

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Consolidated Cases: 1140 CD 2020, 1139 CD 2020, 1138 CD 2020, 1137 CD
2020, and 1136 CD 2020

DONALD J. TRUMP FOR PRESIDENT, INC. et al,

Petitioners,

v.

PHILADELPHIA COUNTY BOARD OF ELECTIONS, et al.,

Defendants,

DNC SERVICES CORP. / DEMOCRATIC NATIONAL COMMITTEE,

Intervenor-Defendant.

**APPELLEE DNC SERVICES CORP./DEMOCRATIC NATIONAL
COMMITTEE'S BRIEF IN OPPOSITION TO PETITION FOR REVIEW
OF DECISION**

On appeal from the November 13, 2020 Final Orders of the Philadelphia Court of Common
Pleas, Consolidated case numbers 201100874, 201100875, 201100876, 201100877, 201100878

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INTRODUCTION

In an attempt to disenfranchise more than 8,000 registered and qualified voters who timely cast their votes in the midst of an ongoing pandemic, Donald J. Trump for President, Inc., and Elizabeth J. Elkin (collectively “Petitioners”) filed five appeals asking the Court of Common Pleas to invalidate absentee and mail-in ballots submitted by Philadelphia County electors solely because they arrived in outer envelopes that lacked a handwritten name, address, date, or some combination thereof. The trial court denied all five appeals, holding that the Philadelphia County Board of Elections (the “Board”) did not abuse its discretion or commit an error of law in counting the challenged ballots because the Board’s decision complied with the Election Code and judicial decisions interpreting the Code. *See* Court of Common Pleas Orders (attached as Exhibit A).¹ The trial court was correct, and its decisions should be affirmed.

The Board correctly accepted the ballots at issue here. Petitioners’ challenges are based on immaterial technicalities, none of which provide reason to invalidate ballots and disenfranchise the voters who cast them. There is no statutory requirement that voters print their name or address on the outer envelope containing

¹ The same day, the Court of Common Pleas in Montgomery County reached the same result on a similar challenge to ballots contained in outer envelopes that lacked a handwritten address or date. *Donald J. Trump for President, Inc., et al. v. Montgomery Cnty. Bd. of Elections*, No. 2020-18680 (November 13, 2020 Memorandum and Order denying petition for review).

the ballot. Nor is there any statutory requirement that ballots be voided for lack of a printed name, address, or date, particularly where—as here—there is no allegation of fraud, much less any evidence of it. At the hearing before the Court of Common Pleas, Petitioners *admitted* that the ballots were cast by lawful voters, that they were cast and received on time, and that there was no fraud or other impropriety. Yet, based *solely* on minor technicalities with the ballot envelopes, Petitioners ask this Court to invalidate 8,329 ballots. To do so would contravene the Election Code, this Commonwealth’s precedent, and federal law. This Court should affirm the lower court’s ruling and the Board’s decision.

STATEMENT OF JURISDICTION

As explained below, this Court lacks jurisdiction over this appeal because the General Assembly has lodged exclusive jurisdiction in the Pennsylvania Supreme Court. *See* 42 Pa. C.S. § 722(2).

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 Election*, 634 A.2d 170, 171–72 (Pa. 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*, 88 A.2d 787, 788 (Pa. 1952) (observing that county election 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 535, 536–37 (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.”); *In re Duquesne Appeals from Cnty. Bd. of Elections*, 39 Pa. D. & C.2d 545, 547 (Pa. Com. Pl. 1965) (confirming an “appeal [from the county election board] is not a de novo proceeding”).

Given the “longstanding and overriding policy in this Commonwealth to protect the elective franchise,” *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004), “[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,” *Ross Nomination Petition*, 190 A.2d 719, 719 (Pa. 1963). It is therefore a well-settled principle of Pennsylvania election law that “[e]very rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.” *Appeal of Norwood*, 116 A.2d 552, 554–55 (Pa. 1955). Accordingly, “ballots containing mere minor irregularities should only be stricken for compelling reasons.” *Shambach*, 845 A.2d at 798.

STATEMENT OF QUESTIONS INVOLVED

1. Whether the Pennsylvania Supreme Court has exclusive jurisdiction of this appeal where the issues pertain to the regularity of the electoral process and the action creates uncertainty as to the rightful occupant of public office.

The court below did not address this question.

2. Whether a qualified elector's vote must be canceled where the elector failed to handwrite his or her name or complete address on the outer envelope of an absentee or mail-in ballot, even where there is no requirement in the Election Code to do so and where the elector's name and address are otherwise identifiable from the envelope.

The court below correctly answered this question in the negative.

3. Whether a qualified elector's vote must be canceled where the elector failed to handwrite the date on the outer envelope of an absentee or mail-in ballot, even where there is no dispute that the ballot was submitted before Election Day.

The court below correctly answered this question in the negative.

STATEMENT OF THE CASE

I. Background on absentee and mail-in application and voting procedure.

A. Absentee and mail-in application procedure.

Electors of the Commonwealth of Pennsylvania may choose to cast their votes in any primary or general election by absentee or mail-in ballots. In both instances, electors must submit applications for such ballots to the county board of elections. In submitting such applications, electors must supply the address at which they are registered to vote and sign a declaration affirming, among other things, that they are "eligible to vote by mail-in [or absentee] ballot at the forthcoming primary or election," and that "all of the information" supplied in the mail-in or absentee ballot application is "true and correct."

Before sending an absentee or mail-in ballot to the elector, the county board of elections must confirm the elector's qualifications and verify that the elector's

address inputted on the application matches the elector's registration. That occurred here, and Petitioners do not claim otherwise.

Upon the county board of elections' approval of the application, the elector is provided balloting materials that include: 1) the ballot; 2) instructions as to how the elector is to complete and return the ballot; 3) an inner secrecy envelope into which the ballot is to be placed; and 4) an outer envelope into which the secrecy envelope containing the ballot is to be placed and returned to the board.

B. Balloting materials, elector declaration, and the voting procedure.

The balloting materials sent to electors by the county board of elections include an outer envelope with a pre-printed voter's declaration. The elector's name and address are pre-printed on a label affixed approximately one inch below the voter's declaration. Also pre-printed on the same side of the outer envelope is a unique nine-digit bar code that links the outer envelope to the voter's registration file contained in the Statewide Uniform Registry of Electors ("SURE") system. After receiving a mail-in or absentee ballot envelope, the board scans the unique nine-digit bar code on the envelope linking to the SURE system.

The General Assembly delegated to the Secretary of State the authority to determine the form of the voter declaration for absentee and mail-in ballots. On September 11, 2020, the Secretary of State issued Guidance Concerning

Examination of Absentee and Mail-in Ballot Return Envelopes (“9.11.20 Guidance,” attached as Exhibit B).

II. Procedural history.

A. The Board’s decision.

On November 9, 2020, the Board met to determine, pursuant to 25 P.S. § 3146.8(g)(3), whether certain ballots were “sufficient.” The Board made findings and decisions with respect to nine different categories of ballots, accepting some categories for canvassing and excluding others. Specifically, the Board voted *not* to accept:

- 472 ballots where the outer envelope lacked a signature and any other handwritten information;
- 225 ballots where the outer envelope was not signed by the voter;
- 112 ballots where the individual who completed the declaration appeared different than the individual who was assigned the ballot; and
- 4,027 ballots that were not submitted in a secrecy envelope.

B. The challenged ballots.

Petitioners challenge ballots accepted by the Board in the following categories. In each category, the issue identified is the only alleged irregularity:

- 1,211 ballots that lack a handwritten date, address, and printed name on the back of the outer envelope (but are signed). *See* Case ID 201100874, Pet. ¶ 27.
- 1,259 ballots that lack only a handwritten date on the back of the outer envelope (but are signed and contain other information, including handwritten name and address). *See* Case ID 201100875, Pet. ¶ 27.
- 533 ballots that lack only a handwritten name on the back of the outer envelope (but are signed and dated and contain a handwritten address). *See* Case ID 201100876, Pet. ¶ 27.
- 860 ballots that lack only a handwritten address on the back of the outer envelope (but are signed and dated and contain a handwritten name). *See* Case ID 201100877, Pet. ¶ 27.
- 4,466 ballots that lack only a handwritten name and address on the back of the outer envelope (but are signed and dated). *See* Case ID 201100878, Pet. ¶ 27.

C. Factual admissions.

1. No fraud, misconduct, impropriety, or undue influence.

During oral argument before the Philadelphia Court of Common Pleas on November 13, 2020, Petitioners' counsel, Linda A. Kerns, admitted that Petitioners neither allege, nor is there evidence of, any fraud, misconduct, impropriety, or undue

influence in connection with the challenged ballots. *See* Hearing Tr. at 13–14 (attached as Exhibit C).

2. No missing signatures or naked ballots.

Petitioners do not allege, nor is there any evidence, that the Board counted any ballots without signatures on the outer envelope or counted “naked ballots” (ballots that did not arrive in a secrecy envelope). The transcript of the Board’s meeting confirms that those ballots were not counted. Board Tr. at 13 (attached as Exhibit D).

3. Each ballot was in an outer envelope displaying the elector’s address.

Petitioners’ counsel conceded that each ballot was contained in an outer envelope that had on its face the elector’s address affixed to the envelope. Ex. C, Hearing Tr. at 32–33.

4. No ineligible voters, deceased voters, or impersonations.

Petitioners’ counsel admitted there is no evidence that any of the electors were ineligible to vote in the election and they are not challenging the eligibility of the electors who cast the challenged ballots. Petitioners’ counsel further admitted that Petitioners do not allege, and there is no evidence, that any of the challenged ballots were cast by, or on behalf of, a deceased person or cast by someone other than the electors whose signatures are on the outer envelopes. *Id.* at 18, 35–38.

5. The ballots were timely cast and received.

Petitioners conceded that each of the challenged ballots was timely received by the Board before 8:00 p.m. on Election Day, November 3, 2020. *Id.* at 13–14.

III. The Court of Common Pleas Decision.

The Court of Common Pleas subsequently denied each appeal. The Court emphasized that the outer envelope contains a checklist that directs the elector to sign the declaration, and the checklist makes no mention of supplying a date or any other information. *See* Ex. A. Further, the Court determined that the term “fill out” in the Election Code’s instruction that voters “fill out, date and sign the declaration” is an ambiguous term. *Id.* (quoting 25 P.S. §§ 3146.6(a), 3150.16(a)). Considering Petitioners’ factual concessions and guided by the Election Code’s instruction that the Court’s consideration of appeals from county boards of elections shall “make such decree as right and justice may require,” the Court denied each petition. *Id.* (quoting 25 P.S. § 3157(b)). This appeal followed.

SUMMARY OF ARGUMENT

At the threshold, the Pennsylvania Supreme Court has exclusive jurisdiction over this case because the issues pertain to the regularity of the electoral process and the action creates uncertainty as to the rightful occupant of public office. On the merits, the Board did not abuse its discretion in rejecting the attempted challenges at issue. First, there is no statutory requirement that voters print their full name or address on the outer envelopes. Second, a lack of flawless technical compliance with

the statutory directives does not require disenfranchisement where, as here, there is no such statutorily mandated consequence, it is undisputed that the ballots were timely cast and submitted, and the directive to add a date to the envelope serves no compelling purpose that would be undermined by the lack of a date.

ARGUMENT

I. This Court lacks jurisdiction to hear appeals related to the regularity of the electoral process.

The DNC agrees with Philadelphia County that this appeal should be transferred to the Supreme Court of Pennsylvania.² The Legislature has lodged “exclusive jurisdiction” in the Pennsylvania Supreme Court “of appeals from final orders of the courts of common pleas” in cases related to the “right to public office.” 42 Pa. C.S. § 722(2). The Supreme Court has interpreted this class of cases to include challenges to the “regularity” of the electoral process. *Commw. v. Spano*, 701 A.2d 566, 567 (Pa. 1997) (citing *Appeal of Bowers*, 269 A.2d 712 (Pa. 1970)). While the Commonwealth Court occasionally maintains jurisdiction in some election cases under its authority to hear appeals of “election procedures” under 42 Pa. C.S. § 762(a)(4)(i)(C), the Supreme Court has made clear that it maintains exclusive

² Notably, the Board has asked the Pennsylvania Supreme Court to exercise jurisdiction over this matter by filing an application for extraordinary relief. The Court has accepted jurisdiction. *See* Supreme Court docket, attached as Exhibit E.

jurisdiction in election cases where time is of the essence.³ As the Court explained in *Spano*, “[w]hen the results of an election are challenged, the occupancy of a key public office is left uncertain until the legal contest is decided by the courts. For as long as the contest goes on, there is uncertainty over who is the rightful occupant of that office and no policy can be made.” 701 A.2d at 567. “In such cases, the public interest in having a functioning representative government demands that the contest be terminated as expeditiously as possible. *Therefore appeals come directly to this court*, not because we have more expertise, but because the answer will be final.” *Id.* (emphasis added).

As a result, while the Supreme Court and Commonwealth Court each sometimes accept jurisdiction over cases involving election contests, *compare In re Reading Sch. Bd. Election*, 634 A.2d at 171, with *Dayhoff v. Weaver*, 808 A.2d 1002, 1006 (Pa. Commw. Ct. 2002), the Supreme Court’s claim to jurisdiction must govern. Here, the election certification process is on a tight timeline: the Board must receive the computation of ballots by *today*, November 18th, *see* 25 P.S. § 3154(f), and the Board must certify the results to the Commonwealth by November 23, 2020,

³ A third statute, 25 P.S. § 3157(b), which purports to prohibit any elections appeals from the courts of common pleas, is dead letter according to settled precedent. *See In re Reading Sch. Bd. Election*, 634 A.2d at 171; *Dayhoff*, 808 A.2d at 1006.

see 25 P.S. § 2642(k).⁴ Transfer to the Supreme Court would help resolve this dispute on the necessary timeline, which is why the General Assembly has vested it with exclusive jurisdiction over this appeal.

II. There is no statutory basis to invalidate ballots that comply with all statutory instructions.

Nothing in the Election Code requires that voters handwrite their names and addresses on the outer envelope—particularly where that information is pre-printed on the envelope less than an inch away. Nevertheless, Petitioners seek to invalidate thousands of votes on those grounds. But Petitioners may not add mandatory voting procedures that are not prescribed in law, and the Board did not err by refusing to invalidate votes that complied with every statutory instruction. *See Appeal of McCracken*, 88 A.2d at 788; *In re City of Wilkes-Barre Election Appeals*, 44 Pa. D. & C.2d at 536–37; *In re Duquesne Appeals from Cnty. Bd. of Elections*, 39 Pa. D. & C.2d at 547. Petitioners’ claims have no merit.

The Board correctly denied Petitioners’ challenge to ballots with no printed name or address because the Election Code does not require voters to include this information. The relevant statutes instruct that, after marking the ballot, “[t]he

⁴ This Court can take judicial notice of the fact that the Philadelphia Board of Elections did indeed reconvene to accept the computation of the vote last night, November 17, at a meeting held at 10:00pm. *See Reconvening of the Return Board for the 2020 General and Special of November 3, 2020*, Nov. 17, 2020, available at https://www.philadelphiavotes.com/en/home/item/1891-reconvening_board_for-the_2020_general_election.

elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.” 25 P.S. § 3146.6(a) (absentee ballots); 25 P.S. § 3150.16(a) (same instructions for mail-in ballots). The statute thus does not expressly require voters to handwrite their names or addresses on their declarations.

Notably, the General Assembly did impose such a requirement elsewhere in the same section when addressing voters who are unable to sign their declaration due to illness or physical disability. *That* provision requires that a witness not only sign the declaration but also provide his or her “complete address.” 25 P.S. § 3146.6(a)(3); *accord* 25 P.S. § 3150.16(a.1). That the General Assembly included this statutory requirement in another provision “clearly demonstrate[s] that it knows how to impose such a requirement when it wishes to do so.” *Whitfield v. United States*, 543 U.S. 209, 216 (2005); *see In re Nov. 3, 2020 Gen. Election*, No. 149 MM 2020, 2020 WL 6252803, at *14 (Pa. 2020) (noting that the legislature’s prior inclusion of a signature comparison requirement demonstrated that “it understands how to craft language requiring signature comparisons at canvassing when it chooses to do so”). Petitioners thus ask this Court to read into the statute a requirement that the General Assembly did not impose. But, as the Supreme Court recently explained, courts should not “judicially rewrite” the Election Code by imposing requirements

“where the legislature has, in the exercise of its policy judgment, seen fit not to do so.” *In re Canvassing Observation*, No. 30 EAP 2020 (Pa. Nov. 17, 2020) (slip op. at 17); *see also Sivick v. State Ethics Comm’n*, No. 62 MAP 2019, 2020 WL 5823822, at *10 (Pa. Oct. 1, 2020) (observing that “[i]t is axiomatic that we may not add statutory language where we find the extant language somehow lacking” and that “[u]nder the doctrine of *expressio unius est exclusio alterius*, the inclusion of a specific matter in a statute implies the exclusion of other matters”).

Petitioners suggest that the Court should read the requirement in sections 3146.6(a) and 3150.16(a) that the voter “fill out” the declaration as imposing a rule that a voter must handwrite his or her name and address on the declaration. But as the court below properly determined, the term “fill out” is ambiguous. *See, e.g., Ex. A* at 2. Where an election statute is ambiguous, it applies the “longstanding” interpretive principle that “election laws . . . ordinarily will be construed liberally in favor of the right to vote.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 360–61 (Pa. 2020). Additionally, the General Assembly has delegated authority to the Secretary of State to interpret this aspect of the Election Code, and the Secretary has interpreted it not to require the handwritten information that Petitioners suggest. The General Assembly expressly authorized the Secretary to “prescribe[]” the “form of [the] declaration,” requiring only that it include “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(b). Pursuant to this authority, the Secretary promulgated the declaration form at issue here and issued guidance to the county boards of elections about how to determine whether voters “fill[ed] out” the form. *See* Ex. B, 9.11.20 Guidance. The Secretary’s guidance instructs that ballot return envelopes must be set aside and not counted if the declaration is “blank,” but otherwise, “[i]f 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.” *Id.* at 3 (emphasis added). The Board here acted pursuant to the Secretary’s reasonable interpretation of the statute, rejecting hundreds of ballots that were not “sufficient” but accepting those ballots that were signed by voters whose name and address were printed on the outer envelope. Petitioners offer no reason to adopt their reading of the phrase “fill out” rather than the Secretary’s reasonable one. *See Colville v. Allegheny Cnty. Ret. Bd.*, 926 A.2d 424, 430 (Pa. 2007).

Petitioners do not dispute that each outer envelope at issue here includes a declaration signed by the voter. Nor do they dispute that the voter’s name and address are already embedded in the outer envelope itself—pre-printed near the declaration and in the unique barcode on every envelope. The only potential deficiency with these envelopes is the lack of a complete *handwritten* name and address below the voter’s signature. But given that such information is already

printed on the envelope, and that the checklist makes no mention of the name or address, a voter could reasonably conclude that it was unnecessary to also handwrite such information. Because a name and address are not specified in statute; because the Secretary has made clear that an outer envelope must be set aside only if the declaration is blank; and because the county board otherwise determines whether the declaration is sufficient, the court below was correct to conclude that Board did not abuse its discretion in deciding that the ballots inside these envelopes should be counted.

III. There is no compelling reason to disenfranchise thousands of voters based on mere technicalities.

Technical defects with a signed declaration on the outer envelope are not grounds to reject a ballot. Nothing in the Election Code requires rejection for failure to input a handwritten name, date, or address, and there is no compelling reason for an elector to include such information, particularly where, as here, the name and address already appear on the outer envelope and it is undisputed that each of the challenged ballots was timely cast and received.

Even were the omission of this information inconsistent with the instructions given to voters, which it is not, Pennsylvania law is clear that not every failure to comply with an instruction in the Election Code is grounds to reject a ballot. As the Supreme Court explained earlier this year, “[w]hile both mandatory and directory provisions of the Legislature are meant to be followed, the difference between a

mandatory and directory provision is the consequence for non-compliance: a failure to strictly adhere to the requirements of a directory statute will not nullify the validity of the action involved.” *Pa. Democratic Party*, 238 A.3d at 378 (quoting *JPay, Inc. v. Dep’t of Corr. & Governor’s Office of Admin.*, 89 A.3d 756, 763 (Pa. Commw. Ct. 2014)); see *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108 (Pa. 1972) (holding the statutory instruction that voters shall mark their ballot in blue, black, or blue-back ink is not mandatory).

“The power to throw out a ballot for minor irregularities . . . must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disenfranchised at an election except for compelling reasons.” *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945); see also *In re Duquesne Appeals from Cnty. Bd. of Elections*, 39 Pa. D. & C.2d at 557 (same). An imperfect envelope nonetheless may be sufficient; omission of limited and immaterial information does not represent a compelling reason requiring the voter who voted the ballot to be disenfranchised. See *Shambach*, 845 A.2d at 799 (“[M]arking a ballot in voting is not a matter of precision engineering but of an unmistakable registration of the voter’s will in substantial conformity to the statutory requirements.”). Because the statutory requirements at issue here are directory, not mandatory, the extreme remedy of disenfranchisement is neither required nor appropriate.

A. The Election Code does not provide that ballots with technical imperfections shall be “set aside.”

The General Assembly has provided no instruction—explicitly or implicitly—that ballots shall not be counted if they are contained in an outer envelope that lacks a handwritten date, name, or address. No other section of the Election Code would be undermined or defeated if the ballots at issue were counted, and voiding these ballots would serve no compelling state interest.

The General Assembly specified elsewhere in the Election Code particular instances in which an absentee ballot must be rejected:

- i.) The ballot of a deceased elector “shall be rejected by the canvassers,” 25 P.S. § 3146.8(d), and “set aside,” *id.* § 3146.8(g)(3).
- ii.) If the secrecy envelope contains any marking that identifies the elector’s identity, political affiliation, or candidate preference, “the envelopes and the ballots contained therein shall be set aside and declared void.” *Id.* § 3146.8(g)(4)(ii).
- iii.) Where the eligibility of an elector has been challenged, the elector’s ballot “shall be placed unopened in a secure, safe and sealed container” until the challenge is resolved. *Id.* § 3146.8(g).

None of these three issues is implicated here. Petitioners expressly disclaim any challenge related to whether an elector is deceased or ineligible to vote, *see* Ex. C, Hearing Tr. at 18, 34; they likewise do not allege that any secrecy envelopes

contain identifying markings. Thus, the ballots at issue here do not fall within any of the discrete categories of invalid ballots that the Legislature has instructed not be counted.⁵

The “fill out, date, and sign” requirement is in this way distinguishable from the secrecy-envelope requirement that the Pennsylvania Supreme Court concluded was mandatory in *Pennsylvania Democratic Party*. In that case, the Court relied not merely on the fact that the statute directed the voter to take a particular action (there, use a secrecy envelope), but the fact that the statute elsewhere required that, if the election board found that the integrity of a secrecy envelope had been compromised, it should “set aside” that envelope and the ballot within it. 238 A.3d at 378; *see* 25 P.S. § 3146.8(g)(4)(ii). This statutory provision, when “read *in pari materia*” with the provision requiring the use of the secrecy envelope in the first instance, “ma[d]e clear the General Assembly’s intention that . . . it should not be readily apparent who the elector is, with what party he or she affiliates, or for whom the elector has voted,”

⁵ Comparison with a separate section of the Election Code lends further support for the fact that the General Assembly knows how to require information such as a date when it intends to. Because dated signatures on candidate nominating petitions are essential to determining whether and which signatures are valid under the statutory scheme governing these petitions—unlike for absentee and mail-in ballots, which can be voted as soon as they are issued, one cannot lawfully sign a nominating petition *prior* to a particular date—the General Assembly provided, “*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.S. § 2868 (emphasis added). There is no parallel consequence for a missing date, name, or address in the statutes governing absentee and mail-in ballots.

and that any contravention of that goal required (as § 3146.8(g)(4)(ii) made clear) the invalidation of the ballot. *Pa. Democratic Party*, 238 A.3d at 378; accord *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1232 (Pa. 2004) (emphasizing the General Assembly’s commitment to votes “remain[ing] secret and inviolate” in interpreting ban on third-person delivery as mandatory, not directory). Only after considering multiple sections of the Election Code regarding secrecy envelopes—and how ballot secrecy is “protected expressly by Article VII, Section 4 of th[e] Court’s state charter”—did the Court conclude that the General Assembly had “signaled beyond cavil that ballot confidentiality . . . *is so essential* as to require disqualification.” *Pa. Democratic Party*, 238 A.3d at 379-380 (emphasis added). By contrast, no provision of the Election Code here demonstrates that the General Assembly similarly considered a handwritten name, date, or address so essential that their omission requires—or even could plausibly be read to contemplate—the invalidation of ballots.

No “weighty interest” analogous to ballot secrecy, *Pa. Democratic Party*, 238 A.3d at 380, is implicated here. An envelope that lacks a handwritten name, date, or address but that was unquestionably cast by the elector and was timely is not analogous to a ballot submitted by a deceased or otherwise unqualified voter, and the omission plainly does not jeopardize the privacy of the vote. Nor would counting these ballots render the statutory scheme meaningless or absurd. Additional indicia

on the outer envelope of the voter's identity may be useful insurance for the unlikely but conceivable situation where the SURE system's barcode fails to scan, just as a dated signature may be relevant evidence where the timeliness of a ballot is in dispute. But where, as here, neither the identity of the elector nor the timeliness of the ballot is in any doubt—and Petitioners have explicitly represented that neither fact is contested here—no legislative purpose would be served by invalidating the lawful votes of eligible voters.⁶ Thus, there is no basis here for the judiciary to take the legislative pen and add to the circumscribed reasons that a ballot may be set aside, especially where deferring to statutory silence does not defeat the General Assembly's obvious intentions or defeat a compelling state interest. Because the General Assembly has not instructed otherwise, the Board did not abuse its discretion by deciding that these votes should be counted.

B. A complete name and address are not necessary because the statute does not require it and because this information already is available on the outer envelope.

The statutory instructions do not direct voters to write their name and address on the outer envelope, but even if that were required, there would be no compelling reason to disenfranchise voters who fail to print their full name and address under the declaration because this information already is available on the outer envelope.

⁶ *Amicus curiae's* speculation (at page 10 of her brief) about double voting is completely irrelevant to this appeal, as Petitioners have conceded that all the ballots at issue were cast by eligible voters, and there are no allegations of double voting.

First, outer envelopes contain, on the same side as the voter's declaration, a unique nine-digit barcode that links the outer envelope to the voter's registration file contained in the SURE system, and the specific voter's information—including name and address—is visible when scanned. *See* Ex. B, 9.11.20 Guidance, *supra*, at 2. Further, the voter's address is pre-printed on the outer envelope. Petitioners admit that none of the contested ballots lacked these indicia of the voter's identity. Ex. C, Hearing Tr. at 32–33.

The fact that the voter's name and address are readily identifiable would make throwing out these ballots a grave injustice. Disenfranchising voters who fail to input their name and address below their signature serves no “weighty interest,” and there is no “concrete provision” that would be rendered ineffective if these ballots were counted. *Cf. Pa. Democratic Party*, 238 A.3d at 380. Indeed, whatever the interest is in having the voter's name and address identifiable from the outside of the ballot—likely an identification mechanism to prevent double voting—it is met here because the voter's name and address are identifiable in at least one (and more often multiple) ways from the outside of every ballot envelope.

This case is analogous to *Wieskerger Appeal*, 290 A.2d at 109, where the Supreme Court held that failure to complete a ballot in pencil or certain color of ink was not a basis to invalidate the ballot. As in *Wieskerger*, Petitioners offer no suggestion that the failure to include a complete name and address here was an effort

at committing voter fraud, and such an attempt would be virtually impossible given that the voter's name and address are identifiable in at least one way on the outer envelope of each of these ballots. Disenfranchising voters based on this minor technicality, when every voter's name and address are still readily 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.

Further (and relatedly), Petitioners' requested interpretation of state law would 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). Here, the SURE barcode provides a readily available means to determine that all ballots at issue were cast by voters "qualified under State law to vote in such election" by allowing the Board and the state to readily confirm each voter's name and address along with other information. The handwritten name and address under the declaration are not

material to determining whether an individual is qualified to vote, and not allowing these votes to count would violate federal law.⁷

C. A date is not necessary because there is no dispute these ballots were received before 8:00 p.m. on Election Day.

The purpose of the date on the outer envelope, when read in context with the rest of the election code, is apparent. Under Pennsylvania law, a ballot must be voted before 8:00 p.m. the day of the primary or election to be counted. 25 P.S. § 3150.16(a). Thus, the date serves the purpose of allowing election officials to confirm that the ballot was timely voted. In this case, a handwritten date is not necessary for such confirmation, as Petitioners crucially admit that the ballots at issue in this case were received before 8:00 p.m. on Election Day. Moreover, the receipt date of the ballots is verifiable. The County Board “stamp[s] the date of receipt on the ballot-return” and “record[s] the date the ballot is received” in the

⁷ By requiring the post hoc invalidation of ballots cast by eligible voters, Petitioners’ proposed interpretation of the Election Code would raise serious federal constitutional concerns. *See Griffin v. Burns*, 570 F.2d 1065, 1075 (1st Cir. 1978) (finding the retroactive invalidation of ballots cast in an officially-endorsed manner amounted to a constitutional violation); *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 98 (2d Cir. 2006) (affirming injunction prohibiting Board from certifying elections without tallying certain absentee ballots when election officials “at least arguably [] misled voters”). Accordingly, if there is any ambiguity in the statute, it should be construed to avoid such constitutional questions. *See Commonwealth v. Veon*, 150 A.3d 435, 443 (Pa. 2016) (“[W]hen a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” (citation omitted)).

SURE system. *See* Ex. B, 9.11.20 Guidance, *supra*, at 2. The date stamp provides an objective indicator of timeliness that renders any handwritten date superfluous. Thus, there can be no doubt that the 2,349 challenged 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.”).

Although the statute provides that electors shall date the declaration, that directive is not mandatory. The Supreme Court has made clear that “[i]n construing election laws while we must strictly enforce all provisions to prevent fraud our overriding concern at all times must be to be flexible in order to favor the right to vote. Our goal must be to enfranchise and not to disenfranchise.” *Wieskerger Appeal*, 290 A.2d at 109. 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. *Id.* (“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.”). *Id.*⁸

⁸ For this reason, a voter’s failure to comply with the requirement that he or she “date” the declaration may logically carry different consequences than a failure to

CONCLUSION

For the foregoing reasons, the DNC respectfully requests this Court affirm the Court of Common Pleas and deny the Petition for Review of Decision.

comply with the requirement that he or she “sign” the declaration. A voter’s failure to date a declaration—at least in the context of an absentee or mail-in ballot—may be remedied by clear evidence that the vote was timely cast. A voter’s failure to sign the declaration at all, by contrast, renders the declaration void.

Dated: November 18, 2020

Respectfully submitted,

By: /s/ Michael R. McDonald

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**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 18, 2020

By: /s/ Michael R. McDonald
Michael R. McDonald

**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 18, 2020

By: /s/ Michael R. McDonald
Michael R. McDonald

CERTIFICATE OF SERVICE

I, Michael R. McDonald, 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 18, 2020

By: /s/ Michael R. McDonald
Michael R. McDonald

EXHIBIT A

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

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

NOVEMBER TERM, 2020

No. 201100874

ORDER

AND NOW, to-wit, this 13th day of November, 2020, upon consideration of Petitioner Donald J. Trump for President, Inc.'s Notice of Appeal via Petition for Review of the Decision of the Philadelphia County Board of Elections, the response of the Philadelphia County Board of Elections and the submissions on behalf of Intervenors, DNA Services Corp./Democratic National Committee and the arguments of counsel, it appearing that Petitioner has properly and timely sought review of the decision of the Board of Elections pursuant to 25 Pa. C.S.A. §3146(g)(6), it further appearing that Petitioner is not contending that there has been fraud, that there is evidence of fraud or that the ballots in question were not filled out by the elector in whose name the ballot was issued, and it further appearing that Petitioner does not allege fraud or irregularity in the canvass and counting of the ballots, and the Court finding that the Intervenor's Objection to the consideration of the appeal as an "eligibility challenge" pursuant to 25 Pa. C.S.A. §3146.8 is a mischaracterization of the above-referenced review (and therefore a meritless objection), the Court finds as follows:

1. Petitioner asserts a challenge to the decision of the Board of Elections to count the votes represented in the grouping designated Category 3, those being 1,211 ballots on

which the outer envelope contains only the Elector's signature but which do not have the date, printed name or the elector's address filled out in the space provided.


2. The envelope provided to the elector from the Secretary of State of the Commonwealth contains a direction in the form of a checklist on the back of the envelope that directs the elector to sign the declaration, but makes no mention of filling out the date or other information.
3. The Election Code provides that a voter shall "fill out, date and sign the declaration" on the outer envelope.
4. The term "fill out" in the Code is not a defined term and is ambiguous.
5. The pre-printed ballot already contains the elector's name and address on the pre-printed exterior envelope.
6. Neither a date nor the elector's filling out of the printed name or of the address are requirements necessary to prevent fraud.
7. The Petitioner concedes that all ballots by a qualified elector in this category were timely received.
8. The Election Code directs the Court of Common Pleas in considering appeals from the County Board of Elections to make such decree as right and justice may require.

25 Pa. C.S.A. §3157.

WHEREFORE, the Court ORDERS and DECREES that the Petition is **DENIED**. The Court further ORDERS AND DECREES that the decision of the Philadelphia County Board of Elections in canvassing and counting 1,211 absentee and mail-in ballots containing the elector's signature on the Declaration envelope but missing the date and other "fill out" information is

AFFIRMED as in accordance with the provisions of the Election Code and the decisions of the Courts interpreting the Code.

BY THE COURT,


Crumlish, J.

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

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

NOVEMBER TERM, 2020

No. 201100875

ORDER

AND NOW, to-wit, this 13th day of November, 2020, upon consideration of Petitioner Donald J. Trump for President, Inc.'s Notice of Appeal via Petition for Review of the Decision of the Philadelphia County Board of Elections, the response of the Philadelphia County Board of Elections and the submissions on behalf of Intervenors, DNA Services Corp./Democratic National Committee and the arguments of counsel, it appearing that Petitioner has properly and timely sought review of the decision of the Board of Elections pursuant to 25 Pa. C.S.A. §3146(g)(6), it further appearing that Petitioner is not contending that there has been fraud, that there is evidence of fraud or that the ballots in question were not filled out by the elector in whose name the ballot was issued, and it further appearing that Petitioner does not allege fraud or irregularity in the canvass and counting of the ballots, and the Court finding that the Intervenor's Objection to the consideration of the appeal as an "eligibility challenge" pursuant to 25 Pa. C.S.A. §3146.8 is a mischaracterization of the above-referenced review (and therefore a meritless objection), the Court finds as follows:

1. Petitioner asserts a challenge to the decision of the Board of Elections to count the votes represented in the grouping designated Category 4, those being 1,259 ballots on which the outer envelope contains only the Elector's signature and hand-printed address but which do not have the date on which the Elector signed the envelope.

2. The envelope provided to the elector from the Secretary of State of the Commonwealth contains a direction in the form of a checklist on the back of the envelope that directs the elector to sign the declaration, but makes no mention of filling out the date or other information.
3. The Election Code provides that a voter shall “fill out, date and sign the declaration” on the outer envelope.
4. The term “fill out” in the Code is not a defined term and is ambiguous.
5. The pre-printed ballot already contains the elector’s name and address on the pre-printed exterior envelope.
6. Neither a date nor the elector’s filling out of the printed name or of the address are requirements necessary to prevent fraud.
7. The Petitioner concedes that all ballots by a qualified elector in this category were timely received.
8. The Election Code directs the Court of Common Pleas in considering appeals from the County Board of Elections to make such decree as right and justice may require.
25 Pa. C.S.A. §3157.

WHEREFORE, the Court ORDERS and DECREES that the Petition is **DENIED**. The Court further ORDERS AND DECREES that the decision of the Philadelphia County Board of Elections in canvassing and counting 1,259 absentee and mail-in ballots containing the elector’s signature, hand-printed name and address on the Declaration envelope but missing the date is

AFFIRMED as in accordance with the provisions of the Election Code and the decisions of the Courts interpreting the Code.

BY THE COURT,


_____ Crumlish, J.

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

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

NOVEMBER TERM, 2020

No. 201100876

ORDER

AND NOW, to-wit, this 13th day of November, 2020, upon consideration of Petitioner Donald J. Trump for President, Inc.'s Notice of Appeal via Petition for Review of the Decision of the Philadelphia County Board of Elections, the response of the Philadelphia County Board of Elections and the submissions on behalf of Intervenor, DNA Services Corp./Democratic National Committee and the arguments of counsel, it appearing that Petitioner has properly and timely sought review of the decision of the Board of Elections pursuant to 25 Pa. C.S.A. §3146(g)(6), it further appearing that Petitioner is not contending that there has been fraud, that there is evidence of fraud or that the ballots in question were not filled out by the elector in whose name the ballot was issued, and it further appearing that Petitioner does not allege fraud or irregularity in the canvass and counting of the ballots, and the Court finding that the Intervenor's Objection to the consideration of the appeal as an "eligibility challenge" pursuant to 25 Pa. C.S.A. §3146.8 is a mischaracterization of the above-referenced review (and therefore a meritless objection), the Court finds as follows:

1. Petitioner asserts a challenge to the decision of the Board of Elections to count the votes represented in the grouping designated Category 5, those being 533 ballots on which the outer envelope contains the Elector's signature , the date and the elector's

address filled out in the space provided but do not have the Elector's name printed under the signature.

2. The envelope provided to the elector from the Secretary of State of the Commonwealth contains a direction in the form of a checklist on the back of the envelope that directs the elector to sign the declaration, but makes no mention of filling out the date or other information.
3. The Election Code provides that a voter shall "fill out, date and sign the declaration" on the outer envelope.
4. The term "fill out" in the Code is not a defined term and is ambiguous.
5. The pre-printed ballot already contains the elector's name and address on the pre-printed exterior envelope.
6. Neither a date nor the elector's filling out of the printed name or of the address are requirements necessary to prevent fraud.
7. The Petitioner concedes that all ballots by a qualified elector in this category were timely received.
8. The Election Code directs the Court of Common Pleas in considering appeals from the County Board of Elections to make such decree as right and justice may require.

25 Pa. C.S.A. §3157.

WHEREFORE, the Court ORDERS and DECREES that the Petition is **DENIED**. The Court further ORDERS AND DECREES that the decision of the Philadelphia County Board of Elections in canvassing and counting 533 absentee and mail-in ballots containing the elector's signature, hand-written address and date on the Declaration envelope but missing the hand-

printed name under the signature is **AFFIRMED** as in accordance with the provisions of the Election Code and the decisions of the Courts interpreting the Code.

BY THE COURT,


Crumlish, J.

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

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

NOVEMBER TERM, 2020

No. 201100876

ORDER

AND NOW, to-wit, this 13th day of November, 2020, upon consideration of Petitioner Donald J. Trump for President, Inc.'s Notice of Appeal via Petition for Review of the Decision of the Philadelphia County Board of Elections, the response of the Philadelphia County Board of Elections and the submissions on behalf of Intervenors, DNA Services Corp./Democratic National Committee and the arguments of counsel, it appearing that Petitioner has properly and timely sought review of the decision of the Board of Elections pursuant to 25 Pa. C.S.A. §3146(g)(6), it further appearing that Petitioner is not contending that there has been fraud, that there is evidence of fraud or that the ballots in question were not filled out by the elector in whose name the ballot was issued, and it further appearing that Petitioner does not allege fraud or irregularity in the canvass and counting of the ballots, and the Court finding that the Intervenor's Objection to the consideration of the appeal as an "eligibility challenge" pursuant to 25 Pa. C.S.A. §3146.8 is a mischaracterization of the above-referenced review (and therefore a meritless objection), the Court finds as follows:

1. Petitioner asserts a challenge to the decision of the Board of Elections to count the votes represented in the grouping designated Category 5, those being 533 ballots on which the outer envelope contains the Elector's signature, the date and the elector's

address filled out in the space provided but do not have the Elector's name printed under the signature.


2. The envelope provided to the elector from the Secretary of State of the Commonwealth contains a direction in the form of a checklist on the back of the envelope that directs the elector to sign the declaration, but makes no mention of filling out the date or other information.
3. The Election Code provides that a voter shall "fill out, date and sign the declaration" on the outer envelope.
4. The term "fill out" in the Code is not a defined term and is ambiguous.
5. The pre-printed ballot already contains the elector's name and address on the pre-printed exterior envelope.
6. Neither a date nor the elector's filling out of the printed name or of the address are requirements necessary to prevent fraud.
7. The Petitioner concedes that all ballots by a qualified elector in this category were timely received.
8. The Election Code directs the Court of Common Pleas in considering appeals from the County Board of Elections to make such decree as right and justice may require.

25 Pa. C.S.A. §3157.

WHEREFORE, the Court ORDERS and DECREES that the Petition is **DENIED**. The Court further ORDERS AND DECREES that the decision of the Philadelphia County Board of Elections in canvassing and counting 533 absentee and mail-in ballots containing the elector's signature, hand-written address and date on the Declaration envelope but missing the hand-

printed name under the signature is **AFFIRMED** as in accordance with the provisions of the Election Code and the decisions of the Courts interpreting the Code.

BY THE COURT,


Crumlish, J.

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

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

NOVEMBER TERM, 2020

No. 201100878

ORDER

AND NOW, to-wit, this 13th day of November, 2020, upon consideration of Petitioner Donald J. Trump for President, Inc.'s Notice of Appeal via Petition for Review of the Decision of the Philadelphia County Board of Elections, the response of the Philadelphia County Board of Elections and the submissions on behalf of Intervenors, DNA Services Corp./Democratic National Committee and the arguments of counsel, it appearing that Petitioner has properly and timely sought review of the decision of the Board of Elections pursuant to 25 Pa. C.S.A. §3146(g)(6), it further appearing that Petitioner is not contending that there has been fraud, that there is evidence of fraud or that the ballots in question were not filled out by the elector in whose name the ballot was issued, and it further appearing that Petitioner does not allege fraud or irregularity in the canvass and counting of the ballots, and the Court finding that the Intervenor's Objection to the consideration of the appeal as an "eligibility challenge" pursuant to 25 Pa. C.S.A. §3146.8 is a mischaracterization of the above-referenced review (and therefore a meritless objection), the Court finds as follows:

1. Petitioner asserts a challenge to the decision of the Board of Elections to count the votes represented in the grouping designated Category 3, those being 4,466 ballots on which the outer envelope contains the Elector's signature and the date but which do not have the printed name or the elector's address filled out in the space provided.

2. The envelope provided to the elector from the Secretary of State of the Commonwealth contains a direction in the form of a checklist on the back of the envelope that directs the elector to sign the declaration, but makes no mention of filling out the date or other information.
 3. The Election Code provides that a voter shall “fill out, date and sign the declaration” on the outer envelope.
 4. The term “fill out” in the Code is not a defined term and is ambiguous.
 5. The pre-printed ballot already contains the elector’s name and address on the pre-printed exterior envelope.
 6. Neither a date nor the elector’s filling out of the printed name or of the address are requirements necessary to prevent fraud.
 7. The Petitioner concedes that all ballots by a qualified elector in this category were timely received.
 8. The Election Code directs the Court of Common Pleas in considering appeals from the County Board of Elections to make such decree as right and justice may require.
- 25 Pa. C.S.A. §3157.

WHEREFORE, the Court ORDERS and DECREES that the Petition is **DENIED**. The Court further ORDERS AND DECREES that the decision of the Philadelphia County Board of Elections in canvassing and counting 4,466 absentee and mail-in ballots containing the elector’s signature and the date on the Declaration envelope but missing the other “fill out” information

(hand-printed name and address) is **AFFIRMED** as in accordance with the provisions of the Election Code and the decisions of the Courts interpreting the Code.

BY THE COURT,


Crumlish, J.

EXHIBIT B



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	

EXHIBIT C

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
COURT OF COMMON PLEAS FOR PHILADELPHIA COUNTY
ELECTION COURT

- - -

In re: :
: CASE NOS. 2011-00874
: 2011-00875
CANVASS OF ABSENTEE AND : 2011-00876
MAIL-IN BALLOTS OF : 2011-00877
NOVEMBER 3, 2020 GENERAL : 2011-00878
ELECTION :
: Filed on behalf of:
: Donald J. Trump for
: President, Inc.
:

- - -

Friday, November 13, 2020

- - -

MOTIONS COURT, TRAFFIC COURT

800 SPRING GARDEN STREET

PHILADELPHIA, PA

- - -

BEFORE: THE HONORABLE JAMES C. CRUMLISH, J.

- - -

MOTION

- - -

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1 THE COURT: Good morning, everyone.

2 We're here on five separate election
3 petitions. They are numbered 201100874, 5, 6,
4 7 and 8.

5 The parties present.

6 MR. GORDON: Yes, Your Honor.
7 Matthew Gordon and Michael McDonald on behalf
8 of the intervenor, DNC.

9 THE COURT: You can be seated.

10 We have some preliminary matters and
11 we, as you know, have arranged this as a Zoom
12 hearing. There was, unfortunately, exposure to
13 the coronavirus to some members of the legal
14 teams. Therefore, we made these arrangements,
15 and we have to be conscious of social
16 distancing and all of the safety precautions to
17 maintain the safety of those here today.

18 So I'm going to ask, for all those in
19 the audience, to keep your mask up.

20 As to the intervenors, I would grant
21 the motion to intervene. The pro hac is
22 pending, and as a matter of law in
23 Pennsylvania, there are some required steps
24 that have to occur for that admission, but I
25 will keep that in a pending status for the

1 moment. I will consider a mitigating factor
2 that our colleague from Seattle is here today,
3 and because of the change in the schedule and
4 everything attendant to accommodating all of
5 the different counsel, especially with this
6 corona exposure, we may make an exception to
7 our general rule that only admitted practice,
8 especially because you have learned counsel
9 with you.

10 So, that's to get that out of the way
11 right away.

12 MR. GORDON: Thank you, Your Honor.

13 MR. MCDONALD: Thanks, Your Honor.

14 THE COURT: Otherwise, we have
15 everyone, I think, present. We have the
16 petitioner present.

17 Could I have the respondents enter
18 their appearance for the purposes of the
19 record.

20 Are you unmuted, folks?

21 COURT CRIER: Some of them aren't,
22 Your Honor.

23 THE COURT: We're going to rearrange
24 the windows so that the speaking attorneys
25 become present in the Zoom. Just give us a

1 moment to work through this technology.

2 - - -

3 (Pause in the proceedings.)

4 - - -

5 MR. GORDON: Your Honor, if I am
6 addressing the Court, would you prefer that I
7 leave my mask on or take it off?

8 THE COURT: Yes. For the moment,
9 let's leave it on unless we can't hear each
10 other, especially the Zoom participants, but
11 we'll know that shortly.

12 MR. GORDON: Okay. Would you prefer
13 that I stand or remain seated when I'm
14 addressing the Court?

15 THE COURT: You can do anything
16 except lay down.

17 MR. GORDON: Thank you, Your Honor.

18 THE COURT: As you all know, we had
19 anticipated an in-person hearing, so this is
20 normally much more facile.

21 MR. MCDONALD: We're getting there.

22 THE COURT: Yes.

23 - - -

24 (Pause in the proceedings.)

25 - - -

1 MS. KERNS: Your Honor, can you hear
2 me?

3 THE COURT: Yes.

4 MS. KERNS: There was a discussion
5 that I couldn't hear about the pro hacks or
6 intervenors, and I couldn't hear it. Was that
7 on the record?

8 THE COURT: It was, but I'll repeat
9 myself once we make sure we have all this
10 technology squared away.

11 COURT CRIER: We should be good now.

12 THE COURT: I will repeat myself as
13 we've had some technical difficulties.

14 Pending before the Court are five
15 separate petitions for relief relating to an
16 election matter. They are 201100874, 5, 6, 7
17 and 8 and it is: In re: Canvass of Absentee
18 and Mail-in Ballots, 2020.

19 I'd ask the parties to identify
20 themselves for the record and the party they
21 represent.

22 MS. KERNS: Good morning, Your Honor.
23 Linda Kerns, K-E-R-N-S, Supreme Court No.
24 84495. I represent petitioners Donald J. Trump
25 for President, Incorporated, and Elizabeth

1 Elkin, a voter.

2 MS. HANGLEY: Good morning, Your
3 Honor. This is Michele Hangley from Hangley
4 Aronchick, Bar No. 82779. I represent the
5 Philadelphia County Board of Elections. With
6 me on the Zoom are Ben Field and Lydia Furst
7 from the City Law Department, and my colleague
8 John Coit from Hangley Aronchick.

9 THE COURT: Anyone else?

10 We have also with us here today,
11 physically present, counsel representing the
12 proposed intervenors. Would you identify
13 yourselves, please.

14 MR. GORDON: Yes, Your Honor. Good
15 morning. Matthew Gordon on behalf of the DNC.

16 MR. MCDONALD: Michael McDonald, Your
17 Honor, here on behalf of the DNC, Bar No.
18 326873.

19 THE COURT: Your co-counsel is not a
20 member of the Pennsylvania Bar but is pro hac
21 pending; is that correct?

22 MR. MCDONALD: That's correct. I
23 would move for his admission.

24 THE COURT: We'll take that under
25 consideration as there are preliminary steps to

1 granting that. It is pending but not disposed
2 of yet. We will see how the hearing goes. I
3 am taking into consideration that our colleague
4 is from Seattle, I believe.

5 We had some last-minute adjustments.
6 As I am told, one of the members of the
7 President's campaign staff has been diagnosed
8 with corona, and there has been exposure to a
9 number of the members of the legal team. So,
10 out of an abundance of caution, last night the
11 parties agreed to conduct a Zoom hearing. I
12 think because of the distance and travel
13 involved, we have here present just two parties
14 representing the intervenor.

15 So, what I'd first like to address is
16 the application for the intervenors to be
17 granted leave to participate. Hearing no
18 objection -- or is there an objection?

19 So, the intervenor's motion to
20 intervene is granted.

21 I would also, again, as a preliminary
22 matter, like to disclose that years ago I
23 represented Lisa M. Deeley in a civil matter
24 unrelated to her duties as election
25 commissioner. She is named in this action as a

1 nominal party in her official capacity. I
2 don't believe it would affect my ability to be
3 fair and impartial in this matter.

4 Secondly, I'd like to disclose that
5 in my private practice, attorney James
6 Fitzpatrick, who I believe is served as a
7 witness in the Trump campaign's election
8 disputes, he was a member of my firm and then
9 left to provide his service to our country in
10 the military. I think he's now the director of
11 Pennsylvania for Trump. I don't know if he
12 would appear or be a witness, but I wanted to
13 disclose this on a preliminary basis just to
14 make sure everyone understood that his
15 participation, or presence, would be treated
16 like any other witness that would appear before
17 this Court.

18 So having said that, Ms. Kerns, we
19 have these five petitions. Have any of the
20 petitions been resolved before we begin
21 proceedings today?

22 MS. KERNS: No, Your Honor. They're
23 still at issue.

24 THE COURT: Okay. In my preliminary
25 reading of the intervenor's argument, it

1 suggests that it's a jurisdictional challenge
2 to the proceeding; is that correct?

3 MR. GORDON: That's fair, Your Honor,
4 yes. I believe the county makes the same
5 argument --

6 THE COURT REPORTER: I'm sorry, but
7 I'm hearing an echo when you speak.

8 MR. GORDON: Is that better?

9 THE COURT REPORTER: Yes, thank you.

10 THE COURT: I had asked Ms. Kerns if
11 any of these had been resolved, and I believe
12 her answer was, no, they hadn't been; is that
13 correct?

14 MS. KERNS: Right, all of these are
15 still at issue.

16 THE COURT: So, it is the
17 petitioners' position that 3157 of the code
18 controls the conduct of this hearing; is that
19 correct?

20 MS. KERNS: I really apologize, but
21 I'm having trouble understanding you. I have
22 my computer audio up as high as possible.
23 Could you just repeat what you just said?

24 THE COURT: Yes. It's the
25 petitioners' position that 3157 of the code

1 controls the conduct of this contest before the
2 Court; is that correct?

3 MS. KERNS: Yes, Your Honor.

4 THE COURT: I wanted to read the full
5 sentence of Section B, which reads: "The court
6 on an appeal shall have full power and
7 authority to hear and determine all matters
8 pertaining to any fraud or error committed in
9 any election district to which such appeal
10 relates, and to make such decree as right and
11 just may require," period.

12 Is that as your understanding,
13 Ms. Kerns?

14 MS. KERNS: Yes, it is, Your Honor.

15 THE COURT: Okay. What I will do,
16 because the intervenor and, I think, the Board
17 have both argued jurisdictional arguments
18 relating to whether or not we can proceed, I'd
19 like to have more time to review the briefing
20 on that today. So, therefore, I will take both
21 the intervenor and Board's argument relating to
22 jurisdiction of the court under advisement.

23 Therefore, I would like to call on
24 you, Ms. Kerns, to give me a brief overview of
25 how these five challenges may have related

1 facts or may be different.

2 MS. KERNS: Sure, Your Honor. The
3 facts are actually related. The Clerk's
4 officer had actually asked me to put them in
5 five different petitions. That's the only
6 reason that there are five different petitions
7 before Your Honor. I had originally planned to
8 just file one petition and list the different
9 categories.

10 THE COURT: My question, Ms. Kerns,
11 is: There are five categories, but each have
12 distinct and different facts upon which you
13 rely upon to object; is that correct?

14 MS. KERNS: Yes. There are five
15 different categories of ballots, and in each
16 category, there's a different issue. Just by
17 way of example, category 3 is where the voter
18 had only signed and not provided any other
19 information, and then each category has a
20 description as to something that the voter did
21 not do on the declaration. But, it's five
22 different categories.

23 THE COURT: Having read your moving
24 papers, would you agree with me that you are
25 not proceeding based on allegations of fraud or

1 misconduct; is that correct?

2 MS. KERNS: I am not proceeding on
3 those allegations. I'm simply proceeding on
4 3157 of the election code as well as 3246.

5 THE COURT: All right. More directly
6 to my question, you are not alleging fraud or
7 irregularity as the basis, you are alleging an
8 error of law; is that correct?

9 MS. KERNS: I'm alleging that these
10 ballots were not filled out correctly, yes.
11 That's what I'm alleging.

12 THE COURT: It is important, and I'd
13 ask you to listen carefully if I'm not being
14 clear. You are alleging that the Board
15 committed an error of law in deciding to vote
16 to count these ballots; is that correct?

17 MS. KERNS: Yes.

18 THE COURT: Okay. Now I'll hear from
19 the other parties, and we will then proceed to
20 the petitioners' argument. Who would go first
21 in this group of esteemed colleagues?

22 MS. HANGLEY: I believe I would, Your
23 Honor, after Ms. Kerns.

24 THE COURT: Fine, thank you.

25 Ms. Hangley.

1 MS. HANGLEY: Yes, Your Honor. Is
2 the question what the common issues are?

3 THE COURT: Well, your overview of
4 your client's position, I guess, is the fairest
5 way to articulate it as we've heard Ms. Kerns'
6 position.

7 MS. HANGLEY: Right. So, we
8 certainly agree with Ms. Kerns' statement that
9 there's no issue of fraud raised here, no issue
10 of voters' desires or wishes being overwhelmed.
11 This is an issue of whether minor technical
12 errors, or irregularities, on a declaration
13 envelope are a basis for the Board to throw out
14 a vote, to tell that voter that their vote
15 doesn't count.

16 It's our position that under the
17 plain language of the statute and under all of
18 the precedents of this Commonwealth that
19 directs us to respect the voters' wishes, to
20 interpret the law in favor of allowing people
21 to vote except in issues of fraud, which are
22 not raised here, that these irregularities were
23 no basis for the Board to toss out these votes.
24 The Board made a correct legal decision, that
25 this Court should defer to it and affirm.

1 THE COURT: Who would be next,
2 please?

3 MR. GORDON: Your Honor, if there's
4 nobody else on behalf of the respondents who
5 are speaking, I don't want to --

6 THE COURT: There's a lot of people
7 there.

8 MR. GORDON: There are a lot of
9 people. I do want to mention, just briefly,
10 that Mr. Bonin and Mr. Williams are here on
11 behalf of intervenor DNC as well.

12 THE COURT: And they're known to this
13 Court. Thank you.

14 Anyone else need to add a perspective
15 on the proceeding, taking aside for the moment
16 what I call the jurisdictional challenge?

17 MR. GORDON: Sure. Thank you, Your
18 Honor.

19 Setting aside the jurisdictional
20 argument, we agree with the arguments on behalf
21 of the county. Petitioners here --

22 THE COURT: You can sit down.

23 MR. GORDON: I didn't know if you
24 meant slow down or sit down. I'll do both.

25 THE COURT: Slowing down is important

1 as well, but thank you. Just speak slowly and
2 articulate as best you can.

3 MR. GORDON: Certainly.

4 Petitioners here seek to invalidate
5 and disenfranchise ballots cast by more than
6 8,000 Philadelphia voters. They point to
7 nothing in the election code, or anywhere else,
8 that requires these ballots to be set aside and
9 disregarded and these voters to be
10 disenfranchised.

11 We agree with Ms. Kerns, there is
12 nothing here, no allegation of fraud,
13 impropriety, undue influence, anything of the
14 sort. At most, we are dealing here with very
15 minor technicalities about what information was
16 included on the outside of the absentee ballot.
17 Petitioners can point to nothing in the
18 election code suggesting that on the basis of
19 such technicalities, voters should be
20 disenfranchised. They can identify no
21 compelling reason why they should be
22 disenfranchised. Instead, they have challenged
23 every decision of the Board that allowed these
24 votes in, each of these five. Regardless of
25 the distinctions between them, petitioners say

1 that that should result in the
2 disenfranchisement of Philadelphia voters.

3 The DNC's position is similar to the
4 county's position. These are, at most, minor
5 technical irregularities of the sort that the
6 Supreme Court of Pennsylvania has repeatedly
7 said do not warrant disenfranchisement.

8 THE COURT: Thank you.

9 Ms. Kerns, if I may ask, do we all
10 agree that the thousands of ballots that are
11 under challenge all represent eligible voters?

12 MS. KERNs: Was the question that I
13 agree that these were eligible voters?

14 THE COURT: Yes, taking aside, for
15 the moment, whether or not they properly filled
16 out the mail-in or absentee ballot envelope.

17 MS. KERNs: Yes, I'm not challenging
18 their eligibility.

19 THE COURT: Then, secondly, we can
20 agree that your client did not file a challenge
21 on the Friday proceeding the election and post
22 a bond challenging the ballots under the
23 statute?

24 MS. KERNs: To challenge their
25 eligibility?

1 THE COURT: No, to challenge the
2 ballots.

3 MS. KERNS: Right. Those challenges
4 that were due on the Friday before election
5 would have been to challenge the electors'
6 eligibility, and, no, these electors weren't
7 challenged. As I said, we're not challenging
8 these ballots on the basis that these are not
9 registered voters.

10 THE COURT: Having said that, are
11 there any other facts that require the Court to
12 proceed on the arguments based on law? Do any
13 of the parties have any additional facts that I
14 can take notice of or are required to
15 adjudicate this matter?

16 Hearing none, Ms. Kerns, you can give
17 me your argument. For the convenience of the
18 Court, I'm going to move to one of your
19 petitions which is with the last three digits
20 878. That involves 4,466 mail-in ballots; is
21 that correct?

22 MS. KERNS: Let me just check, Your
23 Honor. What are the last four digits?

24 THE COURT: 0878.

25 MS. KERNS: Yes, that's right, Your

1 Honor.

2 THE COURT: So, I'd like you to
3 address your objections relating to 0878
4 petition number.

5 MS. KERNS: Your Honor, as we
6 discussed, we are here based on Section 3157 of
7 the code. Additionally, 3246 says clearly that
8 when the County Board meets to pre-canvass,
9 they shall examine the declaration on the
10 envelope of each ballot.

11 Additionally, Section 3146.6 states
12 that when an elector is filling out their
13 ballot, they shall mark the ballot, fold the
14 ballot, enclose it in an envelope, and then
15 place it in a second envelope. And I quote,
16 "The elector shall then fill out, date and sign
17 the declaration printed on such envelope." The
18 General Assembly specifically used the word
19 "shall." The elector shall then fill out, date
20 and sign the declaration on the envelope.

21 Section 3150 duplicates those
22 directions for mail-in ballots, where again it
23 says, "The elector shall then fill out, date
24 and sign the declaration printed on the
25 envelope."

1 The General Assembly was crystal
2 clear. It did not provide for any exceptions.
3 It did not merely suggest that the voter fill
4 out some of the declaration. It did not leave
5 any room for an interpretation other than the
6 plain meaning of the statute.

7 Right now, we are in a courtroom,
8 some of us virtually, at the old Traffic Court
9 building at 8th and Spring Garden. We are not
10 on the floor of the General Assembly. None of
11 us were elected by the people of this great
12 Commonwealth to change the law, and we're not
13 lobbying to change the law. We are addressing
14 an appeal of a decision of the Board of
15 Elections.

16 Counting ballots in violation of the
17 election code in Philadelphia under the
18 umbrella of liberal construction has much
19 broader implications than just these ballots.
20 If the Philadelphia Board of Elections is
21 permitted to pick and choose what provisions of
22 the election code they will enforce and which
23 they will not enforce, then voters in
24 Philadelphia are being treated differently than
25 voters in other counties of the Commonwealth.

1 While boards of elections have some
2 leeway regarding the conduct of elections, they
3 can't treat people differently. They cannot
4 treat voters differently. By using the word
5 "shall" in the election code, our General
6 Assembly decided with particularity how every
7 voter's absentee and mail-in ballot be treated.
8 If Philadelphia is permitted to ignore the
9 election code when it sees fit, then it is
10 treating Philadelphia voters under a completely
11 different standard than voters in other
12 counties where the Boards of Elections follow
13 their duties and law.

14 This disparate treatment of citizens
15 violates the very basic tenets of the
16 Constitution. And, the General Assembly
17 provided for an appeal right of these Board
18 decisions to check the process.

19 On Monday, a Board of Elections
20 employee spelled out his summary of what was
21 the matter with these 4,466 ballots. He said:

22 "This is where the voter affixed
23 their signature to the declaration envelope and
24 provided the date of signing. However, it is
25 missing the printed name and street address

1 specifically written in hand by the voter."

2 Remember, the General Assembly said
3 that the voter shall fill out the declaration.
4 There was no leeway in that statute that allows
5 the voter to not fill out that entire
6 declaration; therefore, there is no leeway for
7 the Board of Elections to pick and choose what
8 they're going to follow as far as the election
9 code and what they are not going to follow.

10 The General Assembly allowed this
11 absentee and mail-in voting, but long ago, our
12 courts have noted that absentee voting is a
13 privilege, and it's fraught with evils and the
14 potential for fraud. In that vein, the General
15 Assembly chose to implement these requirements
16 when voters fill out the envelopes. It is not
17 our job today to decide whether or not the
18 General Assembly's choice in mandating that
19 voters fill out these declarations, whether
20 that is sufficient to discourage fraud, or why
21 they did it, or whether their reasons were good
22 enough. That's not what we're here for today.
23 We are here to follow the election code, and
24 the election code could not be clearer on this
25 issue.

1 The petitioners are asking you, Your
2 Honor, to serve as a check on the Board of
3 Elections' decision, and the General Assembly
4 contemplated that by allowing this appeal
5 right.

6 So, on behalf of the petitioners, we
7 are requesting that the trial court here, the
8 Court of Common Pleas, uphold the law and
9 overturn the decision of the Board of Elections
10 because they were wrong. Those commissioners
11 were elected by the people of Philadelphia to
12 follow the election code, and for reasons I do
13 not understand, they chose not to on Monday.
14 By doing that, they are treating voters
15 differently in Philadelphia than in the rest of
16 the Commonwealth, and that is disparate
17 treatment, a violation of equal protection of
18 law and simply unfair.

19 So, I ask Your Honor that you
20 overturn their decision to count these votes.

21 THE COURT: Ms. Kerns, I'd like to
22 ask you a couple of follow-up questions from
23 your argument.

24 MS. KERNS: Sure.

25 THE COURT: You've argued that the

1 legislature has constrained the Court in
2 reviewing decisions of the election board, and
3 you haven't referenced Justice Todd's opinion
4 in *In re November*, nor Justice Baer's opinion
5 in the *Boockvar* case. Both of those direct the
6 Court on how to evaluate election challenges.

7 And lastly, the statute that you rely
8 upon, as you know, empowers the Court to
9 resolve objections based on fairness and
10 justice, and that is the articulated power that
11 you've agreed would guide this Court; is that
12 correct?

13 MS. KERNS: Well, with regard to your
14 first point as far as election challenges, this
15 isn't necessarily a challenge. This is an
16 appeal from a decision. The Board of Elections
17 made a decision to count ballots where the
18 declaration was not filled out in violation of
19 the statute. So, we are simply asking you to
20 review that decision.

21 Your second point with regard to
22 fairness, I think you used the words "fairness"
23 and "just," it would be absolutely unfair to
24 treat voters differently. We have statutes so
25 that we all can rely on them. It is simply not

1 fair to have a statute written in black and
2 white, printed and bound, distributed to
3 everybody, available on the internet that says
4 one thing, and then the Board of Elections, for
5 whatever reason, decides: You know what, we
6 don't think that all of that information is
7 needed on the declaration envelope. We don't
8 think that the General Assembly should have
9 required that this be filled out completely.

10 That is not fair. If the Board of
11 Elections, or basically any citizen, wants that
12 law changed, then vote for new people in the
13 General Assembly and have them change that law.
14 Have them write in that law not "shall," not
15 "shall," write "fill out what you want." But
16 don't have the General Assembly pass a statute
17 that says "shall fill out the declaration," and
18 then in the Convention Center a couple days
19 after the election decide, we're not going to
20 follow what the General Assembly said.

21 So, if you're talking about fairness,
22 the fair thing to do is that we can all rely on
23 the written election code. If the election
24 code says "shall fill out the declaration,"
25 require voters to fill out the declaration.

1 And anyone on this call or in this Commonwealth
2 who doesn't like it, talk to your General
3 Assembly person.

4 THE COURT: All right. Ms. Kerns,
5 again, I'm trying to focus questions that will
6 help me understand all of the parties'
7 arguments.

8 MS. KERNS: Okay.

9 THE COURT: Again, let me put it more
10 simply: Didn't Justice Todd, writing for a
11 unanimous court, outline the parameters of a
12 court reviewing an election matter and direct
13 us on how we are to consider the interpretation
14 of the code; isn't that correct?

15 MS. KERNS: Yes, Your Honor.

16 THE COURT: Similarly, Justice Bear,
17 in his majority opinion, also articulated the
18 basis in reviewing the election code. Both of
19 those are directly on point on the notion of
20 how the Court is to interpret the code to
21 facilitate the free and fair exercise of the
22 franchise. In this matter, we are considering
23 depriving, at least in this one petition, 4,600
24 eligible voters of their right to vote.

25 So I am asking you, consistent with

1 your understanding that -- irrespective of your
2 philosophic arguments about the balance of
3 power in the legislature, this is what the
4 Supreme Court of Pennsylvania has told us, in
5 reviewing election disputes, how we are to
6 interpret and apply the code; is that correct?

7 MS. KERNS: Well, I don't agree with
8 you that the Supreme Court issued an order
9 telling anybody not to follow the election
10 code, and I don't think that any of my
11 arguments are philosophical. They're legal.
12 There's no Supreme Court decision that says
13 don't follow the election code.

14 So, my answer to you would be that
15 this Court should look at the plain meaning of
16 the code and follow the statute because the
17 Board of Elections did not.

18 THE COURT: All right. Who is going
19 to be the lead counsel for -- Ms. Hangle, are
20 you going to be lead counsel for the
21 respondent?

22 MS. HANGLEY: Yes, I am, Your Honor.

23 THE COURT: You may proceed.

24 MS. HANGLEY: Your Honor, category 7,
25 as you pointed out, is almost 4,500

1 Pennsylvania voters who did not include their
2 address or their printed name. Ms. Kerns talks
3 about the language of the statute, following
4 the statute. You can read the statute cover to
5 cover. You will not find any requirement that
6 a voter put their address on the declaration or
7 that they print their name on the declaration,
8 and no requirement even that the declaration
9 contains those materials. The legislature did
10 not see fit to prescribe to tell voters that
11 they had to include their address or their
12 printed name. That is an administrative
13 practice by the Secretary of State that could
14 change.

15 So, given that there is no mention of
16 addresses or printed names in the code, the
17 argument that somehow it is disrespectful to
18 the legislature to count ballots that don't
19 have that information, that turns the law on
20 its head. It would be disrespectful to the
21 legislature to throw out those ballots. The
22 legislature has provided for mail-in and
23 absentee voting.

24 Ms. Kerns talks about the evils of
25 mail-in and absentee voting. That is an

1 opinion, but it is not what the legislature has
2 chosen to do. The legislature has chosen to
3 expand or make the franchise easier, to protect
4 the electorate to allow them to vote by mail
5 and vote by absentee ballot. Certainly it's
6 not the place of the Board of Elections, or
7 this Court, to start putting limitations on
8 that that don't appear in the code.

9 Your Honor's correct that both the
10 legislature and the courts have been very clear
11 on how you interpret elections laws, and you
12 interpret them in favor of the franchise,
13 except when issues arise like secrecy
14 envelopes, as the Pennsylvania Supreme Court
15 has found, like third party ballot delivery,
16 except when to view the law in favor of the
17 franchise would undercut important critical
18 issues having to do with fraud and protecting
19 the security of the election.

20 Having a handwritten address on the
21 back of a declaration envelope does not serve
22 that purpose. Having a handwritten name does
23 not serve that purpose. There are multiple
24 fraud prevention and security provisions in the
25 code that do not include those two things.

1 Just a word on the equal protection
2 argument that Ms. Kerns seems to be making.
3 That's not before this Court. There's no
4 evidence of what any other county in this
5 Commonwealth does, and certainly it is not Your
6 Honor's job to disenfranchise Philadelphians
7 based on unsupported statements that other
8 counties are doing the same thing.

9 THE COURT: Ms. Kerns, just as a
10 follow-up, is there any dispute that these
11 mail-in or absentee ballots were received in a
12 timely fashion, that is, on or before election
13 day?

14 MS. KERNS: No.

15 THE COURT: No dispute. So they were
16 received timely by the County Board of
17 Elections; is that right?

18 MS. KERNS: Yes.

19 THE COURT: We had a discussion, your
20 argument -- can you direct me where the phrase
21 "date" is statutorily described in a "shall"
22 language? I didn't see the word "date." Did I
23 miss it?

24 MS. KERNS: Are you addressing me?

25 THE COURT: Yes, ma'am.

1 MS. KERNS: Oh, sorry. In 3146.6(a)
2 it says, "The elector shall then fill out, date
3 and sign the declaration printed on such
4 envelope."

5 3150.16(a), which addresses mail-in
6 ballots, and the other statute I quoted,
7 3146.6(a), addresses absentee.

8 So 3150.16, which addresses mail-in
9 ballot has the identical language: "The
10 elector shall then fill out, date and sign the
11 declaration printed on such envelope."

12 So, to the extent anyone is saying
13 that it doesn't -- that the election code
14 doesn't tell you to fill out the declaration,
15 the words are right there: "Fill out, date and
16 sign," not "write on some of it but not all of
17 it." It says "fill out, date and sign."

18 THE COURT: Just again, this may be
19 consistent throughout the arguments on these
20 petitions, the absentee or mail-in ballot
21 itself has on its face the address of the
22 elector; isn't that correct?

23 MS. KERNS: So, that's like a
24 tracking measure. There's a sticker on it that
25 I think comes out of the SURE system with that

1 information on it, yes.

2 THE COURT: Okay. I am visualizing
3 at this point the Secretary of the Commonwealth
4 has provided, as I recall, a checklist at the
5 top of the envelope. What does the checklist
6 direct the voter to do in preparing the ballot
7 before they place it in the secrecy envelope?

8 MS. KERNS: I don't have that in
9 front of me, so I can't tell you for sure. If
10 I recall, it says to fill it out, but I would
11 defer to maybe Mr. Field. He might have that
12 in front of him. I filled out my mail-in
13 ballot and returned it, so I don't have it.

14 MS. HANGLEY: Your Honor, if I may?

15 THE COURT: Sure, Ms. Hangley.

16 MS. HANGLEY: The brief that we
17 submitted this morning, on Page 3, has a copy
18 of the back of the ballot envelope. It does
19 have that checklist. I don't know whether this
20 checklist is identical in every county, but in
21 Philadelphia it says: "Did you sign the
22 voter's declaration in your own handwriting?
23 Did you put the ballot inside the secrecy
24 envelope and place it in here?"

25 We agree, the Board of Elections

1 agrees that those are the only two mandatory
2 provisions relating to this declaration. The
3 voter has to sign it, and the voter has to
4 include the secrecy envelope.

5 THE COURT: When we talk about the
6 signature, it's in support of an oath; is that
7 correct?

8 MS. HANGLEY: That's correct. It's
9 not formally an oath, Your Honor, it's a
10 declaration; but that is the purpose of the
11 signature, to commit the voter to the
12 statements in the declaration.

13 THE COURT: The petition also appears
14 to repeat the same arguments, but I just want
15 to make sure I haven't missed anything. You
16 have bolded and highlighted an argument
17 relating to voters who may have passed away.
18 Why is that in this petition? That has nothing
19 to do with this case, does it?

20 MS. KERNS: No. No, Your Honor.

21 THE COURT: Okay. Then there's a
22 discussion of naked ballots, as we've come to
23 describe them. That has nothing to do with
24 this case as well, right?

25 MS. KERNS: No. No, Your Honor,

1 because they voted not to count the naked
2 ballots.

3 THE COURT: I'm just asking why
4 that's in this petition and it's not relevant.

5 MS. KERNS: I had prepared it,
6 because of the strict timelines, not knowing
7 how the Board of Elections would rule, and I
8 think I just neglected to take it out.

9 THE COURT: I asked earlier, was
10 there a reason, as a matter of law, that you
11 didn't include Justice Todd's opinion in your
12 briefing, because that was well before this was
13 filed?

14 MS. KERNS: Right. Well, from my
15 perspective, Justice Todd's opinion directed --
16 was focused on the comparison of signatures,
17 and that was not at issue here. None of us
18 were challenging -- none of these ballots were
19 counted or not counted based on a comparison of
20 signatures. That was not at issue here.

21 THE COURT: So, there is no dispute
22 that this is the elector who executed this
23 ballot and that sent it in to the County Board
24 of Elections, right? There's no genuine
25 dispute of fact --

1 MS. KERNS: There's no way I would
2 know that, but that I'm not challenging -- or,
3 that is not the basis of my appeal. There's no
4 way I would know whether or not the elector
5 filled this out or didn't. So, that is not the
6 basis of my appeal.

7 THE COURT: I didn't ask you that.
8 I'm asking you, is that a matter of --

9 MS. KERNS: The basis of my appeal
10 is --

11 THE COURT: Ms. Kerns.

12 MS. KERNS: Yes.

13 THE COURT: Is that a matter in
14 dispute, that this is the elector who executed
15 this declaration and mailed it to the County
16 Board of Elections in a timely fashion, any
17 dispute of that?

18 MS. KERNS: I did not raise that
19 issue, no.

20 THE COURT: I'm asking it directly:
21 Is there any dispute, even if you didn't raise
22 it?

23 MS. KERNS: Well, Your Honor, our
24 position is that when these declarations are
25 not filled out completely, it does raise an

1 issue of whether or not the voter actually did
2 it. But that is not -- the basis of my appeal
3 is not whether or not it was the actual voter
4 because I have no evidence of that.

5 THE COURT: Right, and you didn't
6 raise it as an issue. This is not a serious
7 dispute before this Court, that this is the
8 elector attempting to have their ballot
9 counted, right?

10 MS. KERNS: Your question is, is this
11 the elector attempting to have their ballot
12 counted?

13 THE COURT: There is no serious --

14 MS. KERNS: Yes.

15 THE COURT: -- dispute that this is
16 the elector who has signed and sent a ballot in
17 to be counted to the County Board of Elections;
18 is that correct?

19 MS. KERNS: This is a ballot that the
20 -- Your Honor, I don't know. I cannot say
21 whether or not the electors who signed these
22 were actually -- it was actually their ballot.
23 That was not the basis of my appeal. So, I'm
24 not disputing whether or not these 4,466
25 ballots were each signed by the electors whose

1 name were on it.

2 THE COURT: Okay, fine.

3 MS. KERNS: I can't dispute that. I
4 don't have that evidence.

5 THE COURT: You just don't dispute
6 it. I got it, thank you.

7 Ms. Hangle, is there anything more
8 on this group that we've been discussing and
9 the statutory interpretation of "mandatory"
10 versus "directory?"

11 MS. HANGLEY: Your Honor, there's
12 certainly more to say on the statutory
13 interpretation of "directory" versus
14 "mandatory." On this particular group of
15 ballots, Your Honor never needs to reach that
16 point. There is no "shall" relating to
17 addresses or to a voter's printed name. There
18 is nothing in the code that requires that.

19 The argument, as I understand it,
20 seems to be that since the code says the voter
21 has to fill out the declaration, that there
22 must be absolute technical perfection in every
23 aspect of that. But, we know from Supreme
24 Court precedent, and we know from the rest of
25 the statute, that what that means is the voter

1 has to sign that declaration. The signature is
2 what is important, and any sort of procedural
3 policy that the Secretary has to put in place
4 cannot be a basis for disenfranchising voters
5 who, there's no dispute, are real voters who
6 really did vote, who really want their votes to
7 be counted, and should not be punished for
8 certain failure to dot all of the i's and cross
9 all of the t's.

10 THE COURT: In the event that the
11 Secretary has been less than clear in their
12 instructions, how is the Court required to
13 apply the Supreme Court-articulated basis of
14 law in maximizing a franchise if the Secretary
15 hasn't made a more expansive checklist, or some
16 other device, to make sure that the voter, the
17 elector, is aware of what the statutory
18 requirement is that Ms. Kerns is making?

19 MS. HANGLEY: Well, certainly the
20 Secretary and the Boards of Elections should
21 make every effort to help voters understand.
22 And if voters do not understand, they should
23 not be punished for that lack of understanding.
24 I think the more -- before we even get to that,
25 especially with this category of 4,500 ballots,

1 is that there is no law that anyone has to
2 teach to the voters about how complete an
3 address has to be or whether an address has to
4 be on the declarations. It's simply not a
5 legal basis for tossing out these votes.

6 But certainly, Your Honor, in your
7 jurisdiction to hear appeals of election
8 matters, and in the Court's jurisdiction to
9 interpret the election code, again, wherever it
10 does not directly compete with another goal of
11 the code, Your Honor should weigh in on the
12 side of the voter and on the side of counting
13 those votes.

14 MS. KERNS: May I respond?

15 THE COURT: Briefly, yes.

16 MS. KERNS: I just want to point out
17 again, back to the election code, the sentence
18 says, "The elector shall then fill out," comma,
19 "date and sign." So, the General Assembly
20 directed three things: fill out, date and sign.

21 In looking at the envelope so
22 helpfully supplied, fill out -- if you're being
23 directed to date and sign it, then the "fill
24 out" refers to the name and the address. The
25 election code was clear about what the voter is

1 to do.

2 As far as the reminder at the top,
3 for whatever reason, there doesn't also appear
4 to be a reminder to date it, but that's not
5 controlling. What's controlling is that the
6 election code says "fill out," and the only
7 part that would apply to that is name and
8 address. "Date" is a separate category; write
9 the date. And then sign the declaration.

10 So, to the extent anyone says that
11 completing this envelope is not in the election
12 code, I would submit that they're not reading
13 that sentence, and it's clear.

14 THE COURT: Well, again, what do you
15 do with a responsible elector who goes through
16 the entire process and has this ballot
17 delivered to the County Board of Elections on
18 or before election day and has faithfully
19 followed the checklist, for example, provided
20 by the Secretary of the Commonwealth? How
21 would that faithful voter, relying upon that
22 checklist, be disenfranchised from their right
23 to vote?

24 You understand that this relies upon
25 not only the Supreme Court's guidance and

1 opinions, but also the statute, which says
2 "fair and just." In this case, I'm trying to
3 reach what is fair and just for the elector who
4 has expressed their intention to participate in
5 this election.

6 MS. KERNS: Your Honor, fairness and
7 justice requires treating all voters equally.
8 So, if we do not follow what the statute says
9 and count some votes where the voters complied
10 and some where they didn't, we're not treating
11 all voters equally.

12 I think that people sometimes try to
13 do a lot of things and, unfortunately, don't
14 manage to complete it. I mean, I would say
15 that even people who go into the voting booth
16 might try to vote and do it incorrectly. I
17 remember myself once, I tried to vote and the
18 machine got stuck. You know, it was all chaos
19 in my polling place, and we couldn't tell
20 whether or not my vote was recorded, but I
21 certainly tried.

22 Same if you go into the polling
23 place, you try to push the button, and maybe
24 you pushed the wrong button and then forget,
25 not realize it, and cast your vote.

1 Yes, sometimes voters will try and
2 maybe, despite their best efforts, not complete
3 the act, but that's not what's at issue here.
4 If that's that much of an issue, then maybe the
5 guidance should be better, the education should
6 be better, the statue should be changed, the
7 procedure should be changed. But, that's not
8 what we're talking about here. We're talking
9 about the statute that we have and the
10 materials that were supplied to the voter.

11 Nothing on this envelope says "don't
12 bother filling it out." Nothing on this
13 envelope says "it's up to your discretion." It
14 is an envelope with clear lines of what exactly
15 to do printed in two different languages. I
16 mean, I suppose that we can send a Board of
17 Elections person to everyone's house and go
18 over it with them by hand and say, this is what
19 you do, but that's not how we do this.

20 The government sends out these
21 envelopes and expects the voters to comply. To
22 the extent that voters don't comply, it's not
23 necessarily unfair if those ballots are
24 discarded because those ballots don't follow
25 the law. That happens in all walks of life,

1 and that is not a reason to ignore the election
2 code.

3 Perhaps, the General Assembly may
4 look at this transcript some day and decide to
5 alter the election code when they realize that
6 there may be some issues, but that's not what's
7 here today. What's here today is a sentence
8 that everyone learns in their first year of law
9 school that "shall means shall," and there's
10 three things that the voter may do -- must do:
11 Fill out, separately sign, separately date.
12 Those are the three things.

13 THE COURT: Fill out, which is not a
14 defined term; sign, pretty clear on what "sign"
15 means; and dating; is that right? Those are
16 the three legs of the stool?

17 MS. KERNS: That's what the statute
18 says, and I would disagree that "fill out"
19 isn't clear.

20 THE COURT: Okay. If it isn't
21 clear --

22 MS. KERNS: If you look at the plain
23 meaning of the statute --

24 THE COURT: Hold on a second, one at
25 a time. It's hard with this Zoom technology, I

1 know.

2 MS. KERNS: I know. I'm having a
3 little trouble.

4 THE COURT: Okay.

5 I just want to close this up. So,
6 you concede that it is not clear, and in the
7 case where a statutory prescription is not
8 clear when it comes to the franchise, isn't the
9 court directed to rule in favor of a vote being
10 counted?

11 MS. KERNS: Well, Your Honor, you'd
12 have to decide that it's not clear, and I
13 disagree that that's not clear.

14 THE COURT: I thought's what you just
15 said.

16 MS. KERNS: No.

17 THE COURT: Okay.

18 MS. KERNS: I said it's very clear.
19 Fill out, date and sign. I never said that
20 nothing is clear. I said that -- you're
21 referring to the reminders at the top of the
22 envelope, which really have nothing to do with
23 it.

24 THE COURT: Nothing to do with what
25 the Secretary of the Commonwealth is directing

1 a voter to do?

2 MS. KERNS: The reminder at the top

3 --

4 THE COURT: I don't want to belabor
5 this, but I'm a little taken aback by that. It
6 does have everything to do with the elector
7 relying upon that direction to have their vote
8 counted.

9 MS. KERNS: That doesn't say, "Voter,
10 only sign your name and date it." That's not
11 what it says. It just says "did you." And
12 there's nothing about that that says it's an
13 all-inclusive list. I don't know the
14 Secretary's reasoning for putting that wording
15 on there. But, there's nothing on there that
16 says, "Voter, only sign" or "only date" or
17 "don't worry about filling out the
18 declaration."

19 MR. GORDON: Your Honor, may I be
20 heard briefly on this point?

21 THE COURT: Sure. I was about to
22 ask.

23 MR. GORDON: Thank you, Your Honor.

24 A couple of points. Your Honor
25 referenced that these are responsible electors

1 who are trying to do everything right to vote
2 and vote in the midst of a pandemic. I think
3 it's worth mentioning, as a factual matter,
4 that many of these voters were undoubtedly
5 voting for the first time via mail. These were
6 voters who had not -- many of them undoubtedly
7 did not have prior experience with the
8 vote-by-mail process. I think it's important
9 to keep that in mind and, again, to keep in
10 mind the questions that Your Honor asked of
11 counsel indicating that -- and I believe she
12 agreed to all of them -- these votes, these
13 ballots, all arrived on time in the proper
14 place. They were all signed. There is no
15 dispute as to their authenticity or that the
16 ballot was cast by the person who signed the
17 envelope. No hint of fraud, mischief, undue
18 influence, impropriety any of that.

19 All we're dealing with are these
20 technical issues, and petitioners reference,
21 and Ms. Kerns references repeatedly, the
22 language of the election code and mentions that
23 the General Assembly might decide to alter
24 that. I would submit that counsel here is
25 trying to rewrite the election code by adding

1 to the election code additional words that are
2 not there.

3 The legislature knew how to require
4 an address on a declaration when they wanted
5 to. In the same section, 3146.6(a) subsection
6 3, the legislature specified that a person
7 witnessing a signature must include their
8 address. That's right in the statute. There
9 is no similar language in 3146.6(a), the
10 provision that applies to a person filling out
11 their own declaration.

12 Counsel would also read into the
13 election code and into this section of the
14 election code a consequence for any failure to
15 comply with these particular provisions. That
16 is not there in the election code. Again, the
17 legislature knew how to write in the
18 consequence, and they've done that in Section
19 3146.84, sub 2. The legislature says: "If any
20 of the inner envelopes contain any text, mark
21 or symbol which reveals the identity of the
22 elector, the elector's political affiliation or
23 the elector's candidate preference, the
24 envelopes and the ballots contained therein
25 shall be set aside and declared void."

1 That language "shall be set aside and
2 declared void" appears nowhere in the section
3 that counsel is referencing in 3146.6.

4 Similarly, in 3146.8, the legislature
5 says that if an elector has passed away, the
6 ballot shall be set aside and declared void.

7 So, it's very clear that when the
8 legislature wanted to prescribe situations in
9 which a ballot must be set aside and declared
10 void, they said so in the code. There is no
11 similar language at issue here with respect to
12 filling out, signing or dating the election,
13 but petitioners would have the Court read into
14 that section, those words "set aside and
15 declared void."

16 So actually, the plain language in
17 the election code here does not support
18 petitioners' position.

19 The other points I wanted to make
20 briefly, Your Honor, is that the Board, by
21 code, is afforded discretion to make a decision
22 about the sufficiency of the declaration. That
23 is what the Board has done here, and the Board
24 did not accept all ballot envelopes at issue
25 here. The Board carefully went through the

1 nine different categories. If there was a
2 signature missing, if the declaration was
3 blank, if there was no secrecy envelope, the
4 Board voted, we will not accept those.

5 So, the Board exercised its
6 discretion, and the question before the Court
7 is whether there was an abuse of discretion to
8 accept the ballots that were timely received
9 and signed and contained only these minor
10 failures to complete everything on the
11 envelope.

12 Your Honor saw and referenced the
13 copy of the outer envelope that was helpfully
14 excerpted into the brief by the county. It's
15 worth repeating, I think, that as that
16 illustrates, the information that petitioners
17 are pointing to as missing from these ballots,
18 even though it wasn't handwritten on these
19 ballots in all cases, it's present -- I'm
20 sorry, these ballot envelopes. It is present
21 on the outside of these ballot envelopes. The
22 name and date is printed there, and there's
23 also the barcode that can be scanned and linked
24 directly to the SURE system.

25 So the Board here, upon reviewing

1 these envelopes, reviewing the information,
2 correctly exercised its discretion in
3 determining whether or not that information was
4 sufficient. There's no abuse of discretion
5 here, and the Board's decision should be
6 upheld, respectfully, Your Honor.

7 THE COURT: Do I need to hear from
8 anyone else on this category 7?

9 MS. KERNS: May I just respond
10 briefly on that last point?

11 THE COURT: Sure.

12 MS. KERNS: In the statute where it
13 indicates, in 3246.8(g.3), where the Board must
14 be satisfied that the declaration is
15 sufficient, in determining the sufficiency, the
16 Board can't just decide on their own what's
17 sufficient or not. They have to, they must
18 refer to the statute. In deciding sufficiency,
19 they must refer back to the directions in the
20 statute that the voter must fill out, date and
21 sign.

22 THE COURT: Ms. Kerns, are you
23 reading from a statute, or is this an argument
24 you're making of what --

25 MS. KERNS: I'm read from the

1 statute.

2 THE COURT: Of what the Board's
3 discretion is?

4 MS. KERNS: Well, the statute doesn't
5 have the word "discretion." The statute simply
6 states -- and I'm reading 3246.8(g), as in --
7 "G" as in God, 3: "If the County Board has
8 verified the proof of identification as
9 required under this act and is satisfied that
10 the declaration is sufficient," and then it
11 goes on. But that phrase "is satisfied that
12 the declaration is sufficient" doesn't say
13 anything about in their discretion or what they
14 think. It should be referred back to the
15 statute as to what the elector is directed to
16 do, which is fill out, date and sign.

17 THE COURT: But the statute language
18 says the Board determines whether or not it's
19 sufficient; isn't that correct?

20 MS. KERNS: Yes.

21 THE COURT: That would be --

22 MS. KERNS: In determining
23 sufficiency, the Board must -- can't ignore the
24 election code and what the election code
25 required with regard to these ballots.

1 THE COURT: All right. Anyone else?

2 MS. HANGLEY: Your Honor, Ms. Kerns
3 has been talking about the provision "fill out,
4 date and sign," so I think it might be useful,
5 even though we were just talking about category
6 7, if I could address the difference between
7 those three aspects of the statute and
8 mandatory versus directory.

9 THE COURT: Good point, because I did
10 want to get to that. This preliminary
11 discussion may apply to all of the different
12 categories of alleged defects that the
13 petitioner has asserted on objection.

14 So, can you address which, if any, of
15 these pieces of information are insignificant
16 or something that the Board, in its discretion,
17 could conclude that the affidavit has been
18 sufficiently completed for the vote to count.

19 MS. HANGLEY: Yes, Your Honor. I'll
20 start with the last, sign.

21 We believe the courts have directed
22 that a signature is necessary on those
23 envelopes. Of all of the ballots that are
24 being discussed today, every one of those has a
25 signature. And the Board rejected other

1 ballots, many of them, unfortunately, that were
2 not signed. So, I don't think Ms. Kerns and
3 the City have any dispute over the signature
4 requirement.

5 Now, fill in, the first of that trio,
6 that is, as Your Honor pointed out, it's an
7 ambiguous, at best, provision. We believe it
8 means sign, put the signature, the biggest and
9 most prominent piece of information, on that
10 declaration. There can be no argument that the
11 legislature, in drafting a statute with the
12 words "fill out" meant that voters could be
13 disenfranchised really at the whim of whatever
14 an election administrator puts into the
15 declaration form. That is not a standard that
16 we apply in most aspects of civil society.
17 People do their best to provide the information
18 they need, and they often need some leeway.

19 In the election code, it's doubly,
20 triply true that the first principle of the
21 election code is that it must be construed
22 liberally, and that is the Ross case, if I can
23 find my quote: "The election code must be
24 liberally construed so as not to deprive the
25 voters of their right to elect a candidate of

1 their choice." It's important, it's a critical
2 right, and to take it away based on sloppy form
3 filling out on non-mandatory provisions would
4 be -- is the opposite of what this Court is
5 mandated to do in interpreting the code.

6 So, the last category in that trio is
7 "date." And the code does say, "The voter
8 shall date the form." Now, the word "shall"
9 does not put handcuffs on this Court. The
10 Supreme Court, and other courts of this
11 Commonwealth, have repeatedly held that. There
12 are provisions in this very sentence that the
13 courts have held that the statute says "shall,"
14 but they are not mandatory provisions.

15 The statute begins with: "The
16 mail-in elector shall, in secret, mark the
17 ballot only in black lead pencil, indelible
18 pencil, or blue, black or blue-black ink, in
19 fountain pen or ball point pen."

20 The courts held long ago in the --
21 I'll get the pronunciation wrong, but the
22 *Weiskerger* case from the 1970s, using green
23 ink, despite what the statute says, using green
24 ink does not disenfranchise a voter. Same
25 thing for if someone were to cast a write-in

1 vote for someone who already appears on the
2 ballot. The statute says what the voter should
3 do, but a voter's failure to do that is not a
4 basis to disenfranchise them.

5 The only exception to that are, as
6 we've seen from the Supreme Court in various
7 cases, provisions that the legislature has made
8 clear are critical to preventing fraud or to
9 preventing subversion of an election.

10 So, we saw that very recently with
11 the so-called naked ballots ruling, where the
12 court looked at the word "shall" and then went
13 elsewhere in the statute and found provisions
14 stating that ballots with secrecy envelopes
15 with writing on them that identified the voter,
16 that those should be discarded, and concluded
17 from that that the legislature intended that
18 ballots without secrecy envelopes should also
19 be discarded. The court didn't rely just on
20 the use of the word "shall." It dug much more
21 deeply into the meaning for that provision, why
22 it was there.

23 The third party ballot delivery is
24 the same kind of analysis. The courts have
25 held that that is a mandatory provision. But

1 as for a date on the envelope, we could search
2 the code, and I know that petitioners have, and
3 have presented no reason to believe that the
4 voter, whether the voter writes the date in
5 that space or not, is a fraud-prevention matter
6 or is in any way important to protecting the
7 integrity of the election. Because after all,
8 even if the voter doesn't handwrite the date,
9 if the voter puts it in the mail, a date is
10 applied, a postmark is applied; if the voter
11 delivers it to the Board of Elections, they put
12 a date stamp on it. And it's clear just from
13 reality when the voter filled out this
14 declaration. It has to have been sometime
15 between when the ballots went out the door,
16 which was, at the earlier, end of September,
17 and when they came back, which was, at the
18 latest, November 3rd or November 6th, depending
19 on the outcome of the cases.

20 We presented, in our brief, case law
21 showing that on declarations in general, when
22 dates are required, the lack of date is not a
23 problem if other circumstances show when the
24 ballot was filled out.

25 So here, a date, it serves no purpose

1 for election integrity. There's no question
2 here that these ballots arrived on time.
3 There's no argument that having a date, or not
4 having a date, tells us anything about whether
5 this is a legitimate vote where the voter is
6 who they say they are.

7 So on that third aspect, and I
8 believe this covers the first three or four
9 categories of the petition, the word "shall" is
10 there, but the word "shall" does not mean that
11 these votes get discarded.

12 THE COURT: Anything, Ms. Kerns, on
13 that?

14 MS. KERNS: Yes, Your Honor. There
15 appears to be a focus on the voters who
16 apparently tried and did not complete this
17 envelope, and there appears to be talk about
18 how it's not fair because they did try, and if
19 they tried, well, then it would be a shame not
20 to count their vote. But, didn't the Board of
21 Elections, on Monday, decide not to count some
22 votes where the voters tried? I mean, all
23 those voters who did not use the secrecy
24 envelope --

25 THE COURT: Ms. Kerns --

1 MS. KERNS: -- they tried and they
2 failed.

3 THE COURT: Wait a minute.
4 Ms. Kerns, that is the law. The Supreme Court
5 has ruled specifically on the naked ballot
6 issue. That's the law, right?

7 MS. KERNS: Well, so is what is in
8 the statute.

9 THE COURT: No, stop. This is by
10 ruling of the Supreme Court of Pennsylvania
11 specifically addressing an interpretation of
12 the election code. They ruled that a secrecy
13 ballot that is not cloaked will not be counted.
14 That's the law, so the Board had no other
15 alternative. It wasn't an evaluative process;
16 is that right?

17 MS. KERNS: But the Board doesn't
18 have an alternative with regard to a statute.
19 We don't wait until the Supreme Court opines to
20 decide that the law that the General Assembly
21 has written should be followed. Some of the
22 voters didn't fill it out, or forgot to sign
23 it, or the information appeared different. I
24 mean, those voters tried and they didn't
25 complete it, just like the voters at issue

1 here.

2 THE COURT: Let me ask if this
3 satisfies everyone that we've covered the
4 universe of these five petition disputes, that
5 petitioner suggests there is absolutely no
6 circumstance that any one of these absences
7 from the envelope deprives the person of their
8 vote. That's the petitioners' position.

9 Have we addressed all of the legal
10 issues and the controlling law of Pennsylvania
11 on how the election code is to be interpreted
12 and applied?

13 Let me ask you a last and final
14 question, and it's interrelated: What
15 consideration does the court give to the
16 thousands of electors who are unaware that the
17 petitioner is seeking to invalidate their vote,
18 number one?

19 And a subset of that is: Aren't
20 there a whole array of candidates --
21 Republican, Democrat, whatever -- who would
22 have been the beneficiary of this elector's
23 vote? They're being deprived of those votes as
24 well.

25 So, do I consider those circumstances

1 in effectuating the fullest measure of the
2 right to vote?

3 Ms. Kerns.

4 MS. KERNS: Yes. Your Honor, if you
5 look at the statute, it's clear that the Board
6 of Elections announces a meeting with regard to
7 what they're going to do at the meeting. That
8 was a public announcement on their website.
9 Everyone had the opportunity to appear:
10 candidates, voters, whoever wanted to appear.
11 Those who appeared on Monday appeared, and
12 anyone who wanted to challenge a Board of
13 Elections' decision had the opportunity to do
14 so, and they had two days to do so.

15 THE COURT: Ms. Kerns, how would they
16 know that their vote is going to be taken away
17 from them? How would they know this? Don't
18 they have the right to rely upon following the
19 instructions on the ballot and sending it in on
20 time for their vote to be counted?

21 MS. KERNS: Absolutely. You're
22 right, Your Honor. You're exactly on point.
23 The voters can rely on following the
24 instructions and sending their ballot in for it
25 to be counted, and these voters did not because

1 they left blanks on their declarations. So,
2 you are right in that they can rely on that
3 that if they complete it, complete the form and
4 send it in, their vote would be counted. And
5 if they did not, the code allows for this
6 Sunshine meeting and two-day appellate process.
7 Everything was open and public and above board,
8 and the petitioners followed every procedure
9 that they were supposed to follow.

10 THE COURT: Wait a minute. I
11 compliment the commissioners and the public
12 officials in discharging their duties in having
13 public meetings and discussing a decision, but
14 we have thousands of voters who are unaware
15 that your petition is seeking to invalidate
16 their attempts to vote in this election,
17 thousands. They don't know they're being
18 disenfranchised or risk disenfranchisement.

19 Is that fair or just to the voter?

20 MS. KERNS: Judge, there are many
21 votes that were disqualified, not just the ones
22 that we're seeking to overturn from the Board
23 of Elections. By that argument, the Board then
24 should have given the voters in categories 1,
25 2, 8 and 9 the opportunity to be heard on that

1 issue, and they did not. That's not what is
2 required by the statute.

3 THE COURT: No. You, the petitioner,
4 are seeking the disenfranchisement, correct?
5 The thousands of voters, the petitioner is
6 seeking to disenfranchise the voters for
7 whatever reasons. They are unaware that this
8 is happening, their particular vote is going to
9 be removed. They don't know.

10 MS. KERNS: Your Honor,
11 "disenfranchise," as a matter of a dictionary
12 definition, is to prevent people from voting.
13 Neither of my clients prevented anyone from
14 exercising their right to vote. So, I do not
15 think that the use of the term
16 "disenfranchisement" is accurate here.

17 THE COURT: Well, should I correct it
18 to say "the exercise of the franchise?" Would
19 that be a more accurate description: You are
20 trying to invalidate the exercise of the
21 franchise?

22 MS. KERNS: No. I am, on behalf of
23 my clients, assuring that every eligible vote
24 and vote that was properly cast is counted, and
25 these votes were not properly cast. Your

1 Honor, the votes at issue here, categories 3,
2 4, 5, 6, 7, these are not the only votes that
3 voters attempted to vote in this election that
4 may not be counted. There was a lot of issues
5 with a lot of ballots.

6 THE COURT: But none of those did
7 you, the petitioner, challenge. I'm talking
8 about what your candidate has done. What your
9 candidate, or your client, has done is
10 challenge these particular voters. I'm not
11 talking about the --

12 MS. KERNS: I'm appealing a Board of
13 Elections decision, yes.

14 THE COURT: Anything else anyone?

15 MS. HANGLEY: Yes, Your Honor.

16 You pointed out very fairly and
17 succinctly the consequences of what the
18 petitioners are asking for today. I would
19 disagree with Ms. Kerns about whether this is
20 disenfranchisement. Of course there are rules
21 and voters have to take certain steps to make
22 sure their votes get counted, but what you're
23 being asked to do today is throw up more
24 roadblocks to do something the statute does not
25 require, make it more difficult for voters to

1 vote, put up more hoops for them to jump
2 through. Many, many people will not be able,
3 or will not know, or will not be able to meet
4 all of these picky and technical requirements
5 that the petitioners are asking you to impose.

6 So, Your Honor, that is
7 disenfranchisement through a court proceeding.

8 You pointed out the harm that ruling
9 in favor of the petitioners could do to the
10 voters and to the parties. I would add to
11 that. As everyone's aware, we are trying to
12 count our votes and certify the results of this
13 election. To the extent that the purpose here
14 is delay, that is another independent harm to
15 really the whole county and the whole
16 Commonwealth.

17 I would ask Your Honor to reject this
18 new interpretation of the election code, to
19 reject what Philadelphia has been doing very
20 publicly for many years in examining these
21 declarations and counting or not counting votes
22 according to the criteria that was laid out. I
23 ask you to reject the petition.

24 THE COURT: The Court is sensitive to
25 the time and the canvass of the votes and the

1 looming certification deadline. We are
2 troubled, as you can understand, any time an
3 elector's vote may be abrogated for any reason.

4 I compliment counsel on the very
5 thoughtful and informative arguments, but I do
6 need to consider this. We have the brief that
7 has been submitted by the Board, by the
8 intervenors, and by the face of the petition.
9 Is there anything else that the Court should
10 know before we conclude this hearing to
11 deliberate?

12 I can't say -- I have to be right,
13 not fast, in my deliberations and my ruling.
14 These are serious matters. Thousands and
15 thousands of voters are at risk. I have to say
16 that I want to be thoughtful about this, as
17 you would expect, apply the law correctly. So,
18 I don't know if I can recall everyone today for
19 this afternoon, because your work product has
20 been very impressive and deserves good
21 attention from me.

22 Having said that, Ms. Kerns, you look
23 like you're ready to say something.

24 MS. KERNS: I just want to briefly
25 note that with regard to counsel's allegation

1 of delay, the Board met on Monday and these
2 petitioners, my clients, filed their appeal
3 within the two-day statutory requirement. So,
4 we cannot be accused of delaying anything.

5 THE COURT: Ms. Kerns, I did not say
6 that your petition was either untimely or for
7 the purposes of delay. As a matter of fact, I
8 think the Court received this petition at
9 eleven o'clock on Tuesday night, and then you
10 have to recognize that we promptly moved to
11 schedule this hearing and dispose of these
12 objections in a timely fashion. However, we
13 cannot ignore as people what we know as lawyers
14 as well in that this is a very time-sensitive
15 process, and that hopefully my adjudication
16 will satisfy all. If not, other courts may
17 have a say, but we really do have to respect
18 the urgency of the moment.

19 MS. KERNS: Right. Yes, Your Honor.
20 I just wanted to make clear because I was
21 responding to Ms. Hangle, as far as the
22 accusations of disenfranchisement, if these
23 votes -- if the Board of Elections' decision is
24 overturned and these votes aren't counted and
25 this is called disenfranchisement, wouldn't the

1 Supreme Court opinion saying don't count the
2 naked ballots be called disenfranchisement? I
3 mean, there's really no difference.

4 So, if this is called
5 disenfranchisement, then the Supreme Court
6 disenfranchised people, and I don't think that
7 is the case. I think that requiring voters to
8 follow the election code, and if they do not,
9 the vote is subject to not being counted, that
10 is not the definition of "disenfranchisement."

11 MR. GORDON: Your Honor, if I may?

12 THE COURT: Sure.

13 MR. GORDON: I just wanted to respond
14 to Your Honor's question about what
15 consideration, if any, should be given to the
16 more than 8,000 Philadelphia voters whose right
17 to vote is at stake here, who went through the
18 process and are now being -- and with all due
19 respect to counsel, the petitioners are
20 absolutely seeking to disenfranchise these
21 voters by preventing their votes from being
22 counted.

23 I know that Your Honor indicated that
24 you have taken under advisement the
25 jurisdictional argument, if you will, and I

1 don't want to get into that too much, but
2 because you raised the question about the 8,000
3 voters, I just wanted to point out that before
4 the legislature removed from Section 3146.8 the
5 right to challenge absentee ballots, there was
6 a notice and opportunity-to-be-heard process
7 built in for those absentee ballot challenges.

8 That's why what the petitioners are
9 trying to do here is particularly concerning
10 from a procedural standpoint. They are now
11 trying to effectively challenge more than 8,000
12 ballots lawfully cast by registered
13 Philadelphia voters without those voters having
14 the opportunity to know what's going on, let
15 alone an opportunity to be heard. That is an
16 opportunity they would have had had those
17 provisions in the code remained that allowed
18 for an absentee challenge, but of course, they
19 are no longer there.

20 The other point I would make is that
21 counsel for petitioners admitted that voters
22 are able to, and should, and can rely on the
23 instructions. I would just draw Your Honor's
24 attention back to the envelope and the
25 instructions at the top.

1 As Your Honor noted, it says, "Did
2 you sign the voter's declaration in your own
3 handwriting?" Then down below the text of the
4 declaration, it says, "Voter sign or mark
5 here."

6 There's no dispute that for any of
7 these ballots, each of the voters and each of
8 the ballots at issue, the voter followed those
9 instructions. They signed the declaration in
10 their own handwriting. So, if voters are
11 entitled to rely on the instructions, as
12 counsel admitted, then these voters have done
13 that and their vote should count.

14 THE COURT: So we've now, I think
15 properly so, come to address the arguments.

16 Ms. Kerns, have you had a copy of the
17 intervenor's brief sent to you? I'm going to
18 ask you more generally, have you ever seen this
19 argument before?

20 MS. KERNS: I'm just looking it up,
21 Your Honor. What is your question?

22 THE COURT: Do you have a copy of the
23 intervenor's brief, or are you familiar with
24 the argument?

25 MS. KERNS: I'm just pulling it up,

1 Your Honor.

2 THE COURT: Tell me, while you're
3 looking that up, if I may, the argument
4 relating to, I'll call it the vestigial quality
5 of Act 77 versus the pre-existing code that
6 Justice Todd talked about in Section 3 in *In re*
7 *November*. It seems to be part of what you've
8 touched upon. It's in the last part of the
9 opinion, but I did not fully analyze it yet.
10 But, it sounds like there are aspects of the
11 previous code that essentially are hanging and
12 unattached to now Act 77 and its process. And,
13 this process is radically different than
14 absentee ballots were designed and treated
15 previous to Act 77.

16 Am I getting close to what your
17 argument is rooted in?

18 MR. GORDON: Yes, Your Honor. I
19 would just reiterate that this is also an
20 argument that the county has made, just for
21 Ms. Kerns' benefit. If she isn't able to
22 locate our briefing on this argument, it's also
23 in the county's briefing as well.

24 MR. BONIN: Judge, if I can very
25 briefly interject?

1 THE COURT: Sure, Mr. Bonin.

2 MR. BONIN: This is Adam Bonin, also
3 on behalf of the intervenors. A courtesy copy
4 of the intervenor's brief was provided to Ms.
5 Kerns via e-mail at 10:05 p.m. last night
6 shortly after it was electronically filed.

7 THE COURT: Ms. Kerns, do you have
8 any response to the intervenor's argument? It
9 sounds like it's rooted in established law in
10 your statutory analysis as well.

11 MS. KERNS: Right. Well, the
12 argument seems to be calling this a challenge.
13 They're framing it as a challenge in saying
14 that my clients do not have a right to
15 challenge. But my response is that the code is
16 clear that any -- that the Board of Elections
17 can make a decision, and once that decision is
18 made, there's a statutory right to appeal it
19 within two days.

20 So, the Board of Elections made a
21 decision on these ballots on Monday, and within
22 two days the petitioners -- both of whom are
23 aggrieved parties. One because he's a
24 candidate in the election and has a right to
25 insist that the election code be followed; and

1 the other, who is a voter, who has a right to
2 insist the election code be followed to make
3 sure her vote is not diluted. With those
4 rights, they can properly appeal a Board of
5 Elections' decision.

6 The intervenors keep using the word
7 "challenge" as if someone was standing in the
8 Board of Elections' office challenging a vote
9 being cast, and that's just not what happened
10 here. All of this was done by the Board of
11 Elections. As is clear in the transcript, they
12 had their workers review the ballots, and then
13 they had some type of a secondary review, which
14 I'm not clear on how that worked, but in any
15 event. Then they had that person who did that
16 so-called secondary review come to the Board of
17 Elections, tell the commissioners what his
18 findings were, and then the Board of Elections
19 voted.

20 So, this is not a challenge. This is
21 an appeal, and the statute couldn't be clearer
22 that an aggrieved person can appeal.

23 THE COURT: Wait a minute.
24 Ms. Kerns, as I understand, having read the
25 brief, there are two aspects to the

1 intervenor's argument. Number one, that 3157
2 has been modified by virtue of Act 77 as it
3 pertains to the process by which mail-in
4 ballots can be challenged. I think the
5 argument, and I could be wrong, is that because
6 of that change in the process, as distinguished
7 from the historic absentee ballot process, that
8 the relief that the petitioner seeks could be
9 found in an application in court for a recount,
10 or other statutory appeal, rather than this
11 objection to the canvass.

12 Did I get that right, sir?

13 MR. GORDON: That's mostly on point,
14 Your Honor. I'm sorry, it is on point.

15 THE COURT: Mostly I'll take.

16 MR. GORDON: I would just add one
17 additional point to that. Section 3146.8 is
18 the section of the election code that, prior to
19 Act 77 and Act 12, contained the provisions
20 allowing a third party to challenge the
21 absentee ballots.

22 Section 3146.8, sub 6 has the
23 specific procedure mechanism allowing for an
24 appeal of the County Board's decision on a
25 challenge of a ballot. It says that a decision

1 of the County Board in upholding, or
2 dismissing, any challenge may be reviewed by
3 the Court of Common Pleas.

4 So, our position is that it's not
5 necessarily that 3157 was modified by Act 77
6 and Act 12 so much as there was this extant
7 provision already in the code that allowed for
8 an appeal of a decision about a challenge, the
9 more specific provision. If 3157 was the way
10 that a petitioner, as petitioners here have
11 done, could try and get to court to challenge
12 absentee ballots, or to challenge the decision
13 about absentee ballots, then 3146.8, sub 6,
14 would have been mere surplusage. But that
15 established a specific mechanism.

16 Once the ability to challenge
17 absentee ballots at the time of canvassing was
18 removed by the legislature, that left no
19 opportunity for petitioners to go through
20 3146.8, sub 6, which was the procedure that was
21 in place.

22 THE COURT: Wasn't that part of what
23 Justice Todd looked at in that provision
24 relating to challenges during canvass?

25 MR. GORDON: Yes. Justice Todd said

1 that, yes, the legislature has removed the
2 ability of parties to make challenges to
3 absentee ballots at the time of canvassing. As
4 Your Honor pointed out, it doesn't mean that
5 challenges or that petitions for recount or
6 election contest can't be brought later. In
7 fact, that's what happened in the *Boockvar*
8 case, which is one of the seminal cases on the
9 interpretation of the issues before the Court.
10 That's where there was a recount, and then
11 there was an election contest. There they were
12 able to use Section 3157 as the procedural
13 vehicle to get before the court.

14 But here -- and I think just one more
15 point that I think is important to understand.
16 The right to challenge an absentee ballot is a
17 statutorily-created right. The General
18 Assembly created that right and it was
19 previously in 3146.8. As a statutorily-created
20 right, the General Assembly can, of course,
21 decide, as they did here, to remove that
22 ability. That's what they did, and they said
23 they want to do that because they want election
24 results to be timely certified. The General
25 Assembly did not want to be Florida 2000 with

1 these things dragging out and out.

2 THE COURT: Please don't even say
3 that in this Court.

4 MR. GORDON: I apologize.

5 THE COURT: On pain of contempt.

6 MR. GORDON: I'll stop there, Your
7 Honor, before I risk any further missteps.

8 THE COURT: Ms. Kerns.

9 MS. KERNS: Your Honor, we're not
10 here because there was some type of procedure
11 in front of the Board of Elections where the
12 petitioners challenged or had any interaction
13 with the Board of Elections whatsoever. I know
14 that intervenors continue to use that word
15 "challenge" as if there is some process at the
16 Board of Elections level where decisions were
17 getting made and people were challenging them,
18 but that's not what happened. In fact, if you
19 read the transcript, no one talked on Monday
20 except for the commissioners.

21 THE COURT: However, Ms. Kerns --

22 MS. KERNS: So I appealed it.

23 THE COURT: Ms. Kerns, having
24 attended a few public meetings, I am absolutely
25 sure, under the Sunshine Act, one of the

1 commissioners or the staff people announced
2 that anyone having a concern relating to the
3 business before that public body can be heard.
4 I don't know who was there, but certainly there
5 was an opportunity to object in realtime or
6 mount a, quote, challenge. So, I don't think
7 it's fair to say that because nobody spoke that
8 it didn't happen.

9 Do you follow me?

10 MS. KERNS: Yeah, but a challenge at
11 the Board of Elections level is completely
12 different. Say had the petitioners
13 challenged --

14 THE COURT: But it never happened,
15 Ms. Kerns. It's a hypothetical. It never
16 happened. I'm saying that the opportunity was
17 there, but it never happened.

18 MS. KERNS: No, the opportunity -- I
19 mean, I suppose someone could have stood up and
20 said, "We don't like what you're doing," but
21 that was not operative at that level.
22 Petitioners could have challenged whether or
23 not these people were registered voters. They
24 could have done that by the Friday before the
25 election.

1 THE COURT: And they didn't.

2 MS. KERNS: Petitioner could have
3 done that.

4 THE COURT: And they didn't.

5 MS. KERNS: And then the Board could
6 have made a decision and then it could have
7 been appealed.

8 Here, the Board announced their
9 decision with regard to how they were going to
10 treat these ballots. Once the Board announced
11 that decision, under 3157, petitioners took
12 their statutory right of appeal to that
13 decision. I know that intervenors and
14 respondents continue to use the word
15 "challenge," but this is simply a statutory
16 right to appeal of a Board of Elections'
17 decision.

18 If this Court is going to remove that
19 statutory right of appeal, then that would be a
20 wholesale rewriting of the election code, and
21 we would submit that that is not permitted.

22 THE COURT: Anyone else?

23 Upon hearing no further applications
24 or submissions to the Court, we will recess and
25 deliberate. The court officers have your

1 contact information. And as I said before, the
2 Court takes this very seriously and wants to
3 get it right and be fair and just, especially
4 considering the impact on voters. Those people
5 have participated in a very difficult election.

6 So, thank you all for your great
7 efforts. It's always a pleasure to see you all
8 in this court. Thank you for your
9 professional, your enthusiasm and your
10 arguments.

11 The Court will stand in recess until
12 the call of the crier.

13 - - -

14 (Matter concluded.)

15 - - -

1
2 I HEREBY CERTIFY THAT THE PROCEEDINGS AND
3 EVIDENCE ARE CONTAINED FULLY AND ACCURATELY IN THE
4 NOTES TAKEN BY ME ON THE TRIAL OF THE ABOVE CAUSE,
5 AND THAT THIS COPY IS A CORRECT TRANSCRIPT OF THE
6 SAME.
7
8
9

10 JENNIFER VENNERI, RPR

11 Official Court Reporter
12
13

14 (The foregoing certification of this
15 transcript does not apply to any reproduction of the
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type [2] 73/13 77/10	unfortunately [3] 4/12 42/13 54/1	useful [1] 53/4
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umbrella [1] 21/18	unless [2] 6/9 81/16	V
unanimous [1] 27/11	unmuted [1] 5/20	various [1] 56/6
unattached [1] 71/12	unrelated [1] 9/24	vehicle [1] 76/13
unaware [3] 60/16 62/14 63/7	unsupported [1] 31/7	vein [1] 23/14
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undercut [1] 30/17	untimely [1] 67/6	verified [1] 52/8
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	urgency [1] 67/18	view [1] 30/16
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		violation [3] 21/16 24/17 25/18
		virtually [1] 21/8

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71/7 71/16 73/9	42/20 50/7 51/3	whose [2] 37/25
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11/7 20/8 20/12	whim [1] 54/13	80/11
22/9 23/16 30/13	white [1] 26/2	WILLIAMS [2]
30/16 34/5 36/24	who [35] 10/6	3/3 16/10
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57/13 57/15 57/17	27/2 28/18 29/1	wishes [2] 15/10
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	39/5 39/6 41/15	72/19 72/21

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EXHIBIT D

Meeting of the Commissioners - Elections
November 9, 2020

Filed and Attested by the
Office of Judicial Records
10 NOV 2020 11:18 pm
S. WULKO

BOARD OF ELECTIONS
MEETING OF COMMISSIONERS

- - -

HELD ON: November 9, 2020

COMMISSIONERS: LISA M. DEELEY
AL SCHMIDT
OMAR SABIR

REPORTED BY: Angela M. King, RPR
(Via Zoom telephone)

- - -

STREHLOW & ASSOCIATES, INC.
FULL SERVICE COURT REPORTING AGENCY
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STREHLOW & ASSOCIATES, INC.
(215) 504-4622

Exhibit A

Case ID: 201100878
Control No.: 20110899

1 (At this time, the proceedings commenced
2 at approximately 9:00 a.m.)

3 - - -

4 COMMISSIONER DEELEY: This is
5 November 9, 2020.

6 First, I have an announcement, the
7 Philadelphia City Commissioners met
8 virtually in Executive Session on Friday,
9 November 6, 2020 to meet with the Council
10 in order to discuss ongoing litigation
11 regarding the election.

12 We will now move to Public
13 Comments. Commenters shall state where
14 they live. Or if they are not a resident
15 in Philadelphia, that they are a
16 Philadelphia approximate. Public Comments
17 is not an opportunity for dialogue or Q and
18 A. It is Public Comments, a chance for you
19 to tell us what you think.

20 Each speaker shall have two
21 minutes. However, I may extend this time
22 at my discretion. All Public Comments must
23 be relevant or germane towards business.

24 Finally, it is my responsibility to

1 preserve order and decorum of the meeting.

2 As such, profane, slanderous,
3 discriminatory or personal attacks will not
4 be tolerated.

5 Anyone wishing to offer Public
6 Comments, please, step forward.

7 Step forward.

8 MS. KERNS: My name is Linda Kerns.
9 I represent Donald Trump -- (audio fades
10 out.)

11 THE STENOGRAPHER: I can't hear at
12 all.

13 COMMISSIONER DEELEY: Wait, one
14 second.

15 THE CLERK: I'm going to go over to
16 the speaker so you can hear better.

17 THE STENOGRAPHER: Please.

18 Thank you.

19 COMMISSIONER DEELEY: Ms. Kerns,
20 can you please repeat your comment.

21 MS. KERNS: Sure. My name is Linda
22 Kerns. I represent Donald Trump. I just
23 needed to know the name of the court
24 reporter. I asked Mr. Bluestein. And he

1 told me to direct my questions to you.

2 COMMISSIONER DEELEY: Thank you.

3 We will give you that information
4 after the meeting.

5 We will now hear a report from
6 Supervisor of Elections, Mr. Garrett Dietz.

7 MR. DIETZ: Good morning,
8 Commissioners.

9 COMMISSIONER DEELEY: Good morning,
10 Garrett.

11 COMMISSIONER SCHMIDT: Good
12 morning, Garrett.

13 MR. DIETZ: Before I get into the
14 ballots that I performed a secondary review
15 on, I just want to note that per the court
16 order from Election Day, we have confirmed
17 that Verna Phillips of Ward 36 Division 15,
18 did not submit a valid ballot.

19 THE STENOGRAPHER: Can you, please,
20 move closer to the speakers. I'm having a
21 hard time hearing.

22 THE CLERK: Okay. I'll put it
23 right up to the speaker.

24 MR. DIETZ: Now I will go through

1 the various categories per my second level
2 review.

3 The first category is ballots with
4 a blank Declaration Envelope where it does
5 not appear that the voter attempted to
6 complete any of the information including
7 signature on the Declaration Envelope of
8 the ballot. There are 472 ballots in this
9 category.

10 COMMISSIONER DEELEY: I vote no
11 count.

12 COMMISSIONER SCHMIDT: I vote not
13 to count.

14 COMMISSIONER SABIR: I vote not to
15 count.

16 MR. DIETZ: Okay.

17 Category number two are ballots
18 where it appears that the voter did not
19 sign the Declaration Envelope.

20 COMMISSIONER DEELEY: How many of
21 those, Mr. Dietz?

22 MR. DIETZ: There are 225 ballots
23 in this category.

24 COMMISSIONER DEELEY: Thank you.

1 I vote not to count.

2 COMMISSIONER SCHMIDT: I vote not
3 to count.

4 COMMISSIONER SABIR: I vote not to
5 count.

6 MR. DIETZ: Okay.

7 Category number three. There are
8 1,211 ballots in this category. This is a
9 category where the voter affixed their
10 signature to the Declaration Envelope, but
11 no other information was provided.

12 I should add that every ballot --
13 every ballot category I am going through
14 today was timely received by close of polls
15 on Election Day.

16 COMMISSIONER SCHMIDT: And how many
17 ballots are in this universe?

18 MR. DIETZ: 1,211 ballots.

19 COMMISSIONER DEELEY: Garrett, the
20 voters did sign -- there is a signature on
21 the Dec?

22 MR. DIETZ: Correct. The voter did
23 affix their signature.

24 COMMISSIONER DEELEY: I vote to

1 count.

2 COMMISSIONER SCHMIDT: I vote not
3 to count.

4 COMMISSIONER SABIR: Garrett, can I
5 have a question.

6 Did the signatures match the list?
7 Did we check that?

8 MR. DIETZ: Per the directions from
9 the Department of State, we cannot verify
10 signatures against the system.

11 COMMISSIONER SABIR: I vote to
12 count.

13 MR. DIETZ: Okay.

14 Category number four. This is
15 where ballots were completed except for the
16 date of signature. So, the Declaration had
17 a signature. And they had the printed name
18 of the elector and the street address of
19 the elector.

20 COMMISSIONER DEELEY: And, Garrett,
21 how many of these ballots?

22 MR. DIETZ: 1,259 ballots.

23 COMMISSIONER DEELEY: And these
24 ballots were received timely?

Meeting of the Commissioners - Elections
November 9, 2020

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1 MR. DIETZ: Correct.

2 COMMISSIONER DEELEY: I vote to
3 count.

4 COMMISSIONER SCHMIDT: I vote not
5 to count.

6 COMMISSIONER SABIR: I vote to
7 count.

8 MR. DIETZ: Okay.

9 Category number five. Ballots in
10 this category were complete with signature,
11 date and street address and are missing the
12 printed name of the voter.

13 COMMISSIONER DEELEY: And how many
14 ballots were these, Garrett, in this
15 category?

16 MR. DIETZ: 533 ballots in this
17 category.

18 COMMISSIONER DEELEY: I vote to
19 count.

20 COMMISSIONER SCHMIDT: I vote to
21 count.

22 COMMISSIONER SABIR: I vote to
23 count.

24 MR. DIETZ: Category number six.

1 Ballots in this category had the signature
2 of the voter as well as the date of
3 signature and the printed name of the
4 elector. It's missing the street address
5 of the voter.

6 COMMISSIONER DEELEY: And how many
7 of these were in this category?

8 MR. DIETZ: I should clarify when I
9 say missing street address, printed by the
10 voter specifically.

11 COMMISSIONER SCHMIDT: But the
12 street address is on the label?

13 MR. DIETZ: Correct. That's why I
14 wanted to make that distinction.

15 COMMISSIONER DEELEY: And,
16 Mr. Dietz, they are signed and dated?

17 MR. DIETZ: Correct.

18 COMMISSIONER DEELEY: And the
19 number?

20 MR. DIETZ: 860.

21 COMMISSIONER DEELEY: I vote to
22 count.

23 COMMISSIONER SCHMIDT: I vote to
24 count.

1 COMMISSIONER SABIR: I vote to
2 count.

3 MR. DIETZ: Category number seven.
4 This is where the voter affixed
5 their signature to the Declaration Envelope
6 and provided the date of signing. However,
7 it is missing the printed name and the
8 street address specifically written in, in
9 hand, by the voter.

10 COMMISSIONER DEELEY: Garrett,
11 these ballots were received timely?

12 MR. DIETZ: Correct.

13 COMMISSIONER DEELEY: And the
14 number in this category?

15 MR. DIETZ: 4,466.

16 COMMISSIONER DEELEY: I vote to
17 count.

18 COMMISSIONER SCHMIDT: I vote to
19 count.

20 COMMISSIONER SABIR: So, these were
21 signed by the voter?

22 MR. DIETZ: Correct.

23 COMMISSIONER SABIR: I vote to
24 count.

1 MR. DIETZ: Category number eight.
2 Ballots where the individual that
3 completed the Declaration appears different
4 than the elector who was assigned the
5 ballot. Using the label on the Declaration
6 Envelope to decide that.

7 There are 112 ballots in this
8 category.

9 COMMISSIONER DEELEY: Garrett, do
10 they indicate on this Declaration Envelope
11 a need for assistance?

12 MR. DIETZ: No.

13 COMMISSIONER DEELEY: Could you
14 repeat the number, please?

15 MR. DIETZ: 112.

16 COMMISSIONER DEELEY: I vote to not
17 count.

18 COMMISSIONER SCHMIDT: I vote not
19 to count.

20 COMMISSIONER SABIR: I vote to not
21 count.

22 MR. DIETZ: Category number nine.
23 Ballots that were not included in a
24 Secrecy Envelope.

1 COMMISSIONER DEELEY: And, Garrett,
2 what is the number of ballots that did
3 not -- were not included in the Secrecy
4 Envelope?

5 MR. DIETZ: 4,027.

6 COMMISSIONER DEELEY: And were
7 those 4,027 received timely?

8 MR. DIETZ: Yes.

9 COMMISSIONER DEELEY: Were the Dec
10 Envelopes filled out accurately? Properly?

11 MR. DIETZ: It varies.

12 COMMISSIONER DEELEY: Thank you.

13 The naked ballot is a difficult one
14 for me. Since I have been a Commissioner,
15 we have always counted naked ballots.

16 I am aware of the recent Supreme
17 Court ruling concerning them and our
18 legislators failure to correct the matter.
19 I am pleased that the awareness campaign
20 leading up to the election, including the
21 work done by myself, Commissioners Sabir
22 and Schmidt. What we were expecting to be
23 tens of thousands of ballots became just
24 over 4,000.

1 But still, these are 4,000
2 Philadelphia voters, 4,000 people who did
3 nothing wrong behind failing to put their
4 ballots into a second envelope. I cannot
5 with a good conscious count these.

6 I, therefore, vote no count.

7 COMMISSIONER SCHMIDT: I vote not
8 to count.

9 COMMISSIONER DEELEY: To count.
10 I'm sorry. I apologize. I read the wrong
11 thing. Let me correct myself.

12 I vote to count the 4,027 ballots
13 not enclosed in the Secrecy Envelope.

14 COMMISSIONER SCHMIDT: I vote not
15 to count.

16 COMMISSIONER SABIR: I vote not to
17 count.

18 MR. DIETZ: Okay.

19 That is all the categories I have
20 today.

21 COMMISSIONER DEELEY: This
22 business having con -- I'm sorry.

23 Does anybody have any New Business?

24 COMMISSIONER SCHMIDT: I have none.

Meeting of the Commissioners - Elections
November 9, 2020

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1 COMMISSIONER SABIR: I'd just like
2 to thank the Election Board Staff, the
3 Commissioners, the Deputies for the timely
4 hard work that leads to this election.

5 COMMISSIONER DEELEY: Thank you,
6 Commissioner Sabir.

7 The business having concluded, we
8 will stand in recess to the call of the
9 Chair.

10 (AT this time, the Meeting
11 concluded at 9:12 a.m.)

C E R T I F I C A T I O N

I, hereby certify that the proceedings
and evidence noted are contained fully and
accurately in the stenographic notes taken by me
in the foregoing matter, and that this is a
correct transcript of the same.

ANGELA M. KING, RPR,
Court Reporter, Notary Public

(The foregoing certification
of this transcript does not
apply to any reproduction of
the same by any means, unless
under the direct control
and/or supervision of the
certifying reporter.)

Meeting of the Commissioners - Elections
November 9, 2020

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Meeting of the Commissioners - Elections
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EXHIBIT E

Supreme Court of Pennsylvania



Miscellaneous Docket Sheet

Docket Number: 90 EM 2020

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November 18, 2020

CAPTION

In Re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election

Petition of: Philadelphia County Board of Elections

CASE INFORMATION

Initiating Document: Application for Extraordinary Relief

Case Status: Active

Journal Number:

Case Category: Election

Case Type(s): Election

CONSOLIDATED CASES

RELATED CASES

Docket No / Reason	Type
89 EM 2020 Lower Court	Consolidated
91 EM 2020 Lower Court	Consolidated
92 EM 2020 Lower Court	Consolidated
93 EM 2020 Lower Court	Consolidated

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Supreme Court of Pennsylvania



Miscellaneous Docket Sheet

Docket Number: 90 EM 2020

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November 18, 2020

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Miscellaneous Docket Sheet

Docket Number: 90 EM 2020

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November 18, 2020

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Supreme Court of Pennsylvania



Miscellaneous Docket Sheet

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November 18, 2020

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Supreme Court of Pennsylvania



Miscellaneous Docket Sheet

Docket Number: 90 EM 2020

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November 18, 2020

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 Pro Se: No
 IFP Status:

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Supreme Court of Pennsylvania



Miscellaneous Docket Sheet

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November 18, 2020

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 IFP Status:

SUPREME COURT INFORMATION

Appeal From:
 Appeal Filed Below: 11/14/2020 12:00:00AM

Probable Jurisdiction Noted: Docketed Date: November 17, 2020
 Allocatur/Miscellaneous Granted: Allocatur/Miscellaneous Docket No.:
 Allocatur/Miscellaneous Grant Order:

FEE INFORMATION

Fee Dt	Fee Name	Fee Amt	Receipt Dt	Receipt No	Receipt Amt
11/17/2020	Extraordinary / Plenary Jurisdiction	70.25	11/17/2020	2020-SUP-E-002978	351.25

INTERMEDIATE APPELLATE COURT INFORMATION

Court Name: Commonwealth Docket Number: 1137 CD 2020
 Date of Order: November 13, 2020 Rearg/Recon Disp Date:
 Rearg/Recon Disposition:
 Judge(s): Brobson, P. Kevin
 McCullough, Patricia A.
 Wojcik, Michael H.
 Intermediate Appellate Court Action:
 Referring Court:

AGENCY/TRIAL COURT INFORMATION

Court Below: Philadelphia County Court of Common Pleas
 County: Philadelphia Division: Philadelphia County Civil Division
 Date of Agency/Trial Court Order: November 13, 2020
 Docket Number: November Term, 2020 No. 201100877
 Judge(s): Crumlish, James C., III OTN:
 Order Type: Order

ORIGINAL RECORD CONTENT

Original Record Item	Filed Date	Content/Description
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Record Remittal:

Supreme Court of Pennsylvania



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November 18, 2020

DOCKET ENTRY

Filed Date	Docket Entry / Representing	Participant Type	Filed By
November 17, 2020	Application for the Court to Exercise Extraordinary Jurisdiction	Petitioner	Philadelphia County Board of Elections
November 17, 2020	Praecipe for Appearance Philadelphia County Board of Elections	Petitioner	Aronchick, Mark Alan
November 17, 2020	No Answer Letter to Application for the Court to Exercise Extraordinary Jurisdiction	Respondent	Bureau of Commissions, Elections and Legislation
November 17, 2020	Answer of DNC to Application for the Court to Exercise Extraordinary Jurisdiction	Respondent	DNC Services Corp. / Democratic National Committee
November 17, 2020	No Answer Letter of Trump/Elkin to Application for the Court to Exercise Extraordinary Jurisdiction	Respondent	Donald J. Trump for President, Inc.
November 17, 2020	Praecipe for Appearance DNC Services Corp. / Democratic National Committee	Respondent	Bonin, Adam Craig
November 18, 2020	Order Regarding Application for Extraordinary Relief - Other Disposition		Per Curiam

Comments:

AND NOW, this 18th day of November, 2020, the Application for the Court to Exercise Extraordinary Jurisdiction over the Commonwealth Court's Cases Docketed at 1140 CD 2020, 1139 CD 2020, 1138 CD 2020, 1137 CD 2020, and 1136 CD 2020, filed by the Philadelphia County Board of Elections, is hereby GRANTED with respect to the following issue:

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

The Commonwealth Court shall immediately transfer the contents of its records for these cases to this Court, including the briefs requested and received from the parties.

Chief Justice Saylor and Justice Mundy note their dissent.

CROSS COURT ACTIONS

Docket Number:

1137 CD 2020