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**Motions for Admission Pro Hac Vice Pending*

***Admitted Pro Hac Vice*

Attorneys for Intervenor-Defendant DNC Services Corp. / Democratic National Committee

**IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY,
PENNSYLVANIA**

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

No. 2020-18680

Petitioners,
v.
MONTGOMERY COUNTY BOARD OF ELECTIONS,
Defendant,
DNC SERVICES CORP. / DEMOCRATIC NATIONAL COMMITTEE,
Intervenor-Defendant

**DEMOCRATIC NATIONAL COMMITTEE’S RESPONSE IN OPPOSITION TO
PETITION FOR REVIEW OF DECISION**

Here we go again. This lawsuit is the latest attempt by the Trump Campaign and other Republican litigants to expand their ability to challenge ballots beyond what is provided for by state law. Every other court confronted with these efforts—including five in the Commonwealth—has rejected them. And for good reason: in order to avoid drawn-out litigation and disputes over absentee or mail-in ballots, the Legislature explicitly removed the ability to challenge these ballots under Pennsylvania law. Despite unambiguous legislative history and court rulings affirming it, many of the same litigants here have proceeded apace in this general election to attempt to challenge ballots throughout the Commonwealth, losing each time. Their efforts are merely attempts at delay to hold up or muddy the result of an election in Pennsylvania they appear inevitably to lose.

But that is not the only flaw with this lawsuit. The parties agree on all of the relevant facts, and the only perceived “deficiency” with the 592 ballots the Montgomery County Board of Elections (the “Board”) correctly accepted here is that the voter did not handwrite their complete address under the voter declaration on the outer absentee ballot envelope. Petitioners do not and cannot point to a mandatory requirement that the voter input their address in this space, and every

one of the ballots at issue here has at least one feature on the outer envelope making the voter's address identifiable. Further, there is no compelling reason to reject the ballots at issue here, and disenfranchising voters over this minor technicality would be plainly in contravention of this Commonwealth's precedent and federal law. The Court should deny the Petition.

I. STATEMENT OF QUESTION INVOLVED

1. Whether the Petitioners can challenge the validity of the individual absentee and mail-in ballots here even though the Pennsylvania Legislature struck from the Election Code the provisions that had allowed such challenges in order to avoid unnecessary delay in tabulating and certifying election results.
2. Whether an elector is required to hand-write his or her address on the outer envelope of an absentee or mail-in ballot where there is no requirement in the Election Code to do so and where the elector's address—and therefore his or her eligibility to vote—is otherwise identifiable from the envelope.

II. BACKGROUND¹

The Pennsylvania General Assembly deliberately removed any opportunity to challenge voted mail-in and absentee ballots from the Election Code. Prior to March 2020, Section 3146.8, which governs the canvassing of absentee and mail-in ballots, provided an unambiguous right and process for third parties to challenge an absentee or mail-in ballot. *See* 25 P.S. § 3146.8(g)(2)-(3) (2019) (“Representatives shall be permitted to challenge any absentee elector or mail-in elector in accordance with the provisions of paragraph (3)” and “the county board . . . shall give any candidate representative or party representative present an opportunity to challenge any absentee elector or mail-in elector”). When the General Assembly passed Act 12 of 2020, however, it deleted from the Election Code the explicit reference to the challenge process for absentee and mail-in ballots. *See* Act of Mar. 27, 2020, P.L. 41, No. 12 (“Act 12”). Section 3146.8(g)(4) now

¹ The parties have stipulated to the facts regarding the 592 absentee ballots at issue here, and Intervenor therefore do not recite them here. *See* Stipulated Facts.

directs that “[a]ll absentee ballots which have not been challenged under section [3146.2b] and all mail-in ballots which have not been challenged under [3150.12b] . . . *shall be counted* and included with the returns of the applicable election district . . .”) (emphasis added). The two provisions referenced in Section 3146.8(g)(4)—sections 3146.2b and 3150.12b—only allow challenges to absentee and mail-in ballot *applications* and require that such challenges be entered no later than 5 p.m. on the Friday before the election.²

The General Assembly introduced the changes to the canvassing procedures in Act 12 to ensure the timely resolution of the election results in Pennsylvania and avoid the delay that would result from mass challenges of absentee and mail-in ballots. *See* Pa. H.R. Jour., 2020 Reg. Sess. No. 12, at 277 (Mar. 24, 2020), <https://www.legis.state.pa.us/WU01/LI/HJ/2020/0/20200324.pdf#page=21> (“[W]e do not want a delay of several weeks before there is actually a result.”). A challenge process for mail-in and absentee ballots threatens to delay election results significantly, especially when layered on top of the application challenge process. The challenge process required county boards of elections to provide notice to all challenged absentee and mail-in voters and to every individual who made the challenge. 25 P.S. § 3146.8(g)(5). A formal hearing on each challenged ballot must be held. *Id.* During such hearings, county boards of elections must hear testimony relating to the challenge, *id.*, and both the challenged voter and the challenger may present witnesses. *Appeal of Petrucci*, 38 Pa. D. & C.2d 675 (Pa. Com. Pl. 1965). The General Assembly specifically stripped the challenge process from the statute because it did

² Mail-in and absentee ballots are still issued to voters before, and sometimes after, their applications are challenged. In those instances, the ballot itself will be set aside while the challenge to the application is pending. 25 P.S. § 3146.8(g)(5)-(7). Thus, some parts of the Election Code still refer to challenging a “ballot.” 25 P.S. § 3146.8(f). But the Pennsylvania Supreme Court has characterized these references as “vestiges remaining in the Election Code of the prior, now eliminated, system for time-of-canvassing ballot challenges.” *In re Nov. 3, 2020 Gen. Election*, No. 149 MM 2020, 2020 WL 6252803, at *14 n.24 (Pa. Oct. 23, 2020).

“not want to be Florida back in 2000.” Pa. H.R. Jour., 2020 Reg. Sess. No. 12, at 277 (Mar. 24, 2020), <https://www.legis.state.pa.us/WU01/LI/HJ/2020/0/20200324.pdf#page=21>.

III. LEGAL STANDARD

This Court can only reverse the county board’s decision 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”).

IV. ARGUMENT

A. The Petition is not properly before the Court because the Election Code does not permit challenges to mail-in ballots.

In recent legislation, the General Assembly affirmatively removed procedures for third parties to challenge absentee and mail-in ballots from the Election Code. *See supra* Section II. The current Section 3146.8 only permits challenges to absentee and mail-in ballot *applications* and requires that such challenges be entered no later than 5 p.m. on the Friday before the election. *See id.* It also directs that all mail ballots not associated with a challenged application “*shall be counted and included with the returns of the applicable election district.*” 25 P.S. § 3146.8(g)(4) (emphasis added). The Pennsylvania Supreme Court has held the word “shall” will not be interpreted as “anything less than mandatory.” *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *25 (Pa. Sept. 17, 2020).

The Pennsylvania Supreme Court recently confirmed that the Election Code no longer provides a third party right to challenge mail-in and absentee ballots. *In re Nov. 3, 2020 Gen. Election*, 2020 WL 6252803, at *14. As the Court explained, when the General Assembly passed Act 77 establishing no excuse mail-in voting in 2019, it simultaneously reduced the grounds for challenges and eliminated time-of-canvassing challenges to mail-in and absentee ballots *entirely*. *Id.* Without a statutory provision authorizing them to challenge mail-in and absentee ballots,

Petitioners have no right to do so. The right to challenge ballots, like the attendant right to observe the canvassing process, is created and defined by statute. *Trump for President v. Boockvar*, No. 20-cv-966, 2020 WL 5997680, at *67 (W.D. Pa. Oct. 10, 2020) (“[T]here is no individual constitutional right to serve as a poll watcher.”); *Pa. Democratic Party v. Boockvar*, 2020 WL 5554644, at *30 (Pa. Sept. 17, 2020) (same); *Republican Party of Pa. v. Cortes*, 218 F. Supp. 3d 396, 413-14 (E.D. Pa 2016) (similar); *see also* Opinion and Order, *Polasek-Savage v. Benson*, No. 20-000217-MM (Mich. Ct. Cl. Nov. 3, 2020) (similar); Order, *Kraus v. Cegavske*, No. 20 OC 00142 (Nev. Dist. Ct. Oct. 29, 2020), motion to stay denied, No. 82018 (Nev. Sup. Ct. Nov. 03, 2020) (denying mandamus because petitioners including Donald J. Trump for President and others failed to cite any constitutional provision, statute, rule, or case that supported their request, among other things, to challenge mail ballots).

Petitioners cannot evade this clear legislative mandate by lodging their appeal under Section 3157. While that Section provides for judicial review of decisions of a county board regarding computation or canvassing of election returns, interpreting it to permit challenges to mail ballots would be a vestige of the previous statutory scheme and would undermine the Legislature’s goal of eliminating such challenges. As the Pennsylvania Supreme Court explained in *In re Nov. 3, 2020 Gen. Election*, “there are some vestiges remaining in the Election Code of the prior, now eliminated, system for time-of-canvassing ballot challenges.” 2020 WL 6252803, at *14 n.24 (citing 25 P.S. § 3146.8(f) (requiring a \$10 deposit for each challenge to an absentee or mail-in ballot application or ballot); *id.* § 1308(g)(5) (discussing procedures for handling “[b]allots received whose applications have been challenged and ballots which have been challenged”)). Even statutory provisions that expressly contemplate a ballot challenge are “overlooked remnants of a prior, now eliminated, process.” *In re Nov. 3, 2020 Gen. Election*, 2020 WL 6252803, at *14

n.24. Section 3157 continues to allow appeals from *other* county board decisions—for example, decisions rejecting swaths of ballots or denying petitions for recount. But it cannot be interpreted to permit a procedure that was intentionally removed from the election code. *Id.* at *14 (“It is a well-established principle of statutory interpretation that that we may not supply omissions in the statute when it appears that the matter may have been intentionally omitted.”) (quoting *Sivick v. State Ethics Commission*, No. 62 MAP 2019, 2020 WL 5823822, at *10 (Pa. Oct. 1, 2020)).³

Allowing Petitioners to circumvent the General Assembly’s change in the Election Code and challenge these mail-in ballots would create a loophole in the Election Code and lead to the precise delay the General Assembly sought to avoid. The purpose of that change to Pennsylvania law is clear: a challenge process for mail-in and absentee ballots threatens to delay election results significantly. *See supra* Section II; *see also In re Nov. 3, 2020 Gen. Election*, 2020 WL 6252803, at *14 (“Presumably, in expanding voting by mail, the legislature sought to streamline the process for canvassing such ballots, perhaps to avoid undermining the expansion effort by eliminating the prospect that voters—including a potentially large number of new mail-in voters—would be brought before the board or the courts to answer third-party challenges.”). An appeal lodged under

³ That is not to say that a county board’s decision to accept ballots in clear violation of the Election Code is unreviewable. Aggrieved parties may still challenge such decisions through recount petitions, *see* 25 P.S. §§ 3154(e), 3261-3263, and election contests, *see* 25 P.S. § 3291. Further, the Secretary of the Commonwealth and the Department of State are charged with enforcing the provisions of the Election Code. The Secretary is Pennsylvania’s Chief Election Official. As such, she supervises the administration of Pennsylvania’s elections and election laws. Among her numerous responsibilities in administering elections, she is charged with tabulating, computing, and canvassing all votes cast as well as certifying and filing the votes’ tabulation. 25 P.S. § 3159. Those responsibilities are no mere legal fiction: when counties have acted in violation of the Election Code, the Secretary and Department of State have taken steps to ensure counties remain in compliance with Pennsylvania law. *See, e.g.,* Letter from Commissioner of Pennsylvania Department of State to County Boards of Election regarding Passive Electioneering (Sept. 4, 2008), available at <https://www.aclupa.org/sites/default/files/legacy/7714/1442/1550/PassiveElectioneering.pdf>.

Section 3157 halts the official certification of votes cast in any election district to which the appeal relates. 25 P.S. § 3157(b) (“Pending such appeal, the county board shall suspend any official certification of the votes cast in such election district.”). That is precisely the sort of delay the General Assembly sought to avoid when it eliminated the right to challenge mail-in and absentee ballots from the Election Code. It is not the role of this Court, or any court, “to engage in judicial legislation and to rewrite a statute in order to supply terms which are not present therein.” *In re Nov. 3, 2020 Gen. Election*, 2020 WL 6252803, at *14. Just as the Pennsylvania Supreme Court refused to do so, this Court should not permit Petitioners to frustrate the General Assembly’s purpose here.

B. Even if Pennsylvania law permitted challenges to mail-in and absentee ballots, the Board did not abuse its discretion in rejecting a challenge to these absentee ballots.

1. The completion of an address under the declaration is not mandatory.

Even if challenges were permitted, the Board correctly denied Petitioners’ challenge here because the requirement to complete a handwritten address under the voter’s declaration is not mandatory and the Board acted consistent with state law in accepting these ballots. 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*, 411 Pa. 45, 48 (Pa. 1963).

A county board of elections should not toss out ballots for failing to comply with non-mandatory requirements. The Election Code clearly lays out the mandatory requirements that a voter must satisfy after receiving their absentee or mail-in ballot, including that the voter must “mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in

fountain pen or ball point pen,” that upon having completed the ballot the voter shall “fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed ‘Official Election Ballot,’” and that then the voter shall place the envelope labeled Official Election Ballot “in the second one, on which is printed the form of declaration of the elector, and the address of the elector’s county board of election and the local election district of the elector.” 25 P.S. § 3146.6(a). The final, and most relevant steps here, are that “[t]he 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.” *Id.*

Nowhere in this litany of specific instructions is a requirement that a voter input their handwritten address under their declaration. Notably, the Legislature chose to include such a requirement elsewhere in the same section, in the provision addressing voters unable to sign their declaration due to illness or physical disability. *That* section requires that a witness include, along with their signature, their complete address. *See* 25 P.S. § 3146.6a(3); 25 P.S. § 3150.16(a.1). But for voters who are able to sign their declaration, there is no such requirement. *See also Sivick, 2020 WL 5823822, at *10* (noting that “it is axiomatic that we may not add statutory language where we find the extant language somehow lacking” and that “under the doctrine of *expressio unius est exclusio alterius*, the inclusion of a specific matter in a statute implies the exclusion of other matters”).

While the statute states that the voter shall “fill out” the declaration, the General Assembly expressly delegated to the Secretary the determination of the form of such 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). The Secretary has,

in turn, issued guidance to the county boards of elections about the examination of absentee and mail-in envelopes, generally, and about the declaration, specifically. *See* Pennsylvania Department of State, *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes* (Sept. 11, 2020), available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf>. 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.

Each outer absentee envelope at issue here includes a declaration signed and dated by the voter. Stipulated Facts ¶ 8. Each envelope thus includes the only information specifically required by the Election Code. *See* 25 P.S. § 3146.6. The only potential deficiency with the envelopes is the lack of a complete handwritten address below the voter’s signature. But because—unlike a signature and date—an address is not specified in statute, and because the Secretary has made clear that an outer envelope must be set aside only if the declaration is blank—and that the county board otherwise determines whether the declaration is sufficient—the Board here did not abuse its discretion in deciding that the ballots inside these envelopes should be counted.

In short, the handwritten address under the declaration is not mandatory, and the Board did not abuse its discretion in deciding to accept these ballots.

2. There is no compelling justification for the voter to have to include their handwritten address here.

Even if there were any doubt whether challenges to absentee ballots were still permitted (they are not) or whether a handwritten address were a mandatory requirement (it is not), the Board

did not abuse its discretion in rejecting the challenges at issue here because requiring a handwritten address under the declaration would not serve a compelling purpose and is not material. “The power to throw out a ballot for minor irregularities should be sparingly used, and it should be done only for very compelling reason.” *In re Duquesne Appeals from Cty. Bd. of Elections*, 39 Pa. D. & C.2d 545, 557 (Pa. Com. Pl. 1965). Indeed, “marking 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.” *Shambach*, 845 A.2d at 799.

Here, no compelling reasons justify the rejections of these 592 absentee ballots given that the voter’s information, including their address is readily identifiable from information on the outer envelope. All parties agree that the only “error” on these ballots is that the voter did not handwrite their complete address under the declaration on the outer envelope, despite both signing and dating the declaration. Stipulated Facts ¶ 8. But the parties also agree that for each of these ballots the voter’s address information is readily identifiable in a host of ways. First, all 592 outer envelopes contain, on the same side as the voter’s declaration, 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, and the specific voter’s information—including address—is visible when scanned. *Id.* ¶ 6 n.1. Further, the vast majority (509) of these ballots have the voter’s address pre-printed on the outer envelope to the right of the voter’s declaration. *Id.* n.1. Moreover, on more than half (313) of the envelopes, the voter wrote their address in the space provided for return addresses on the front of the envelope. *Id.* As a result, 556 of the 592 envelopes include the voter’s address in at least one location—and 266 of the envelopes have the address twice. *Id.* Only a small percentage of envelopes (36) do not have the voter’s address written on the outside, and for those, the voter’s information is still readily available through the barcode and the SURE system. *Id.*

The fact that the voter’s address is readily identifiable would make throwing out these ballots a grave injustice. Requiring a voter to input their 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*, 2020 WL 5554644, at *26. Indeed, whatever the interest is in having the voter’s address identifiable from the outside of the ballot—likely an identification mechanism to prevent double voting—it is met here because the voter’s address is identifiable in at least one (and more often multiple) ways from the outside of every one of these 592 ballots.

The lack of any weighty interest that would be undermined by allowing these ballots to be counted makes this case most analogous to *Wieskerger Appeal*, 290 A.2d 108, 109 (Pa. 1972), where the Supreme Court of Pennsylvania held that ballots marked in a different color ink from those enumerated in the statute should be counted. The Court held that the purpose underlying the limitation on marking ballots in certain colors was to ensure that individual ballots were not identifiable. *Id.* Given that there was no indication that the ballots at issue before the Court were marked in a different color for the purpose of making the ballot identifiable or otherwise indicating fraud, the Court held they should be counted. *Id.* As in *Wieskerger*, Petitioners offer no suggestion that the failure to include a complete address here was an effort at committing voter fraud, and such an attempt would be impossible on these facts given that the voter’s address is identifiable in at least one way on the outer envelope of each of these 592 ballots. Disenfranchising voters based on this minor technicality, when every one of these 592 voters addresses is 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), Petitioner’s requested interpretation of state law may well lead to a violation of federal law by asking the state to deny the right to vote for immaterial reasons. Nobody acting under color of state law may deny anyone the right to vote “in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B). Here, the SURE barcode provides a readily available means to determine that all 592 ballots as issue in this case 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 address along with other information. *Id.* The handwritten address under the declaration is therefore not material to determining whether an individual is qualified to vote, and not allowing these votes to count would plainly be in violation of this provision of federal law.

V. CONCLUSION

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

Dated: November 9, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael R. McDonald, Esquire, do hereby certify that on November 9, 2020, I caused a true and correct copy of the foregoing Response in Opposition to Petition for Review of Decision to be served *via the Court's electronic filing system* on all counsel of record.

Counsel for Intervenor

/s/ Michael R. McDonald
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