

In The Matter Of:
In re: CANVASSING OBSERVATION

(Motion)
November 3, 2020

John J. Kurz, RMR, CRR, Official Court Reporter
City of Philadelphia
First Judicial District Of Pennsylvania
100 South Broad Street, 2nd Floor
Philadelphia, PA 19110

(Motion) - November 3, 2020
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1 FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
2 COURT OF COMMON PLEAS FOR PHILADELPHIA COUNTY
3 ELECTION COURT
4 - - -
5 In re: : Case No. 20110703
6 : ELECTION MATTER
7 CANVASSING OBSERVATION :
8 : Filed on behalf of:
9 : Donald J. Trump For
10 : President, Inc.
11 - - -
12 TUESDAY, NOVEMBER 3, 2020
13 - - -
14 - COURTROOM 305 -
15 THE JUSTICE JUANITA KIDD STOUT CENTER FOR
16 CRIMINAL JUSTICE
17 1301 Filbert Street
18 Philadelphia, Pennsylvania
19 - - -
20 B E F O R E: THE HONORABLE STELLA TSAI, J.,
21 - - -
22 M O T I O N
23 REPORTED BY:
24 JOHN J. KURZ, RMR, CRR, CRC
25 REGISTERED MERIT REPORTER
CERTIFIED REALTIME REPORTER
OFFICIAL COURT REPORTER

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Mark Morales, Reporter, CNN
Lauren Vidas, Director of Government Relations

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1 - I N D E X -
2 WITNESSES: DIRECT CROSS
3 JEREMY MERCER
4 By Ms. Kerns 20
5 By Mr. McGrath 33
6
7
8
9
10
11
12 E X H I B I T S
13 NO. PAGE NO.
14 (None were marked at this time.)
15
16
17
18
19
20 A R G U M E N T
21 ATTORNEY PAGE NO.
22 Ms. Kerns 42
23 Mr. McGrath 49
24
25

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1 P R O C E E D I N G S
2 (9:51 p.m.)
3 (All parties present and
4 participating in the following proceedings are
5 wearing masks pursuant to FJD protocol.)
6 THE TIPSTAFF: Court is now back in
7 session. Please cease all private conversation.
8 THE COURT: All right. Good evening,
9 everyone.
10 MS. KERNS: Good evening, Your Honor.
11 MR. McGRATH: Good evening, Your
12 Honor.
13 MS. LIN: Good evening, Your Honor.
14 MR. FIELD: Good evening, Your Honor.
15 THE COURT: You may be seated.
16 I understand there is a request from
17 the Republicans; is that correct?
18 MS. KERNS: It's on behalf of the
19 Donald J. Trump For President, Incorporated.
20 THE COURT: Okay. What's the nature
21 of this request?
22 MS. KERNS: My name is Linda Kerns,
23 K-E-R-N-S, and I represent Donald J. Trump For
24 President, Incorporated.
25 Under 3146.8, candidates are

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1 permitted to have watchers at the prec canvassing
2 canvass, and there's also a separate provision
3 under (g)1.1 that authorizes candidates to have
4 an authorized representative.

5 Mr. Trump has a representative at the
6 canvass, and he is waiting in the waiting room
7 on Zoom because he plans to testify because we
8 want the Court to understand that he does not
9 have meaningful access to what is going on at
10 the canvass.

11 Now that the polls have closed, we've
12 moved from prec canvass to canvass. And he's
13 going to testify that there's different
14 activities going on, extraction, examining
15 envelopes for their sufficiency and scanning,
16 and he can see less than half of that. And with
17 regard to the examination of the envelopes, only
18 about 10 percent of that, because he is so far
19 away. There are gates up at the canvass that
20 keep him quite far away, like in excess of
21 12 feet from the first tables, and then there's
22 other tables behind that. So he's quite far
23 away and cannot meaningfully observe what's
24 going on.

25 My client brought this lawsuit

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1 earlier today during the prec canvass, but we then
2 withdrew it without prejudice. We learned that
3 another candidate had sued on similar issues,
4 not about Philadelphia County, but about other
5 counties. However, that suit has not, as I
6 understand it, was not heard today and is not
7 scheduled -- is not possibly scheduled until
8 tomorrow.

9 And what's different now than was
10 occurring this morning is that we have now moved
11 into the canvass. So there's a lot more
12 activity. There's ballot boxes coming back.
13 There's materials coming back from the polling
14 places. And all day today we've been litigating
15 various issues about things going on in polling
16 places. I even had one case where there
17 definitely was someone -- and I don't think
18 there was an agreement -- I don't think that
19 anyone disagreed that someone who had received
20 an absentee ballot had voted on the machine,
21 even though the law indicates that those who
22 received an absentee ballot should not be voting
23 on the machine. So we know that there are
24 irregularities.

25 **THE COURT:** Counsel, slow down.

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1 **MS. KERNS:** Additionally, there's
2 going to be a lot of provisional ballots coming
3 back. So at this point, we really don't have
4 sightline or access. And I think we would all
5 agree that the right to vote is a fundamental
6 right. But that includes not just showing up at
7 the polling place and voting but the entire
8 process. And that right also includes the right
9 to have your vote effectively tabulated. And
10 there is now a burden on the candidate who
11 cannot observe this tabulations.

12 And I understand that no one
13 questions that there is an issue with COVID, but
14 it appears that the observers are being kept
15 well more than 6 feet from what's going on at
16 the canvass, and they are all wearing masks and
17 taking the proper precautions.

18 The statute indicates under 3146.8
19 (g)1.1, that an authorized representative of
20 each candidate in an election and one
21 representative from each political party shall
22 be permitted to remain in the room in which the
23 absentee ballots and mail-in ballots are
24 prec canvassed.

25 So I think we have to explore that

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1 wording "in the room."

2 There's ways to interfere with that.
3 For example, would it be a proper reading of the
4 statute if the observer was in the room and a
5 huge blanket was put up in front of them so they
6 couldn't see what was going on? Well, they
7 would still be in the room. But let's face it,
8 that would not be having an authorized
9 representative there in a meaningful way.

10 Similarly, this canvass is taking
11 place in the Convention Center rather than a
12 Board of Elections' office. And the Convention
13 Center is a huge space. And if you call that
14 one room, well, the observers could be on one
15 end and the canvass activities could be on the
16 other end, you know, so that they could see that
17 there's people there, but not necessarily
18 meaningfully understand what's going on. So the
19 statute, we believe, intends that the observers
20 actually can see what is happening.

21 We already know that irregularities
22 occurred in polling places today. Well,
23 candidates have a right to watch to see whether
24 irregularities are occurring when the votes are
25 being tabulated and counted and so forth. And,

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<p>- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 9</p> <p>1 for example, we know that there may be an issue 2 where if a ballot comes back and there's no 3 secrecy envelope, that under the Code, that 4 should not be counted. Well, a candidate has a 5 right to stand there and watch and make sure 6 that the Board of Elections' workers aren't 7 making mistakes or counting ballots that they 8 shouldn't.</p> <p>9 So I have my witness. His name is 10 Mr. Jeremy Mercer, and he's ready to testify 11 because he's been there all day, and he can 12 enlighten the Court as to exactly what's going 13 on there.</p> <p>14 THE COURT: Okay. That covers it? 15 MS. KERNS: I think so. 16 THE COURT: Okay. 17 MS. KERNS: I'm trying. I can come 18 up with more if you want me to keep going. 19 THE COURT: Thank you for doing it 20 quickly. Thank you very much. 21 Who's going to speak? 22 MR. McGRATH: Good evening, Your 23 Honor. Sean McGrath on behalf of the City of 24 Philadelphia and Board of Elections. 25 THE COURT: All right. Do you want</p>	<p>- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 11</p> <p>1 morning. Not only that, but ensuring voter 2 privacy is a part of that process. We have 3 envelopes that are being opened, declaration 4 envelopes that are being opened, secrecy 5 envelopes that are being opened, ballots that 6 are being extracted, several different stages 7 where voter privacy needs to be taken into 8 account.</p> <p>9 In addition, there are also 10 legitimate paramount concerns about COVID-19. 11 All of these things have been taken into account 12 to set up the physical space.</p> <p>13 Now, all of those factors have been 14 balanced with the fact that the Code requires 15 that observers from the campaign, one 16 representative, authorized representative, have 17 the ability to remain in the room. We have 18 ensured not only that they're able to remain in 19 the room, but that all of these activities are 20 occurring in a row along this designated area so 21 that there's a clear line of sight to all of 22 them. Every single part of the process, every 23 single stage of the process is fully visible. 24 There are no obstructions. And I believe we 25 can, you know, explore that obviously with</p>
<p>- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 10</p> <p>1 to respond?</p> <p>2 MR. McGRATH: I would. Thank you. 3 As an initial matter, I'm surprised 4 that this issue is coming up now. I'll note 5 that this motion was made at around 7:45 this 6 morning and then withdrawn by the Trump 7 Campaign. And that was made during the 8 prec canvass when all of these activities were 9 occurring. And it doesn't appear from anything 10 that has been represented by the Trump Campaign 11 that that has changed in any material fashion.</p> <p>12 I know that they have brought up a 13 decision in federal court -- or rather, a case 14 in federal court. I'll note that that motion is 15 scheduled to be heard tomorrow morning, and it 16 has been scheduled for a period of time today. 17 There's no meaningful reason that we've heard as 18 to why this motion needs to be raised now at 19 this late hour.</p> <p>20 That being said, I will say that the 21 physical setup in the Convention Center was done 22 based on a variety of complicated factors. 23 Obviously, of paramount importance, security of 24 350,000 ballots that are now being processed and 25 have been processed since 7 o'clock this</p>	<p>- IN RE: CANVASSING OBSERVATION NOVEMBER 3, 2020 - Page 12</p> <p>1 witness testimony.</p> <p>2 THE COURT: Okay. Anything else? 3 (Counsel conferring.) 4 MR. McGRATH: The other important 5 point I'll point out or would like to explain to 6 the Court is that recently, the Pennsylvania 7 Supreme Court has made clear that based on the 8 amendments to the Code by Act 12, that there are 9 no challenges during the prec canvass or canvass 10 anymore that are allowed under the Code.</p> <p>11 And so the initial purpose before Act 12 12 was passed was that these names were read 13 aloud. They were never -- there was never -- 14 the Code never contemplated the ability to 15 necessarily see any of these things. And 16 indeed, these recent amendments indicate that 17 the Act was changed to ensure the smooth and 18 efficient processing of the prec canvass.</p> <p>19 Oh, and the very last thing I'd like 20 to add is that there was a recent decision in 21 the Nevada federal court that considered the 22 exact -- almost the exact same issue and made it 23 clear that observers are there to observe. They 24 are not there to audit the prec canvass. 25 It was, excuse me, state court.</p>

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1 **THE COURT:** Okay. Did you say it was
2 a federal decision?
3 **MR. McGRATH:** Excuse me. It was a
4 state court decision in Nevada.
5 **THE COURT:** State court decision,
6 okay.
7 All right. I think we'll hear
8 testimony from the witness.
9 **MS. LIN:** Your Honor, if I may.
10 **THE COURT:** Sure.
11 **MS. LIN:** Good evening. Susan Lin on
12 behalf of the PA Dems.
13 Your Honor, we're not really taking a
14 position on this motion at all, but I do feel
15 the need to correct some things that were stated
16 on the record.
17 Ms. Kerns did refer to irregularities
18 throughout the day that she said appeared in
19 court. I would like to point out that there was
20 a single incident that appeared -- that was
21 presented in court of a person who had received
22 a mail-in ballot voting on the machine. And
23 that situation was corrected by Judge Clemons.
24 Outside of that, there has not been
25 any incidents that have been presented in court

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1 of a person who had received a mail-in ballot
2 voting on a machine without following the proper
3 procedures that are in place to allow people who
4 have received mail-in ballots to vote on
5 machines, assuming they follow those procedures.
6 The other thing that I feel like we
7 should inform the Court of is the statute itself
8 cited by Ms. Kerns does not have the word
9 "meaningful" in it. There is no phrase
10 "meaningful -- meaningfully observe," the
11 opportunity to "meaningful observe." Those
12 words do not appear in the statute. The statute
13 refers to the right to remain in the room and
14 that observers are permitted to be present.
15 That is the kind of language used in the
16 statute.
17 And I would urge the Court to read
18 that Nevada state court case. We don't really
19 have a statute. We have a copy of it that we
20 might be able to get to the Court if the Court
21 wants, but I do think that it is on point.
22 **THE COURT:** I would appreciate it, if
23 you can get the cite.
24 **MS. LIN:** All right.
25 **MS. DAVIS:** We can email it with your

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1 email address. I can email it to you.
2 **THE COURT:** Wait. My judicial
3 assistant can assist you with that.
4 **MS. DAVIS:** Okay.
5 **THE COURT:** What's the citation, if
6 you can just give it to me?
7 **MS. LIN:** Court's indulgence, please.
8 **THE COURT:** Sure.
9 (Counsel conferring.)
10 **MS. DAVIS:** Your Honor, my name is
11 Melissa Hazel Davis for the Pennsylvania Dems.
12 The name of the case is Fred Kraus, K-R-A-U-S,
13 an individual registered to vote, and it was
14 brought by Donald J. Trump For President versus
15 Barbara -- and I cannot pronounce the last
16 name -- C-E-G-A-V-S-K-E, Case No. 20-oc-00142.
17 And I will email it to you right now.
18 **THE COURT:** Okay. Great. Thank you.
19 All right. Any other comments from
20 that side of the bench?
21 No? Okay.
22 All right. Thank you.
23 **MS. KERNS:** Your Honor, I just want
24 to be clear that the Trump Campaign -- that
25 lawsuit that I referenced in Montgomery County,

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1 the Trump Campaign did not bring that lawsuit.
2 Apparently a candidate out there brought it, but
3 because it was addressing similar issues, I --
4 **THE COURT:** Understand. So let's
5 present your witness.
6 **MS. KERNS:** Okay.
7 **COURT OFFICER:** Judge, may I admit
8 him into the Zoom call?
9 **THE COURT:** Yes, you may.
10 (Whereupon the witness appeared on
11 screen via Zoom videoconferencing.)
12 **THE COURT:** Could you state your name
13 for the record, please.
14 (No response.)
15 **THE TIPSTAFF:** Sir, can you please
16 state your name and spell your last name for the
17 record.
18 **THE WITNESS:** I'm sorry, are you
19 talking to me?
20 **THE TIPSTAFF:** Yes.
21 **THE WITNESS:** Oh. Jeremy Mercer.
22 First name is J-E-R-E-M-Y. Last name is Mercer,
23 M-E-R-C-E-R.
24 **THE TIPSTAFF:** Do you solemnly swear
25 or affirm the testimony you're about to give

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1 this Court in the issue now trying will be the
2 truth, the whole truth, and nothing but the
3 truth, so help you God?
4 **THE WITNESS:** I do.
5 - - -
6 ...JEREMY MERCER, (appearing via Zoom
7 videoconference), after having been first duly
8 sworn, was examined and testified as follows:
9 - - -
10 **THE COURT:** Thank you. Welcome.
11 **THE WITNESS:** Thank you.
12 **THE COURT:** So I'm Judge Tsai, and
13 you are participating in this hearing by Zoom,
14 and I want to go over some matters with you,
15 okay, before we start.
16 First, can you see me?
17 **THE WITNESS:** I'm -- well, I can see
18 the head of someone who looks like she's sitting
19 in a judge's chair.
20 **THE COURT:** Well, that would be me.
21 **THE WITNESS:** If that's you speaking,
22 I'm sorry.
23 **THE COURT:** Okay. That's fine. With
24 glasses. Okay.
25 All right. So you're testifying

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1 today by video conference; you understand that,
2 correct?
3 **THE WITNESS:** I'm sorry, Your Honor.
4 I'm having trouble --
5 **THE COURT:** Yeah. I think it's
6 difficult with the mask. Let me just try this
7 again.
8 All right. So the most important
9 thing is, can you hear me?
10 **THE WITNESS:** Yes, I can. I'm sorry.
11 I'm putting in the other earpiece as well, to
12 make that hopefully a little bit better.
13 **THE COURT:** That's good.
14 Oh, did we lose him?
15 **COURT OFFICER:** I think he
16 accidentally hung up on us.
17 **THE COURT:** He hung up on us, okay.
18 I won't hold that against him.
19 (Laughter.)
20 **THE COURT:** All right. He'll call
21 back.
22 **MS. KERNS:** He says he got cut off.
23 (Witness reappeared on screen.)
24 **COURT OFFICER:** There he is. He's
25 back now.

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1 **THE COURT:** All right. Welcome back.
2 **THE WITNESS:** Thank you. Sorry about
3 that.
4 **THE COURT:** These things do happen.
5 So I want you to understand that
6 you're testifying as if you're testifying from
7 the witness box here today. So this is a formal
8 proceeding; you understand that?
9 **THE WITNESS:** I do.
10 **THE COURT:** Okay. And that means
11 that you can't refer to notes unless we go
12 through some certain procedures before you do
13 so. And that you can't be assisted by -- you
14 cannot refer to notes unless we say you can do
15 so, okay.
16 **THE WITNESS:** Understood.
17 **THE COURT:** And also that if there's
18 anybody with you, that they cannot assist you
19 with your testimony; do you understand that?
20 **THE WITNESS:** There is no one with
21 me, but understood.
22 **THE COURT:** Okay. That makes it
23 easier.
24 All right. And if you do have to
25 refer to a document, understand that there's a

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1 procedure that we need to follow and we need to
2 address it that way. And that lawyers may have
3 occasion to object, so I'm going to ask you to
4 pause if you hear an objection so that we can
5 resolve it before you continue testifying. Do
6 you understand that?
7 **THE WITNESS:** Understood, Your Honor.
8 **THE COURT:** Okay. Great.
9 I think we'll do our best. We will
10 do our best to speak slowly so you can
11 understand us. And I hope we can all get it
12 done.
13 All right. So, Ms. Kerns, your
14 witness.
15 - - -
16 **DIRECT EXAMINATION**
17 - - -
18 **BY MS. KERNS:**
19 **Q. Good evening, Mr. Mercer.**
20 **A. Good evening.**
21 **Q. Could you tell us where you are?**
22 **A. I am in Hall F at the Philadelphia Convention**
23 **Center.**
24 **Q. And why are you there?**
25 **A. I'm one of the representatives designated by**

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1 the Trump Campaign and/or some of the Republican
2 candidates on the ballot to observe the prec canvass.
3 **Q. And how long have you been there today?**
4 A. I got into the hall shortly before 7:00 a.m.
5 this morning. And I have been there in the hall or
6 in the lobby to the hall all day.
7 **Q. And can you tell us what you're doing?**
8 A. I am walking back and forth the width of the
9 hall from the very -- looking at the various
10 stations and watching the ballot envelopes going
11 from beginning of process all the way through the
12 scanning of the ballots that are in the envelopes.
13 I've also been interacting with Mr. Blumenthal
14 whenever necessary to address --
15 **Q. I think you mean Bluestein.**
16 A. I'm sorry, Bluestein. I apologize. Bluestein,
17 whenever any issues come up that need to be
18 addressed.
19 **Q. And can you describe what the setup is there?**
20 A. Uhhh, we are in a very, very large room. I'm
21 on -- I'm on a -- I'm sorry. Someone was coming up
22 to me and I was trying to wave them off, Your Honor.
23 **THE COURT:** Okay.
24 **THE WITNESS:** It's in -- it's in a
25 very, very large hall. And it is divided

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1 width-wise into about four discreet sections for
2 the four discreet processes to about halfway
3 back. And then beyond that is storage of
4 ballots, sorting and processing and receiving
5 facilities for those ballots.
6 **BY MS. KERNS:**
7 **Q. And are tables set up?**
8 A. At various parts along the way, yes.
9 **Q. And --**
10 A. Depending upon the section, they are set up
11 differently.
12 **Q. And about how many tables, if you know?**
13 A. Just in the first section, there are two --
14 four -- eight -- ten -- twelve -- about 35 tables in
15 the first section alone.
16 **Q. And about how many -- I'm sorry. Go ahead.**
17 A. I would just say, I'd be happy to turn the
18 phone around if that would be easier or more
19 descriptive so that you could see. I'm standing in
20 front of the first section right now.
21 **MR. FIELD:** Your Honor, I'd just note
22 for the Court that photography and any video
23 recording is limited to a very specific area of
24 the room to ensure that we don't run into any
25 issues with voter privacy or ballot secrecy.

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1 And certainly, I have no objection to the
2 witness testifying to things here, but I would
3 have an objection to any sort of video tour of
4 the room in that fashion.
5 **THE COURT:** All right. I think
6 that -- Counsel, do you have a concern about
7 that? How would you respond to that?
8 **MS. KERNS:** Well, I don't -- I don't
9 know where he's standing relative to where the
10 press is standing.
11 **THE COURT:** All right. I think I'd
12 rather just hear a description at this point so
13 that we don't --
14 **THE WITNESS:** Okay.
15 **THE COURT:** Because once we get --
16 let's just do it that way.
17 **THE WITNESS:** Okay.
18 **THE COURT:** So give me, you know,
19 feet, meters, whatever you want to use.
20 **THE WITNESS:** The very first section,
21 Your Honor, there are three rows of about 15
22 tables deep. And the closest that we can get to
23 the first table in each row is approximately, I
24 would say, 15 to 18 feet. The one row is more
25 like from the 25 to 30 feet. And that's the

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1 first in each of those three rows of 15. So
2 you're able to -- and then each table is set off
3 further back from the other. I would say
4 roughly 5, maybe 6 feet from each of them. So
5 they just keep adding depth distance-wise.
6 **THE COURT:** Okay. So you can view
7 them from where you're sitting or standing, and
8 that's where you are, right, right in front of
9 them, those tables?
10 **THE WITNESS:** I'm standing in front
11 of them right now, Your Honor, yes.
12 **THE COURT:** Okay. All right. You
13 can -- you may continue.
14 **BY MS. KERNS:**
15 **Q. So the closest table to you is how many feet**
16 **from you?**
17 A. Approximately, I would say, 15 feet.
18 **Q. And the table that's the furthest away, how**
19 **many feet away are you?**
20 A. Uhhh, you're going to ask me to do math.
21 **Q. If you can approximate.**
22 A. Fifteen times six, plus another 15 feet.
23 Whatever that worked out to be. I don't --
24 **Q. I think that's 105.**
25 **So you would say six lengths of 15,**

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1 plus another one?
2 A. That's correct.
3 **Q. And is there a barrier or anything preventing**
4 **you from getting closer?**
5 A. There is. There is -- it's about waist high.
6 There seems to be like crowd control fences is what
7 I refer to them. They're interlocking left to
8 right, and they're slotted about a foot. I can get
9 my foot kind of between the pickets of them, so to
10 speak. They're metal.
11 **Q. And can you compare for me the distance you are**
12 **from the closest Election Board worker to you as**
13 **opposed to the distance the Election Board workers**
14 **are from each other?**
15 A. It's at least -- when they are seated at the
16 table, they are approximately 6 feet apart at most.
17 We are at least 15 to 18 feet from the nearest
18 person.
19 Now, there are times when the
20 election workers are right next to each other, and
21 they fall over their -- when they call over their
22 supervisors or when they're talking to each other.
23 But when they're seated at big tables for this
24 envelope review section, they appear to be about
25 6 feet apart.

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1 **Q. So what's the closest that you've seen an**
2 **Election Board worker be to another Election Board**
3 **worker?**
4 A. I'm sorry. I didn't hear the end of that
5 question.
6 **Q. I'm sorry.**
7 **What is the closest you've seen one**
8 **Election Board worker be to another Election Board**
9 **worker?**
10 A. Standing shoulder to shoulder, leaning over
11 one's shoulder. That's as close as I've seen them.
12 **Q. Now, you're wearing a mask, I can see. Have**
13 **you had that on all day?**
14 A. Except for when I have been taking a drink of
15 water or, you know, eating a sandwich, yes.
16 **Q. And how about other -- are you taking any other**
17 **precautionary measures with regard to protecting**
18 **yourself from potential exposure to any virus or**
19 **germs?**
20 A. I've got hand sanitizer that I've been using.
21 I've been washing my hands in the restroom. When I
22 have been meeting other people, I have been using
23 the elbow bump as opposed to a handshake. I've been
24 attempting to maintain distance from other people.
25 When I have been drinking or eating, I have moved so

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1 that I am more than 6 feet away from other people.
2 **Q. Okay. So let's talk about the -- Mr. Mercer.**
3 A. I'm sorry.
4 **THE COURT:** We're good. Okay.
5 Proceed, please.
6 **BY MS. KERNS:**
7 **Q. Let's talk about the activities that you're**
8 **observing. Can you describe them?**
9 A. In the first section, we have been told that --
10 well, I've seen workers take ballot envelopes out of
11 one tray and look at the back of them and either
12 place them in a different tray or place them back in
13 a tray from which they were pulled.
14 **Q. Can you --**
15 A. They appear to be looking at the back of the
16 ballot envelope where the declaration is located.
17 But from where I am, from where we are limited to
18 standing, we're not able to see what's on the back
19 of that envelope.
20 **Q. Can you hear what is happening?**
21 A. No. It is -- I'm sorry. I had to change
22 earplugs because my earphones are dying.
23 Are you able to hear me still?
24 **Q. Yes.**
25 **THE COURT:** We can.

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1 **THE WITNESS:** I'm sorry. Let me put
2 my other earphone in.
3 No, we're not able to hear what's
4 being said. It's very loud in here. There are
5 a good number of people with equipment that are
6 running. Plus, it's a very open space with no
7 carpeting and it echos very badly.
8 **BY MS. KERNS:**
9 **Q. All right. Other than as you described it -- I**
10 **think you described it as examination of the**
11 **envelopes, what other activities are you observing?**
12 A. At this section of the process, that's it. But
13 at the next stage, what has been denominated the
14 "extraction stage," that's where the ballot
15 envelopes are being fed through machines to slice
16 them open so that what's inside the outer envelope
17 can be removed, and then another set of what appear
18 to be the same or very similar machines so that the
19 inner secrecy envelopes then can be sliced open so
20 that what's inside those can be removed. That's the
21 next stage of the process.
22 **Q. And how close are you to that process?**
23 A. I would say approximately 20 feet -- 18 to
24 22 feet from that is as close as we can get to the
25 first desk. And there are one -- two -- three --

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1 four -- seven rows of three desks each. So we can
2 only go to the first one. The closest one is
3 about -- sorry. The closest one is approximately 20
4 to 22 feet. 18, 22 feet, somewhere in that range.
5 And then the two behind it, they appear to be 5 to
6 6 feet between them. So they progress further back.
7 **Q. And are there -- can you see the ballots that**
8 **are being -- can you see the -- are you close enough**
9 **to see the process and see which ballots are**
10 **being -- are you close -- I apologize. Sorry. Long**
11 **day.**
12 **Are you close enough to the process**
13 **to see what is happening with each of the ballots**
14 **when they're sliced open and whether or not the**
15 **material inside has a secrecy envelope or not?**
16 **MR. McGRATH:** Your Honor, objection;
17 leading.
18 **THE COURT:** Fair enough. Sustained.
19 **BY MS. KERNS:**
20 **Q. With regard to the opening of the ballots by**
21 **the machine, what are you able to observe?**
22 A. Pretty much we're only able to observe the
23 first row in each -- I'm sorry, the first desk in
24 each of the rows. And we're able to essentially see
25 from the first four rows, when they are slicing open

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1 the outside envelope, we're able to see them pull
2 something out. And if you're watching closely, you
3 can discern if it is what's referred to here as the
4 "naked ballot," meaning not in a secrecy envelope,
5 sometimes.
6 We're not able to discern whether, if
7 there is a secrecy envelope, whether the secrecy
8 envelope has any markings on it because we're simply
9 not close enough to be able to see that.
10 **Q. And --**
11 A. The tables -- the desks that are further back,
12 you're simply able to see people pulling things out
13 of an envelope but not really able to discern what,
14 if anything, is being pulled out.
15 **Q. And what other processes are you observing?**
16 A. When the -- when each of these desks finishes
17 their tray of ballots that have been sliced open,
18 the ballots are then -- if there are ones that from
19 what we've been able to see are the naked ballots,
20 they're put in a tray along with the opened or the
21 unopened secrecy envelopes. Those are then taken by
22 a worker back to a table behind all of those desks,
23 and they do something with them. We can't see what
24 they do. And then a tray comes to the next three
25 rows of desks, in the yellow tray now, for those

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1 three rows of desks to slice open the secrecy
2 envelope and look at the ballots.
3 **Q. And how far away are you from that process?**
4 A. The same exact distance as the desks where they
5 were slicing open externally. So approximately 18
6 to 22 feet, somewhere in that range.
7 **Q. And what other activities are you observing?**
8 A. Again, we can see the ballot come through --
9 I'm sorry, not the ballot, the envelope come through
10 the machine. And we can see people pulling
11 something out of the secrecy envelope, placing that
12 in a stack, and then when they're finished with
13 their tray, they put those back in the yellow tray.
14 And they raise their hand, workers come and pick up
15 that tray and take it, again, back behind those
16 desks to stage -- to move to the next area within
17 the hall there.
18 **Q. And you said that you're there on behalf of a**
19 **candidate, Candidate Trump. What, if anything, are**
20 **you able to report back to him about whether the**
21 **Board of Elections' workers are adhering to the**
22 **procedures as laid out in the statute?**
23 A. Little. We're not able to report -- I'm not
24 able to report back anything as it relates to the
25 review for sufficiency of the declaration on the

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1 outside of the ballot, or the envelopes.
2 As it relates to whether naked
3 ballots or marked secrecy envelopes are being
4 pulled, we can report only what we're able to see on
5 the first row of desks, essentially.
6 We have attempted to get a better
7 view by using binoculars. But the process is -- the
8 extraction process is moving so fast that it's
9 really impossible to see even using binoculars the
10 desks that are behind the first one in each row. So
11 there's very little that we're able to report back
12 as to whether there's any ability to object for
13 failure to comply with the requirements as we
14 understand.
15 **Q. And because you're standing there, could you**
16 **tell us what you believe would assist you -- or what**
17 **would need to change to assist you in being able to**
18 **observe what's going on?**
19 A. Well, definitely allowing us to get closer to
20 the desks would allow us to have a better view.
21 We'd at least be able to more than likely see what's
22 happening at the first desk in each row, possibly
23 the second desk in each row, and the extraction
24 process.
25 As it relates to the envelope review

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1 or reviewing the sufficiency of the declaration,
2 moving us closer to the first table in each row, but
3 also allowing us to look, to go down the sides.
4 There's an extensive amount of room on the side of
5 the left most row and on the right most row that
6 would allow us to get within 6 feet and not -- not
7 impinge on the workers' space. That would at least
8 allow us to be able to see perhaps the act of the
9 ballot review -- or, I'm sorry, the envelope review
10 process.
11 **Q. Okay.**
12 **MS. KERNES:** I have nothing further.
13 **THE COURT:** Thank you.
14 All right. Counsel.
15 - - -
16 **CROSS-EXAMINATION**
17 - - -
18 **BY MR. McGRATH:**
19 **Q. Hi. Good evening, Mr. Mercer.**
20 A. Hi.
21 **Q. Can you hear me?**
22 A. I can.
23 **Q. My name is Sean McGrath. I'm an attorney for**
24 **the City.**
25 A. Hi, there.

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1 **Q. Hi.**
2 **So, in terms of the layout that**
3 **you've been describing, is there anything that has**
4 **obstructed your line of sight to these different**
5 **processes?**
6 A. Uhhh, there are some easels with signs for the
7 various sections. I mean, you can move around them.
8 Like, I'm standing in front of the extraction right
9 now. Where I'm standing, I can see all but one row
10 based on the sign. But if I move, then I can see
11 that row, but it blocks another.
12 **Q. Are there parts of the process that you are**
13 **unable to see if you change your vantage point?**
14 A. There are. When the ballots are taken back
15 to -- there's a gentleman who is just walking back
16 to the table after the ballots have been -- the
17 outer envelopes have been sliced open being taken
18 back. And I -- you cannot see what's happening just
19 because of distance. You just -- you know
20 something's going on because the ballot trays go
21 back there and other ballot trays come back out.
22 But we don't know -- we can't see what's going on
23 back there.
24 **Q. Have any -- during your period of time**
25 **observing, have any --**

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1 A. I'm sorry. One second. A security guard just
2 approached me.
3 **Q. Okay.**
4 **(Pause.)**
5 **THE WITNESS:** Okay. Sorry about
6 that, Your Honor.
7 **THE COURT:** That's all right.
8 You may proceed, Counsel.
9 **MR. McGRATH:** Okay.
10 **BY MR. McGRATH:**
11 **Q. In the times that you've been there, have Board**
12 **workers passed between your observation location and**
13 **the tables?**
14 A. I'm sorry, have workers passed between where we
15 are and the tables?
16 **Q. Yes.**
17 A. When they're walking in to go back to the back
18 to put in for their shift or when they're walking
19 out to go on a break, but not on a regular basis,
20 not as part of the routine transiting of the ballots
21 from one station to the next.
22 **Q. But workers are using that to walk through,**
23 **correct?**
24 A. Occasionally a worker will walk through to come
25 back to use the restroom, or a worker will just walk

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1 in in street clothes without a vest on, so I'm
2 assuming is coming in for a shift. But other than
3 that, no.
4 **Q. You said -- I believe you testified that**
5 **there's approximately 15 to 20 feet, depending on**
6 **what stage you're looking at, between your vantage**
7 **point and that process; is that correct?**
8 A. From the --
9 **Q. The front of that process.**
10 A. The first table or first desk, it's -- the 15
11 is on two of the rows of the envelope review.
12 Everything else is probably closer to the 20 or
13 longer more distant.
14 **Q. Would it be fair to say if somebody was walking**
15 **through the middle of that space, that there would**
16 **be between around 7 to 8 feet between them and the**
17 **fence on either side?**
18 A. Uhhh, most of them tend to walk along the
19 fence. So they're closer to the fence when they're
20 walking and then kind of at an angle to cut the
21 corner. I'm not sure if I am answering your
22 question. I...
23 **Q. Could you describe approximately -- I believe**
24 **you testified you've been there since 7:00 a.m. I**
25 **imagine that that's not -- you haven't been there**

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1 the whole time continuously; is that correct?
2 A. I'm sorry. I missed part of what you said.
3 **Q. Have you observed this -- the prec canvass during**
4 **in periods of time or chunks of time or have you**
5 **been there since 7:00 a.m. nonstop?**
6 A. I have been here since before 7:00. I have had
7 to step out into the lobby area of the building to
8 address issues with getting additional
9 representatives in, talking with the credentialing
10 folks out there. And I've had to go use the
11 restroom. But I've not left the building. I have
12 been here observing the process all day.
13 **Q. And I believe you testified that at the first**
14 **stage, that you are able to see workers looking at**
15 **the back of envelopes; is that correct?**
16 A. We're able to see that they are looking at the
17 back of the envelope, but not able to see what's on
18 the back of the envelope. That's correct.
19 **Q. If you were able to be closer, what is it that**
20 **you would want to see that you haven't been able to**
21 **see?**
22 A. It's my understanding that the backs of the
23 envelopes, the declaration is to be filled out,
24 dated, signed, and name of the elector printed,
25 address printed. And it's my understanding that

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1 that information is required in order for the ballot
2 to be determined to be sufficient. And if it's not,
3 it may allow for an objection to that processing of
4 that ballot.
5 We'd like to be able to see whether
6 there are objections that could or should be made to
7 ballots; that perhaps the name is not on there, the
8 date is missing or wrong. Just essentially ensuring
9 that the declaration had been completed as we
10 understand the statute to require it to be
11 completed.
12 **Q. At the extraction stage, what you described as**
13 **the extraction stage, yes or no, were you able to**
14 **see what is extracted from the envelope in the first**
15 **row?**
16 A. In the first row, the first desk in each row,
17 we're able to generally see if it is a naked ballot
18 versus a secrecy envelope, yes. But we're not able
19 to see if the secrecy envelope has any markings on
20 it that, again, as we understand the statute, would
21 require that those ballots -- those envelopes be set
22 aside.
23 **Q. Are you able to freely walk along this area to**
24 **observe?**
25 A. On our side of the crowd control fence?

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1 **Q. Correct.**
2 A. Yes.
3 (Counsel conferring.)
4 **BY MR. McGRATH:**
5 **Q. I just have a few more questions.**
6 **First, could you explain where you --**
7 **where you work; what your employment is?**
8 A. I'm sorry? I'm sorry, where I what?
9 **Q. What your employment is.**
10 A. I am a lawyer with the law firm of Porter,
11 Wright, Morris & Arthur. My office is based in
12 Pittsburgh. My office is in Pittsburgh,
13 Pennsylvania.
14 **Q. And you have represented the Trump Campaign in**
15 **litigation during this election cycle, correct?**
16 A. That's correct.
17 **Q. And is it correct that you have deposed**
18 **Jonathan Marks at the Department of State on some of**
19 **these issues?**
20 **MS. KERNS:** Objection; relevance.
21 **THE COURT:** I'm going to allow it.
22 Overruled.
23 **THE WITNESS:** I'm sorry, Your Honor,
24 I didn't hear your ruling.
25 **THE COURT:** I said "overruled." You

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1 may testify -- you may address the -- answer the
2 question.
3 **THE WITNESS:** That is incorrect. I
4 have not deposed Jonathan Marks.
5 **BY MR. McGRATH:**
6 **Q. Did you depose anyone in that litigation?**
7 A. I did not take any depositions in that case,
8 no.
9 **MR. McGRATH:** I have nothing further,
10 Your Honor.
11 **THE COURT:** Okay. Thank you.
12 I think we have other parties being
13 represented.
14 Did you have any questions?
15 **MS. LIN:** No questions. Thank you.
16 **THE COURT:** Thank you.
17 Ms. Kerns, do you have any redirect?
18 **MS. KERNS:** Can I just have one
19 moment, Your Honor?
20 **THE COURT:** Okay. Yeah. Take
21 your -- I want to say take your time, but just
22 be as efficient as you can.
23 (Counsel conferring.)
24 **MS. KERNS:** No, Your Honor.
25 **THE COURT:** Okay. All right.

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1 Proceed to closing, or do you have someone
2 else -- actually, we can let the witness go.
3 I think, Mr. Mercer, your testimony
4 is complete, so you're dismissed. Your
5 testimony is complete. So thank you very much
6 for your time.
7 **THE WITNESS:** Okay. Thank you, Your
8 Honor.
9 **THE COURT:** All right.
10 (Witness disconnected from the Zoom
11 call.)
12 **THE COURT:** Take care.
13 All right. You may proceed.
14 **MS. KERNS:** Yes, Your Honor.
15 3146.8 of the Pennsylvania Election
16 Code allows --
17 **THE COURT:** Just wait one second,
18 before you complete.
19 I just realized, do you have any --
20 you have only one witness, right?
21 **MS. KERNS:** Yes.
22 **THE COURT:** Okay. Do you have any
23 witnesses? I apologize.
24 **MR. McGRATH:** Your Honor, we're ready
25 to proceed to closing.

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1 **THE COURT:** Okay.
2 **MR. McGRATH:** Unless --
3 **MS. LIN:** No witnesses. Thank you.
4 **THE COURT:** Okay. Thank you.
5 **MS. KERNS:** One second, Your Honor.
6 **THE COURT:** Sure.
7 (Counsel conferring.)
8 **MS. KERNS:** Okay.
9 **THE COURT:** Ready to proceed?
10 **MS. KERNS:** Yes.
11 **THE COURT:** All right. Let's go.
12 Thanks.
13 **MS. KERNS:** 3146.8 of the Election
14 Code allows candidates to be present at the
15 canvassing of the ballots. And to the extent
16 the candidate is unavailable, obviously a
17 candidate can't be at all the canvasses, and
18 there's only one candidate, that candidate can
19 have watchers or representatives to watch the
20 process.
21 And you heard the testimony of the
22 witness. He's there on behalf of Mr. Trump, and
23 he cannot see what is going on. So he cannot
24 tell the candidate who he's representing what is
25 happening at the canvass. And it's important

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1 for a candidate to know what's happening at the
2 count of votes because if the observer sees that
3 the Election Code is not being followed, the
4 procedures aren't being followed, like, for
5 example, the witness spoke about the naked
6 ballot issue where the Election Code indicates
7 that if the ballot does not have the secrecy
8 envelope, it shouldn't be counted, or if the
9 ballot has marks on the secrecy envelope that
10 would identify either the voter or who they are
11 voting for, that it should not be counted. But
12 Mr. Mercer is precluded from really knowing what
13 is happening because he's too far away. So he
14 cannot adequately report back to the candidate
15 what he is observing, which precludes the
16 candidate from taking any action if he needed
17 to.
18 Now, my friends on the other side are
19 going to say, well, you're not allowed to object
20 to what's going on at the canvass. But I would
21 disagree with that because if we saw
22 wholesale -- wholesale, basically, defiance of
23 the Election Code, for example, not processing
24 the ballots correctly, the candidate would have
25 to consider his options with regard to, you

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1 know, possibly filing a lawsuit to stop the
2 process or something along the lines of
3 compelling the Election Board to follow the
4 Code.
5 The Code allows the watchers and
6 representatives there. I mean, they're not
7 there to be potted plants. They're there to be
8 the eyes and the ears of the candidate. And
9 Mr. Mercer testified that he can't get close to
10 almost all of the process, and there's a lot of
11 things going on that he can't see.
12 We've heard a lot about the COVID
13 restrictions, but if Mr. Mercer and other
14 representatives like him are required to follow
15 the COVID restrictions, it doesn't sound like
16 the Election Board workers themselves are
17 following the COVID restrictions.
18 So apparently what's happening there
19 is that the Election Board workers can
20 occasionally be shoulder to shoulder and can be,
21 you know, 6 feet apart or sometimes less, but
22 the observers have to be, for whatever reason,
23 at least 12 feet apart from the action and
24 sometimes more.
25 And there's -- you know, everyone has

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1 heard the CDC guidance, you know, 6 feet of
2 social distancing and masks, frequent hand
3 washing and hand sanitizer, and Mr. Mercer has
4 testified that he's done all that. So it
5 appears that it's not -- that there's one
6 standard for what's going on with the Election
7 Board workers with regard to the COVID
8 restrictions and then there's another standard
9 for what's going on with the observers.
10 Additionally, Pennsylvania is a
11 commonwealth with 67 counties. And if
12 Philadelphia is precluding a candidate from
13 having a meaningful observation of what is
14 occurring, then that's an equal protection
15 argument. That means that the voters in, say,
16 Erie County, where the room is much smaller and
17 you can actually have meaningful observation on
18 behalf of the candidate, or Lackawanna County or
19 Lancaster County or Allegheny County, if they
20 have more meaningful observation, then that's
21 not fair because that means the process is
22 different in all of the counties.
23 And remember, Judge, that, as I
24 started off with, we all agree here that voting
25 is a fundamental right. It's one of our most

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1 precious rights. But voting encompasses the
2 entire process. And it includes the right to
3 properly tabulate and count the votes. And it
4 includes the right for a candidate who invests
5 so much in the process of running for office,
6 whether you're running for the top office or
7 whether you're running for one of the row
8 officers on the ballot or the General Assembly,
9 local General Assembly races, they put so much
10 into it, and they have a right to -- and the
11 General Assembly, indeed, gave them that right
12 to have someone there watching the process for
13 them.
14 We are not asking to defy COVID
15 restrictions and stand shoulder to shoulder.
16 We're not asking to take off our masks. We're
17 not asking to not wash our hands. We're not
18 asking at all to interfere in the process. All
19 we're asking is if there's things going on at
20 the canvass, then representatives who are there
21 on behalf of candidates should be able to
22 meaningfully report back to their candidates
23 what is going on. And that is simply -- simply
24 not happening.
25 And this process is getting -- it

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1 gets more complicated, because today we were
2 counting -- or they were counting, excuse me,
3 mail-in ballots and absentee ballots.
4 Well, this canvass is going to
5 become, you know, counting things that come in
6 from the ballot boxes that were out today and
7 provisional ballots and ballots from the -- that
8 were -- excuse me, the materials from the
9 polling places. And if the candidate can't know
10 that this is happening in a uniform fashion, in
11 adhering to the Election Code, that is simply
12 not fair, and that is not a free and fair
13 election.
14 My friend on the other side indicated
15 that there was one example of a single incident
16 of a mail-in ballot today. But I don't think
17 that's an accurate representation of what
18 occurred either today in this room or the room
19 next door or in the city of Philadelphia. There
20 was multiple, multiple, multiple issues of poll
21 watchers not being allowed in polling places or
22 being kicked out.
23 There was multiple issues of, you
24 know, voter intimidation or improper things
25 happening in polling places. And you know why,

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1 Judge? Because humans are not perfect. I'm not
2 perfect. And I would guess that no one in this
3 room is perfect. And that means that the people
4 at the Convention Center aren't perfect either.
5 And I think the General Assembly knew that. And
6 that is why they put in the statute that let's
7 give a little bit of oversight.
8 And I think it would be ridiculous to
9 expect the General Assembly to write a statute
10 that says watchers are permitted, but, by the
11 way, don't put a cloth in front of them so they
12 can't see, and don't put them in Madison Square
13 Garden where the watchers are on one side and
14 what's happening is on the other side. I don't
15 think that anyone who writes statutes would
16 expect that. I don't think anyone who reads
17 statutes would expect a statute to say that.
18 This is really a commonsense issue.
19 There are watchers and there are
20 representatives. And if they are going to
21 report back to their candidate, they should be
22 able to do so. And it was clear from
23 Mr. Mercer's testimony that he can't report
24 back. So he cannot be a proper representative.
25 And my friends on the other sides are

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1 talking about a Nevada case, but this is the
2 Commonwealth of Pennsylvania. And I am asking
3 you, Judge, to assist us in compelling the Board
4 of Elections to follow this section of the
5 Election Code so that our watchers or my
6 client's watchers and my client's
7 representatives can meaningfully -- can
8 actually, actually, see the process, can be in
9 the room, can observe, and can be there and know
10 what is going on.
11 **THE COURT:** Thank you.
12 Counsel.
13 **MR. McGRATH:** Your Honor, I'd like to
14 focus on the law here in the Commonwealth of
15 Pennsylvania.
16 The Trump Campaign has said multiple
17 times -- used the language "meaningful access."
18 If we look at the plain language of the law, it
19 states that authorized representatives of the
20 campaigns and political parties may remain in
21 the room for the prec canvass and canvasses
22 occurring.
23 "Meaningful access" does not appear
24 in that subsection. It does not appear in the
25 section of the Election Code.

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1 The fact that this plain language
2 becomes even clearer if you look at the recent
3 state Supreme Court decision In Re: November 3,
4 2020 General Election. There, the Supreme Court
5 of Pennsylvania made a decision and a holding
6 that is extremely relevant to the issue here.
7 There they said that -- or excuse me, the
8 Supreme Court held that then, in 2020, the
9 Legislature eliminated time of canvassing
10 challenges entirely, emphasized, from Section
11 3146.8 subsection (g)3. Amending that statute
12 to eliminate the challenging grounds procedures
13 and amending that section to eliminate the
14 proviso that representatives shall be permitted
15 to challenge any absentee elector or mail-in
16 elector.
17 The court went on to say:
18 Presumably, in expanding voting by mail, the
19 Legislature sought to streamline the process for
20 canvassing such ballots perhaps to avoid
21 undermining the expansion effort by eliminating
22 the prospect of voters, including a potentially
23 large number of new mail-in voters, will be
24 brought before the Board or the courts to answer
25 third-party challenges.

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1 As a result, the Pennsylvania Supreme
2 Court made clear that any challenge made during
3 the prec canvass that used to be in the Code no
4 longer exists. These are exactly the type of
5 challenges that the Trump Campaign is now trying
6 to bring.
7 Further, as evidenced by this
8 testimony that we just heard, it's clear that
9 the witness here was able to observe everything
10 that was occurring during the prec canvass. He
11 described every single stage in detail. He
12 described what is happening at every single
13 stage in detail.
14 Simply put: Everything that the
15 Trump Campaign wants to be able to do with this
16 information has been precluded by the
17 Pennsylvania Supreme Court.
18 What the campaign is asking for is
19 rearranging an ongoing processing of 350,000
20 ballots 13 hours after it started, in the
21 middle, just before an overnight canvass.
22 What the campaign seeks to do,
23 importantly, has no basis in law, and in light
24 of the facts that are raised, is completely
25 unreasonable. The Board has balanced the

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1 critical issues of privacy, secrecy, safety with
2 that of the ability to observe. For those
3 reasons, we respectfully submit that the
4 petition should be denied.
5 **THE COURT:** Okay. Do you have any
6 reply?
7 **MS. KERNS:** Well, I just --
8 **THE COURT:** Wait. I believe counsel
9 wishes to address this.
10 All right. Ms. Lin.
11 **MS. LIN:** Thank you, Your Honor.
12 While we're not taking any position
13 on this issue, I would point out that it seems
14 like what Ms. Kerns is asking for or what Mr.
15 Mercer is asking for is basically the best seat
16 in the house. It seems that he wishes to be
17 able to look over the shoulder of the workers,
18 to be able to read exactly what they are
19 reading. And frankly, the statute does not
20 permit that for him. He's not permitted to
21 conduct an audit under the statute. If you look
22 at the language of the statute, he's permitted
23 to be in the room. He's permitted to be
24 present.
25 Thank you.

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1 **THE COURT:** Okay. Thank you.
2 All right. Ms. Kerns.
3 **MS. KERNS:** Yes, Your Honor. I would
4 just like to note that I have not, while we were
5 sitting here, said that we wanted to make a
6 specific challenge to any particular voter. I
7 think that the other side is saying that we are
8 here seeking the right to challenge. That's not
9 what we're seeking. We're seeking the right to
10 see what is going on.
11 So whether or not there could be
12 challenges to individual voters, that appears to
13 be a question for another motion that doesn't
14 appear to be before us right at this second,
15 because I never mentioned challenging any
16 individual voter or ballot, and neither did
17 Mr. Mercer. So that appears not to be relevant
18 to this particular question.
19 In addition, although I was told that
20 they -- that I think it was called -- I think
21 they're called the PA Dems were not taking a
22 position, it appears that they did take a
23 position. And the summary that I just heard
24 from the PA Dems; that Mr. Mercer wants the best
25 seat in the house, to look over the shoulder and

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1 read an audit, I did not hear him say that. He
2 just said that he wanted to be able to see, and
3 he's too far away. He's at least 12 feet, 12 to
4 16 feet away from the closest table. And I
5 think he said six to seven times that from the
6 furthest table. Nowhere did he say he wants the
7 best seat in the house. Nowhere did he say he
8 wants privileges that another observer is not
9 getting. Nowhere did he say he wanted to get
10 any closer than 6 feet. He never even said
11 that. He never said he wanted to look over the
12 shoulder.
13 He did mention how Board workers
14 apparently are not -- are not consistently
15 social distancing and adhering to COVID
16 restrictions. But nowhere did he say that he
17 wants to do that, or that he wants to audit the
18 process.
19 He simply -- he simply wants to see
20 on behalf of his candidate. And we believe that
21 the Election Code and fairness and transparency
22 and democracy would demand that he and the other
23 observers like him and the observers for any
24 other candidate, whether it's the Democratic
25 candidate or the Green or the Libertarian party,

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1 anyone there can have meaningful access.
2 I realize what time of the day it is,
3 but that's -- I don't see how that's relevant to
4 this process. It doesn't say that we relax
5 things if it's a little late. There's nothing
6 in there about that, if we're strictly reading
7 the Code.
8 And, you know, I will note that on
9 behalf of the Trump Campaign, we asked for
10 information as to what this process was going to
11 look like, and we were not told that. So we
12 didn't know any of this until today. So --
13 **THE COURT:** What are you referring
14 to, the "this"? We didn't know any of this,
15 what do you mean?
16 **MS. KERNS:** Oh, what he's saying he
17 observed today, like that wasn't released ahead
18 of time. Like how many tables or that there
19 would be a gate or how far away they would be,
20 or -- none of that was really released in
21 detail.
22 **THE COURT:** Okay.
23 **MS. KERNS:** That's just what I meant;
24 that this was something that we just learned
25 today and so we're acting on today.

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1 **THE COURT:** Okay. I do need to speak
2 with the law clerk before we close.
3 - - -
4 (Whereupon an off-the-record
5 discussion was held.)
6 - - -
7 **THE COURT:** Okay. I'm not prepared
8 at this very moment to decide. I need to take
9 this under advisement at least for a few
10 minutes, because I feel there's a lot to
11 consider. And I want to read the case law, too,
12 that has been mentioned.
13 I need to talk to my staff about how
14 we go from here because it is a little late, and
15 they're here a lot longer than they're supposed
16 to be.
17 All right. So with that.
18 **THE TIPSTAFF:** The Court will take a
19 short recess till the call of the crier.
20 - - -
21 (Whereupon a recess was taken.)
22 - - -
23 **THE TIPSTAFF:** This Court is back in
24 session.
25 **THE COURT:** Thank you, everyone. You

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1 may be seated.
2 I've had an opportunity to consider
3 the testimony and also the law in this matter,
4 and I want to start with a statement.
5 The Petitioner's witness provided
6 copious testimony as to his ability to observe
7 the opening and sorting of ballots. His concern
8 pertained to his inability to observe the
9 writing on the outside of the ballots and
10 similar issues.
11 Given that observers are directed
12 only to observe and not to audit ballots, we
13 conclude, based on the witness's testimony, the
14 Board of Elections has complied with the
15 observation requirements under 25 P.S. 3146.8,
16 and therefore, we are denying the oral motion to
17 allow closer observation of the canvassing of
18 ballots.
19 We, however, would not discourage the
20 Board from considering implementation
21 arrangements to allow for an additional court
22 order for observation along the side of the
23 canvassing tables, if feasible, and only if
24 feasible. This is not mandatory. This is just
25 a suggestion. Subject to spatial distancing

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1 under COVID-19 regulations and voting privacy
2 requirements, if feasible.
3 So that is my order. Thank you very
4 much. Have a good night.
5 **MR. FIELD:** Thank you, Your Honor.
6 **MS. KERNS:** Thank you, Your Honor.
7 **MS. LIN:** Thank you, Your Honor.
8 **MR. McGRATH:** Thank you, Your Honor.
9 **THE TIPSTAFF:** This Court is now
10 adjourned.
11 - - -
12 (Court adjourned at 11:43 p.m.)
13 - - -
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1 CERTIFICATION
2
3 I hereby certify that the proceedings
4 and evidence are contained fully and accurately
5 in the notes taken by me on the trial of the
6 above cause, and that this copy is a correct
7 transcript of the same.
8 I further certify that I am not a
9 relative or employee of any attorney or counsel
10 employed in this case.
11
12
13
14 John J. Kurz, RMR, CRR, CRC
15 Registered Merit Reporter
16 Certified Realtime Reporter
17 Certified Realtime Captioner
18 Official Court Reporter
19
20
21 (The foregoing Certification of this
22 transcript does not apply to any reproduction of
23 the same by any means unless under the direct
24 control and/or supervision of the certifying
25 reporter.)

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