Power at 25, attached as Exhibit 1 to Republican Intervenors’ Application for Leave to Intervene (Oct. 7, 2020), but the statute nowhere directs election officials to compare the form of the signature on the ballot return envelope with the form of the signature in the voter’s registration or other file, let alone to reject ballots if the signatures do not sufficiently—based on some unarticulated standard—match.

The very provisions of the Code the Republican Intervenors cite show that the General Assembly knew how to specify that a signature-matching analysis was required. Upon checking in at a polling place, in-person voters are directed to “sign a voter’s certificate,” 25 Pa. Stat. § 3050(a.3)(1), and the election official is then expressly directed to “compare the elector’s signature on his voter’s certificate with his signature in the district register” and evaluate whether “the signature upon the voter’s certificate appears to be genuine” and “authentic.” *Id.* § 3050(a.3)(2). Similarly, the Election Code provisions regarding provisional ballots specify that elections officials must “compare the signature on the provisional ballot envelope with the signature on the elector’s registration form and ... determin[e]” that the former is “genuine.” *Id.* § 3050(a.4)(5)(i).

In stark contrast, the Code provisions governing the canvassing of absentee and mail-in ballots do *not* require election officials to “compare signatures” or determine if any signature is “genuine” or “authentic.” To the contrary, the Code

calls for election officials to “examine the declaration on the envelope of each ballot ... and compare *the information* thereon with *that contained in the ‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File,’ whichever is applicable.*” 25 Pa. Stat. § 3146.8(g)(3) (emphasis added). If “the information contained in the *‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File’* verifies his right to vote,” the ballot may be canvassed. *Id.* (emphasis added).

The Election Code sets forth the contents of these three types of documents; *these contents do not include a signature.* See 25 Pa. Stat. §§ 3146.2b(a)-(b), 3146.2c(b)-(c), 3146.7(b), 3146.2(h). The Election Code defines the “Military, Veterans and Emergency Civilians Absentee Voters File” as “a master list ... setting forth the name and residence, and at primaries, the party enrollment,” of certain absentee voters. 25 Pa. Stat. § 3146.2c(b). Section 3146.2c(c) provides that absentee voters’ lists contain “the names and post office addresses of all voting residents [of a district] to whom official absentee or mail-in ballots shall have been issued.” 25 Pa. Stat. § 3146.2(c). The “Registered Absentee Voters File” is mentioned only once in the Code, in 25 Pa. Stat. § 3146.2(h), which provides that the File should contain a ballot application number. The contents of these files and/or lists are posted in public places, and available upon written request to

candidates and parties, so the public has an opportunity to confirm that incoming absentee and mail-in ballot envelopes match the master list of names and addresses. These lists are not “voter registration records,” as the Republican Intervenors insist,² and they provide no signatures for comparison. *See* 25 Pa. Stat. § 3146.2c(b).³

It is a cardinal principle of statutory interpretation that where different provisions in the same statute use different language, that difference must be given significance. “[W]here the legislature includes specific language in one section of the statute and excludes it from another, the language should not be implied where excluded. Moreover, where a section of a statute contains a given provision, the omission of such a provision from a similar section is significant to show a

² *See, e.g.*, Republican Intervenors’ Answer at 25 (asserting, in a misleading paraphrase of 25 Pa. Stat. § 3146.8(g)(3), that the Election Code requires county boards to “‘examine the declaration on the envelope of each ballot’ that has not been set aside ‘and ... compare the information thereon with that contained’ in the board’s permanent voter registration records”).

³ The reasoning for this approach is sound. The Election Code requires county boards to verify the elector’s proof of identification—*i.e.*, driver’s license number, the last four digits of the elector’s Social Security number, or a prescribed form of documentary identification, *see* 25 Pa. Stat. § 2602(z.5)(3)—and examine his voter registration record upon submission of the elector’s application to vote by mail. 25 Pa. Stat. § 3146.12b(a). It is at this stage of the process that boards can confirm or reject an elector’s purported identity. Individuals seeking to challenge that decision are given an opportunity to do so. *See* 25 Pa. Stat. § 3146.12b(a)(3). If the application is accepted, the county board adds the elector’s name and address to the “Absentee Voters File” and/or list, which is reviewed when the voted ballot envelope arrives. To require a complete and duplicative second review of the elector’s identification is not only contrary to the Election Code; it simply would not make sense. The Court should reject the Republican Intervenors’ attempt to rewrite the Code.

different legislative intent.” *Fonner v. Shandon, Inc.*, 724 A.2d 903, 907 (Pa. 1999) (internal citations omitted). That principle is fully applicable here. The General Assembly knew how to make clear when election officials were required to “compare signatures” and determine that a signature was “genuine.” As even a cursory glance at 25 Pa. Stat. § 3146.8 makes clear, the General Assembly did not impose such requirements on canvassers of absentee or mail-in ballots. *See Fonner*, 724 A.2d at 907; *Thompson v. Thompson*, 223 A.3d 1272, 1277 (Pa. 2020) (“[A]lthough one is admonished to listen attentively to what a statute says; one must also listen attentively to what it does not say.” (emphasis and internal quotation marks omitted)).

B. The History of the Election Code Confirms that the Code Does Not Authorize County Boards to Reject Absentee or Mail-in Ballots Based on a Signature-Matching Analysis

The history of the Election Code bolsters the conclusion dictated by the statute’s text and structure: The Code does not authorize signature matching for absentee or mail-in ballots. *See Blake v. Civil Serv. Comm’n*, 166 A.3d 292, 299 (Pa. 2017) (examining, for purposes of construing a statute, the “text of [the relevant statutory provision] before it was amended” (discussing 1 Pa. Cons. Stat. § 1921(c)(5)); *see also Commonwealth v. Harper*, 516 A.2d 319, 326 (Pa. 1986) (Papadakos, J., concurring) (referring to the “traditional means to determine legislative intent: the subject, language, and history of the statutes”).

The Election Code’s requirement of signature comparison for *in-person* voters, currently set forth in 25 Pa. Stat. § 3050, dates back to the initial version of the Code enacted in 1937. Section 1210 of the original Code provided:

At every primary and election each elector who desires to vote shall first sign a voter’s certificate and, ... he shall insert his address therein, and hand the same to the election officer in charge of the district register. *Such election officer shall thereupon compare the voter’s signature on his voter’s certificate with his signature in the district register. If, upon such comparison, the signature upon the voter’s certificate appears to be genuine,* the elector who has signed the certificate shall, if otherwise qualified, be permitted to vote.

Act of June 3, 1937, No. 320, § 1210(a), 1937 Pa. Laws 1333, 1419 (emphasis added).

Notably, Article XIII of the original 1937 version of the Code, which addressed voting by electors serving in the military and is the predecessor of the current absentee voting Article, contained similar language *expressly calling* for signature matching. Article XIII provided that certain military service members could fill out and return a ballot by mail. Similar to the current procedure for returning absentee and mail-in ballots, the electors had to enclose their ballot in a secrecy envelope, which was then enclosed in another envelope with an “affidavit” that the voter had to sign, along with a “jurat” to be signed by a military officer acting as a witness. Act of June 3, 1937, No. 320, §§ 1328–1329, 1937 Pa. Laws 1333, 1442–43. The Code provided that, during canvassing, the board of elections shall “examin[e] the affidavit and jurat, [and] *shall compare the signature of such*

*absent voter with his signature upon any register or other record in their possession. **If the county board is satisfied that the signatures correspond and that the affidavit and jurat are sufficient,** they shall announce the name of the elector and shall give any person present an opportunity to challenge the same in like manner and for the same causes as such elector could have been challenged had he presented himself in his own district to cast his vote. If there are no challenges, they shall open the ... envelope in such manner as not to destroy the affidavit and jurat printed thereon”* Act of June 3, 1937, No. 320, § 1330, 1937 Pa. Laws 1333, 1443–44.⁴ In other words, the Code *expressly distinguished* the determination “that the affidavit and jurat are sufficient” from the determination “that the signatures correspond.” Interpreting the former phrase so that it subsumed the latter would render the latter superfluous in violation of fundamental rules of statutory construction. *See Walker v. Eleby*, 842 A.2d 389, 400 (Pa. 2004) (a “statute must ‘be construed, if possible, to give effect to all its provisions,’ so

⁴ Amendments to the Election Code enacted in 1941 replaced the 1937 version of Article XIII with a new one, but the 1941 version of Article XIII contained the same language, quoted above, regarding the canvassing of military ballots. *See* Act of August 1, 1941, No. 273, secs. 3, 4, § 1307, 1941 Pa. Laws 672, 679 (boards of elections shall “examin[e] the affidavit and jurat, [and] shall compare the signature of such absent voter with his signature upon any register or other record in their possession. If the county board is satisfied that the signatures correspond, that the affidavit and jurat are sufficient and that the voter has been duly registered as provided by law, they shall announce the name of the elector and shall give any person present an opportunity to challenge the same in like manner and for the same causes as such elector could have been challenged had he presented himself in his own district to cast his vote. If there are no such challenges, they shall open the ... envelope in such manner as not to destroy the affidavit and jurat printed thereon”).

that no provision is reduced to mere surplusage” (citing 1 Pa. Cons. Stat. § 1921(a)); *Commonwealth v. Lassiter*, 722 A.2d 657, 661 (Pa. 1998) (rejecting statutory interpretation that would render a word superfluous).

Amendments to the Election Code in 1945 repealed and replaced the previous version of Article XIII with a new one. Act of March 9, 1945, No. 17, § 1305, 1945 Pa. Laws 29. The new Article provided for the creation and public posting of “a master list, arranged alphabetically by election districts, setting forth the name, residence and the local voting district or ward of every elector to whom an official military ballot has been sent.... This list shall be known as the ‘Military File’ and shall be posted at least five days before the election day involved” Act of March 9, 1945, No. 17, sec. 10, § 1305, 1945 Pa. Laws 29, 36. This “Military File” was the predecessor of the absentee and mail-in ballot files/lists enumerated in the current version of 25 Pa. Stat. § 3146.8(g)(3). *Compare* Act of March 9, 1945, No. 17, sec. 10, § 1305, *with* 25 Pa. Stat. §§ 3146.2b(a)-(b), 3146.2c(b)-(c), 3146.7(b), 3146.2(h), 3146.8(g)(3) (2020). As with the currently enumerated files/lists, the “Military File” is *not* required to contain the voter’s signature.

Significantly, the canvassing provision in the 1945 version of Article XIII *omits the earlier language calling for the county board to compare signatures and satisfy itself “that the signatures correspond.”* Instead, it states:

The board shall then further examine the affidavit and jurat of each envelope not so set aside *and shall compare the information thereon with that contained in the military file. If the board is satisfied that the affidavit and jurat are sufficient and that the elector has qualified, and the board has utilized the information contained in the military file to verify his right to vote*, the board shall announce the name of the elector and shall give any person present an opportunity to challenge in like manner and for the same cause, except failure to register or enroll, as the elector could have been challenged had he presented himself in his own district to vote other than by official ballot. If no challenges are sustained, the board shall open the envelope in such manner as not to destroy the affidavit and jurat printed thereon.

Act of March 9, 1945, No. 17, sec. 10, § 1307, 1945 Pa. Laws 29, 37–38 (emphasis added); *see also Commonwealth v. Moon*, 117 A.2d 96, 101 (Pa. 1955) (“It is a canon of statutory interpretation that where words of a later statute differ from those of a previous one on the same subject, they presumably are intended to have a different construction.”); *Bilka v. Commonwealth, Dep’t of Transp.*, 92 A.3d 1253, 1258 (Pa. Commw. Ct. 2014) (citing *Masland v. Bachman*, 374 A.2d 517, 521 (Pa. 1977)) (“a change in the language of a statute ordinarily indicates a change in legislative intent”). In other words, the 1945 amendments eliminated the previous requirement that the board “compare the signature of the [absent] voter” on the affidavit with another signature on file. Instead, the board was directed only to compare “the information” on the affidavit and jurat with the information contained in a separately prepared file that did *not* include the voter’s signature.

As discussed above, the basic form of this language has carried through to the current version of 25 Pa. Stat. § 3146.8(g)(3), with (1) “‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File’” replacing “‘Military File’” and (2) “‘declaration’” replacing “‘affidavit and jurat.’” *Compare* 25 Pa. Stat. § 3146.8(g)(3) (2020), *with* Act of March 9, 1945, No. 17, sec. 10, § 1305, 1945 Pa. Laws 29, 36.⁵ The genealogy of this provision confirms—unmistakably—that

⁵ *See also* Act of March 6, 1951, No. 1, sec. 11, §§ 1308(d), 1308-A, 1951 Pa. Laws 3, 13–14, 17; Act of August 13, 1963, No. 379, sec. 24, § 1308(e), 1963 Pa. Laws 707, 744–45; Act of December 11, 1968, No. 375, sec. 8, § 1308(e), 1968 Pa. Laws 1183, 1199–1201; Act of May 11, 2006, No. 2006-45, sec. 12, § 1308(g)(3), 2006 Pa. Laws 178, 187–88; Act of March 14, 2012, No. 2012-18, sec. 7, § 1308(g)(3), 2012 Pa. Laws 195, 204; Act of October 31, 2019, No. 2019-77, sec. 7, § 1308(g)(3), 2019 Pa. Legis. Serv. Act 2019-77 (West); Act of March 27, 2020, No. 2020-12, sec. 11, § 1308(g)(3), 2020 Pa. Legis. Serv. Act 2020-12 (West).

The successive amendments had the effect of significantly reducing the scope of challenges that can be made to absentee or mail-in ballots by candidates, parties, or their representatives. The 1968 amendments deleted the previous language that had allowed watchers at the canvassing to challenge absentee electors “in like manner and for the same cause ... as the elector could have been challenged had he presented himself in his own district to vote other than by official absentee ballot.” Act of December 11, 1968, No. 375, sec. 8, § 1308(e), 1968 Pa. Laws 1183, 1199–1201. Pursuant to those amendments, watchers were limited to challenging absentee electors “upon the ground or grounds (1) that the absentee elector is not a qualified elector; or (2) that the absentee elector was within the county of his residence on the day of the primary or election during the period the polls were open, except where he was in military service or except in the case where his ballot was obtained for the reason that he was unable to appear personally at the polling place because of illness or physical disability; or (3) that the absentee elector was able to appear personally at the polling place on the day of the primary or election during the period the polls were open in the case his ballot was obtained for the reason that he was unable to appear personally at the polling place because of illness or physical disability.” *Id.* Confirming that those were the sole permissible grounds for challenging absentee ballots, the 1968 amendments added language expressly stating that “[a]ll absentee ballots not challenged for any of the reasons provided herein shall be counted and included with the general return of paper ballots or voting machines [as subsequently set forth].” *Id.*

By way of amendments enacted in 2006, 2012, and 2019, the substance of these provisions was

the current Election Code does *not* authorize signature matching with respect to election officials' evaluation of absentee and mail-in ballots.

Respectfully submitted,

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transferred from Section 1308(e) of the Election Code to Section 1308(g)(3), (4) (codified at 25 Pa. Stat. § 3146.8(g)(3), (4)). See Act of May 11, 2006, No. 2006-45, sec. 12, § 1308(g)(3), 2006 Pa. Laws 178, 187-88; Act of March 14, 2012, No. 2012-18, sec. 7, § 1308(g)(3), 2012 Pa. Laws 195, 204; Act of October 31, 2019, No. 2019-77, sec. 7, § 1308(g)(3), 2019 Pa. Legis. Serv. Act 2019-77 (West). Act 77 of 2019, which introduced no-excuse mail-in voting for the first time in the Commonwealth, deleted the second ground for challenging absentee or mail-in electors, as a result of which such electors could be challenged only on the grounds that they were not “qualified elector[s]” or that, in the case of an absentee elector, the “elector was able to appear personally at the polling place on the day of the primary or election during the period the polls were open in the case his ballot was obtained for the reason that he was unable to appear personally at the polling place because of illness or physical disability.” October 31, 2019, No. 2019-77, sec. 7, § 1308(g)(3), 2019 Pa. Legis. Serv. Act 2019-77 (West). Act 12 of 2020 then completely eliminated the ability of candidate or party representatives to challenge absentee or mail-in ballots during the canvassing or pre-canvassing process. Act of March 27, 2020, No. 2020-12, sec. 11, § 1308(g)(3), 2020 Pa. Legis. Serv. Act 2020-12 (West). That Act specified that the only type of challenge that could be made with respect to such ballots was a challenge on the grounds that the voter was not a “qualified elector,” and that any such challenge had to be made no later than the Friday before election day. See § 1308(g)(4) (codified at 25 Pa. Stat. § 3146.8(g)(4)) (citing Section 1302.2(c) and Section 1302.2-D(a)(2) of the Election Code, which are codified at 25 Pa. Stat. §§ 3146.2b(c), 3150.12b(a)).

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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.

Dated: October 16, 2020

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