

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

1191 C.D. 2020

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

Appeal of:
Donald J. Trump for President, Inc.

APPELLANT'S BRIEF

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STATEMENT OF JURISDICTION

This Court has jurisdiction to review the lower court's November 13, 2020 orders of the Court of Common Pleas of Bucks County pursuant to Judicial Code Section 762(a)(4)(i)(C) which grants the Commonwealth Court of Pennsylvania exclusive jurisdiction over appeals from final orders of the Court of Common Pleas in matters involving statutes relating to elections or other election procedures. *See* 42 Pa. C.S. § 762(a)(4)(i)(C); *Dayhoff v. Weaver*, 808 A.2d 1002, 1006 (Pa. Cmwlth. Ct. 2002), *aff'd* 819 A.2d 548 (Pa. 2003).

ORDERS OR OTHER DETERMINATION IN QUESTION

The text of the order or other determination from which this appeal has been taken or which is otherwise sought to be reviewed is set forth verbatim as follows:

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

COURT OF COMMON PLEAS
BUCKS COUNTY
NOVEMBER TERM, 2020

No. 20-05786-35

ORDER

AND NOW, this 19th day of November, 2020, upon consideration of (1) the Petition for Review of Decision by the Bucks County Board of Elections filed on behalf of Petitioners Donald J. Trump for President, Inc., Republican National Committee, Heidelbaugh for Attorney General, Inc., and Garrity for PA; (2) the responses in opposition thereto filed by Respondent Bucks County Board of Elections, Intervener Democratic National Committee, and Interveners Pennsylvania House Democratic Campaign Committee and Bucks County Democratic Committee; and (3) the evidence presented including all stipulations and admissions by counsel as well as the arguments of counsel during the on the record prehearing conference and the hearing on November 17th, 2020, for the reasons set forth in the accompanying Memorandum, it is hereby **ORDERED** and **DECREED** that said Petition for Review is

DENIED. The Bucks County Board of Elections is **ORDERED** consistent with the Memorandum to count the ballots which are the subject of the Petition:

1. 1,196 ballots with no date or a partial date handwritten on the outer envelope;
2. 644 ballots with no handwritten name or address on the outer envelope;
3. 86 ballots with a partial written address on the outer envelope;
4. 182 ballots with a mismatched address on the outer envelope; and
5. 69 ballots with “unsealed” privacy envelopes.

BY THE COURT,

/s/ Robert O. Baldi, J.
Robert O. Baldi, J.
/s/ 11/19/20

STATEMENT OF SCOPE AND STANDARD OF REVIEW

This appeal “requires this Court to engage in statutory interpretation of the Election Code, which, as a question of law, is subject to a de novo standard of review and a plenary scope of review.” *Banfield v. Cortés*, 110 A.3d 155, 166 (Pa. 2015) (citing *Sch. Dist. of Philadelphia v. Dep’t of Educ.*, 92 A.3d 746, 751 (Pa. 2014)).

STATEMENT OF THE QUESTIONS INVOLVED

1. Are absentee and mail-in ballots that fail to conform to the mandatory legislative requirements set forth in Election Code Sections 1306(a) and 3150.16(a) void and not subject to being counted?

Answer of the Court of Common Pleas: *No*

Suggested Answer: *Yes*

STATEMENT OF THE CASE

I. FORM OF ACTION AND PROCEDURAL HISTORY.

This is an appeal from an order of the Court of Common Pleas of Bucks County denying Appellant's appeal in the nature of a petition for review under Election Code Section 1407(a), codified at 25 P.S. § 3157(a). In accordance with Pa. R.A.P. 2111(b), copies of the November 19, 2020 Memorandum and Order are appended hereto in Appendix A ("App. A").

On November 9, 2020, Appellant Donald J. Trump for President, Inc. (the "Campaign") appealed the Bucks County Board of Elections' decision to count 2,177 absentee and mail-in ballots that were cast in the November 3, 2020 General Election and failed to conform to the mandatory legislative requirements set forth in Election Code Sections 1306(a) and 3150.16(a), codified at 25 P.S. §§ 3146.6(a) and 3150.16(a). The Campaign's appeal was docketed in the Bucks County Court of Common Pleas before the Honorable Robert O. Baldi at Case Number 20-05786-35. The Campaign brought similar challenges in other counties as well.

On November 19, 2020, the trial court issued its order denying the Campaign's appeal. The next day, the Campaign appealed to this Court.

II. PRIOR DETERMINATIONS.

The only prior determinations in this matter for which the Campaign is seeking this Court's review is the November 19, 2020 Orders affirming the Bucks County Board of Elections' decision to count 1,995 absentee and mail-in ballots

that were cast in the November 3, 2020 General Election and failed to conform to the mandatory legislative requirements set forth in Election Code Sections 1306(a) and 3150.16(a). *See* App. A.

III. NAME OF THE JUDGE WHOSE DETERMINATION IS TO BE REVIEWED.

The Honorable Robert O. Baldi of the Bucks County Court of Common Pleas issued the November 19, 2020 Orders sought to be reviewed.

IV. CHRONOLOGICAL STATEMENT OF FACTS.

A. The Parties.

The Campaign is the principal committee for the reelection campaign of Donald J. Trump, the 45th President of the United States of America (hereinafter, “President Trump”). President Trump is the Republican candidate for the office of the President of the United States of America in the upcoming November 3, 2020 General Election. The Campaign brought this action for itself and on behalf of its candidate, President Trump. President Trump is a “candidate” as that term is defined in Election Code Section 102(a), 25 P.S. § 2602(a). *See Rowland v. Smith*, 83 Pa. D. & C. 99, 101-2 (Pa. Ct. Com. Pl. Dauphin 1952) (“candidate” under the Election Code includes one who is a candidate for nomination for President of the United States). The Campaign is a “political body” as that term is defined in 25 P.S. § 1102. *See In re Canvass of Absentee Ballots of November 4, 2003*, 839 A.2d 451, 457 (Pa. Cmwlth. Ct. 2003) (en banc) (under Pennsylvania’s Election Code,

the status given to political bodies grants them standing regarding watchers and their ability “to raise objections to the allowance or disallowance of votes, including the right to be present when envelopes containing the official absentee ballots are opened, counted and recorded.”), *rev’d on other grounds*, 843 A.2d 1223 (Pa. 2004); *In re General Election-1985*, 531 A.2d 836, 838 (Pa. Cmwlth. Ct. 1987) (panel decision) (a candidate for office in the election at issue suffers a direct and substantial harm sufficient for standing to contest the manner in which an election will be conducted).¹

Appellee, the Bucks County Board of Elections, has responsibility for elections in Bucks County and one of its principal places of business is located at 55 E. Court Street, Doylestown, PA 18901.

B. Pennsylvania Enacts No-Excuse Mail-In Voting.

On October 31, 2019, the Pennsylvania General Assembly enacted Act 77. *See* Act 2019-77 (S.B. 421), § 8, approved October 31, 2019, eff. October 31, 2019. Act 77 fundamentally changed the administration of elections in the Commonwealth of Pennsylvania in that, for the first time in its history, qualified

¹ In accordance with Pa. IOP Cmwlth. Ct. 414(c), because the cited decision in *In re Canvass of Absentee Ballots of November 4, 2003* was issued by this Court en banc, it is binding precedent. The *In re General Election-1985* decision is similarly binding as it was issued by a three-Judge panel of this Court. *See* Pa. IOP Cmwlth. Ct. 414(c) (“A reported opinion of the Court en banc or panel may be cited as binding precedent.”).

Pennsylvania electors now have the choice to vote by mail, rather than in person on Election Day, without providing a reason or excuse. *See, e.g.*, 25 P.S. §§ 3150.11-3150.17; *see also Pa. Dem. Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). Previously, the law offered electors who could not vote in person on the designated Election Day the ability to apply for and receive an absentee ballot, verifying they qualified based on a limited number of excuses outlined in the statute. Under Act 77, any registered voter could apply for a mail-in ballot and vote by submitting the same to the appropriate county board of elections even though the voter did not have an excuse to not vote in person on Election Day.

The absentee and mail-in voting statutory regime established under the Pennsylvania Election Code, as amended by Act 77, contains certain safeguards to ensure the integrity of the electoral process. Specifically—and of particular relevance to this matter—Sections 1306.6(a) and 3150.16(a) impose the following requirements to properly cast an absentee or mail-in ballot:

a. At any time after receiving an official mail-in ballot, but on or before eight o'clock p.m. on the day of the election, the elector casting the absentee or mail-in ballot must mark the ballot “in secret”;

b. The marked ballot then must be placed and securely sealed in the secrecy envelope bearing the official stamp “Official Election Ballot,” and then placed inside a second envelope (the “Outer Envelope”), on which must be 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”;

c. Then, “the elector shall ... fill out, date and sign the declaration printed on [the Outer Envelope]”; and

d. “[The Outer 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) & 3150.16(a).

Sections 3146.4 and 3150.14(b) delegate to the Secretary of the Commonwealth the responsibility to prescribe the form of the elector’s declaration on the outer envelope used to mail the absentee and mail-in ballots:

§ 3146.4. Envelopes for official absentee ballots

The county boards of election shall provide two additional envelopes for each official absentee ballot of such size and shape as shall be prescribed by the Secretary of the Commonwealth, in order to permit the placing of one within the other and both within the mailing envelope. On the smaller of the two envelopes to be enclosed in the mailing envelope shall be printed, stamped or endorsed the words “Official Election Ballot,” and nothing else. On the larger of the two envelopes, to be enclosed within the mailing envelope, shall be printed the form of the declaration of the elector, and the name and address of the county board of election of the proper county. The larger envelope shall also contain information indicating the local election district of the absentee voter. Said form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain among other things a statement of the electors qualifications, together with a

statement that such elector has not already voted in such primary or election. The mailing envelope addressed to the elector shall contain the two envelopes, the official absentee ballot, lists of candidates, when authorized by section 1303 subsection (b) of this act, the uniform instructions in form and substance as prescribed by the Secretary of the Commonwealth and nothing else.

25 P.S. § 3146.4.

§ 3150.14. Envelopes for official mail-in ballots

...

(b) Form of declaration and envelope.--The form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain, among other things, a statement of the elector's qualifications, together with a statement that the elector has not already voted in the primary or election.

25 P.S. § 3150.14(b).

The pre-canvassing or canvassing of absentee and mail-in ballots proceed in accordance with the dictates of 25 P.S. § 3146.8(g)(3), as follows:

§ 3146.8. Canvassing of official absentee ballots and mail-in ballots

...

(g)

...

(3) When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1)

and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the “Registered Absentee and Mail-in Voters File,” the absentee voters’ list and/or the “Military Veterans and Emergency Civilians Absentee Voters File,” whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the “Registered Absentee and Mail-in Voters File,” the absentee voters’ list and/or the “Military Veterans and Emergency Civilians Absentee Voters File” verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3).

Pursuant to the authority granted in § 3150.14(b), the Secretary of the Commonwealth developed the following declaration used in connection with the 2020 General Election:

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

[BAR CODE]

Voter, sign or mark here/Votante firme o margue aqui

X _____

Date of signing (MM/DD/YYYY)/Fecha de firma
(MM/DD/YYYY)

Voter, print name/Votante, nombre en letra de impreta

Voter, address (street)/Votante, direccion (calle) [LABEL –
Voters' name and address]

25 P.S. § 3146.8(g)(3).

In addition, the Secretary issued guidance to the county boards of elections with respect to the examination of ballot return envelopes. First, on September 11, 2020, she issued the following guidance:

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 Mailin

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.

Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes, 9/11/2020, at 3.

Then, on September 28, 2020, the Secretary offered additional guidance on the treatment of ballot return envelopes:

With regard to the outer ballot return envelope:

A ballot return envelope with a declaration that is filled out, dated, and signed by an elector who was approved to receive an absentee or mail-in ballot is sufficient and counties should continue to pre-canvass and canvass these ballots.

A ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted. Ballot-return envelopes must be opened in such a manner as not to destroy the declarations executed thereon.

All ballot-return envelopes containing executed declarations must be retained for a period of two years in accordance with the Election Code.

...

Pre-canvass and Canvass Procedures

At the pre-canvass or canvass, as the case may be, the county board of elections should:

- Segregate the unopened ballots of voters whose applications were challenged by the challenge deadline (5:00 PM on the Friday before the election).
 - o These ballots must be placed in a secure, sealed container until the board of elections holds a formal hearing on the challenged ballots.
 - o Ballot applications can only be challenged on the basis that the applicant is not qualified to vote.
- Set aside the ballot of any voter who was deceased before election day.
- Set aside any ballots without a filled out, dated and signed declaration envelope.
- Set aside any ballots without the secrecy envelope and any ballots in a secrecy envelope that include text, mark, or symbol which reveals the identity of the voter, the voter's political affiliation (party), or the voter's candidate preference.

The Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis.

No challenges may be made to mail-in or absentee ballot applications after 5:00 pm on the Friday before the election.

No challenges may be made to mail-in and absentee ballots at any time based on signature analysis.

NOTE: For more information about the examination of return envelopes, please refer to the Department's September 11, 2020 Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes.

Guidance Concerning Civilian Absentee and Mail-in Ballot Procedures, 9/28/2020, at 5, 8-9.

A. Bucks County Board of Elections Votes to Count 2,177 Non-Conforming Absentee and Mail-In Ballots.

On November 3, 2020, the General Election in Pennsylvania was held. As part of that election, 2,177 absentee and mail-in ballots were cast that failed to conform to the mandatory legislative requirements set forth in Election Code Sections 1306(a) and 3150.16(a). Specifically, the 2,177 ballots fell into the following categories:

- a. 1,196 ballots with no date or a partial date handwritten on the outer envelope;
- b. 644 ballots with no handwritten name or address on the outer envelope;
- c. 86 ballots with a partial written address on the outer envelope;

- d. 182 ballots with a mismatched address on the outer envelope; and
- e. 69 ballots with “unsealed” privacy envelopes.*See* App. A.

During the pre-canvass on Election Day, the Bucks County Board of Elections set aside the 2,177 absentee and mail-in ballots because they failed to conform to Election Code Sections 1306(a) and 3150.16(a). Then, seven (7) days after the Election, the Bucks County Board of Elections voted to count the non-conforming ballots. However, the Petitioners subsequently withdrew their challenge to the 181 ballots with a mismatched address on the outer envelope. *See App. B.* Accordingly, at issue are the 1995 remaining ballots.

In making its decision, the Board of Elections did not dispute that the ballots failed to conform with Election Code Sections 1306(a) and 3150.16(a). (11/19/2020 Order, p. 9-11.) Nevertheless, because there was no evidence of actual fraud, the Bucks County Board of Elections voted to count all 2,177 non-conforming absentee and mail-in ballots.

B. The Trial Court Affirms the Bucks County Board of Elections’ Decision.

On November 17, 2020, the Honorable Robert O. Baldi held oral argument on the Campaign’s appeal. Thereafter, the trial court entered an order dated November 19, 2020 affirming the Bucks County Board of Elections’ decision to

count the 2,177 absentee and mail-in ballots. As noted, a stipulation was later entered as to 182 ballots so that the actual number of ballots at issue is now 1,995. *See App. B.* In its orders, the trial court denied the Campaign's appeal and affirmed the Bucks County Board of Elections' decision.

SUMMARY OF ARGUMENT

Pursuant to Judicial Code Section 762(a)(4)(i)(C), 42 Pa. C.S. § 762(a)(4)(i)(C), exclusive jurisdiction over appeals from orders of the courts of common pleas entered under Election Code Section 1407, 25 P.S. 3157, rests exclusively in this Court. *Dayhoff*, 808 A.2d at 1006, n.7. This conclusion is consistent with Article 5, Section 9 of the Pennsylvania Constitution, and case law which has held that this Court has jurisdiction over appeals involving election processes.

Moreover, because these appeals do not involve the qualification, eligibility, regularity of the electoral or appointive process, and other preconditions to the holding of a particular office, jurisdiction over these appeals does not lie with the Pennsylvania Supreme Court under Judicial Code Section 722(2) , 42 Pa. C.S. § 722(2), involving appeals from common plea court orders involving the right to public office. Instead, jurisdiction rests solely in this Court as the appeals concern solely questions involving the election process.

Finally, the General Assembly set forth in the Election Code the requirements for how a qualified elector can cast a valid absentee and mail-in ballot, and one of those requirements is for each elector to “fill out, date, and sign” the declaration on the Outside Envelope. *See* 25 P.S. §§ 3146.6(a) & 3150.16a. The Pennsylvania Supreme Court has repeatedly held that the requirements of Election Sections 1306(a) and 3150.16(a) are mandatory and that ballots cast in contravention of the requirements of such sections are void and cannot be counted. Accordingly, the trial court erred in affirming the Bucks County Board of Elections’ decision to count the 1,995 non-conforming absentee and mail-in ballots.

ARGUMENT

I. JUDICIAL CODE SECTION 762(a)(4)(i)(C) PROVIDES THIS COURT WITH EXCLUSIVE JURISDICTION OVER THE CAMPAIGN’S APPEAL.

The first issue for review concerns the scope of this Court’s appellate jurisdiction. “Chapter Seven of the Judicial Code sets forth the ‘legislatively ordained division of labor’ between appellate courts in Pennsylvania.” *Mohn v. Bucks Cty. Republican Comm.*, 218 A.3d 927, 930 (Pa. Super. Ct. 2019) (quoting *Valley Forge Indus., Inc. v. Armand Constr., Inc.*, 374 A.2d 1312, 1316 (Pa. Super. Ct. 1977)). Pursuant to Section 742 of the Judicial Code, appeals from final orders of the courts of common pleas shall vest exclusively in the Superior Court, “except

such classes of appeals as are by any provision of this chapter within the exclusive jurisdiction of the Supreme Court or the Commonwealth Court.” 42 Pa. C.S. § 742.

Section 762(a) of the Judicial Code enumerates seven specific categories of appeal from the courts of common pleas over which the Commonwealth Court has exclusive jurisdiction. Of importance to these appeals, Section 762(a) provides:

(a) General rule.—Except as provided in subsection (b) [which is inapplicable herein], *the Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following cases:*

...

(4) Local government civil and criminal matters.

(i) *All actions or proceedings* arising under any municipality, institution district, public school, planning or zoning code or under which a municipality or other political subdivision or municipality authority may be formed or incorporated or *where is drawn in question the application, interpretation or enforcement of any:*

...

(C) statute relating to elections, campaign financing or other election procedures.

42 Pa. C.S. § 762(a)(4)(i)(C) (emphasis added). “Thus, pursuant to our statutory scheme, appeals from final orders of the courts of common pleas involving the application, interpretation or enforcement of any statute relating to elections or

election procedures fall within the exclusive jurisdiction of the Commonwealth Court.” *Mohn*, 218 A.3d at 931.

As the Pennsylvania Supreme Court held in *In re Petition to Contest Gen. Election for Dist. Justice*, 670 A.2d 629 (Pa. 1996), this Court has jurisdiction over appeals involving elections when it was created in 1970. *Id.*, 670 A.2d at 631 n.1 (“Although [the Pennsylvania Supreme] Court had previously entertained appeals from the courts of common pleas in election matters ... jurisdiction over such appeals was given to the Commonwealth Court when that court was created in 1970.”)). Accordingly, despite Section 1407(b)’s no appeal language, this Court has exclusive jurisdiction over appeals in Election Code cases. *In re Nomination in re Warren*, 692 A.2d 1178, 1181 (Pa. Cmwlt. Ct. 1997).

II. ABSENTEE AND MAIL-IN BALLOTS THAT FAIL TO CONFORM TO THE MANDATORY LEGISLATIVE REQUIREMENTS SET FORTH IN ELECTION CODE SECTIONS 1306(a) AND 3150.16(a) ARE VOID AND NOT SUBJECT TO BEING COUNTED.

When the Pennsylvania General Assembly enacted Act 77 nearly a year ago, it provided voters access to no excuse mail-in voting. In doing so, our legislature described the process for absentee and mail-in voters to follow in completing their ballots. Specifically, Election Code Sections 1306(a) and 3150.16(a) state that “the [absentee/mail-in] elector *shall*, in secret, proceed to mark the ballot ...” 25 P.S. §§ 3146.6(a) & 3150.16(a). Sections 1306(a) and 3150.16(a) then describe the process whereby an absentee/mail-in voter “shall” place his/her ballot inside a

secrecy envelope marked “Official Mail-in Ballot”, and then place that ballot-filled envelope inside another outer envelope which has a printed declaration for the elector to sign. *Id.* The sections then specify: “the elector **shall ... fill out, date and sign** the declaration printed on [the Outer Envelope].” *Id.* (emphasis added). Finally, the Sections 1306(a) and 3150.16(a) provide that “[s]uch 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.* See also *Pa. Democratic Party v. Boockvar*, 238 A.3d at ___, 2020 Pa. LEXIS 4872, at *59.

Consistent with the dictates of the Statutory Construction Act, the Pennsylvania Supreme Court has declared the use of the term “shall” in Election Code Sections 1306(a) and 3150.16(a) is mandatory not directory. *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231-1232, & 1234 (Pa. 2004); *Pa. Democratic Party v. Boockvar*, 2020 Pa. LEXIS 4872, at *70-*74. Moreover, the Supreme Court has recognized that the “so-called technicalities of [Election Code Sections 1306(a) and 3150.16(a)] are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed -- particularly where, as here, they are designed to reduce fraud.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1234.

Accordingly, absentee or mail-in ballots cast in contravention of the requirements of Election Code 1306(a) and 3150.16(a) are “void” and cannot be counted. *Id.*

Here, there is no dispute that the 1,995 ballots were not filled out as mandated by Election Code Sections 1306(a) and 3150.16(a). The Board of Elections proffer any testimony of any voter which revealed that the qualified elector made a mistake by not including their printed name, street address, and date on the declaration envelopes. Instead, the Board of Elections simply inferred that a mistake had been made, despite the fact that it is equally plausible that someone other than the identified electors may have completed the ballots which is why the printed names, addresses, and dates are missing in contravention of the mandates of Election Code Sections 1306(a) and 3150.16(a). Because the General Assembly has clearly stated what an elector must do to cast an absentee and mail-in ballot and there is no affirmative evidence in the record which proves that the elector at issue were misled by the Bucks County Board of Elections when completing their absentee and mail-in ballots, all non-conforming ballots received by the Bucks County Board of Elections are void and cannot be counted.

Further, our Supreme Court previously rejected the notion that absentee or mail-in ballots can be counted despite their failure to comply with the mandates of Election Code Sections 1306(a) and 3150.16(a). Specifically, in *Pa. Democratic Party v. Boockvar*,, our Supreme Court recognized that “[w]hile the Pennsylvania

Constitution mandates that elections be “free and equal,” it leaves the task of effectuating that mandate to the Legislature.” *Pa. Democratic Party v. Boockvar*, 2020 Pa. LEXIS 4872, at *56 (citing *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914)). Moreover, “although the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for [a] ‘notice and opportunity to cure’ ... [and] [t]o the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, ... the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate that risk is one best suited for the Legislature[,] ... particularly in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots, all of which are best left to the legislative branch of Pennsylvania's government.” *Pa. Democratic Party v. Boockvar*, 2020 Pa. LEXIS 4872, at *56. Accordingly, there is nothing in the Election Code that authorizes a county board of elections to accept and count non-conforming absentee and mail-in ballots. In fact, to do so creates a “notice and opportunity to cure” procedure which the Pennsylvania Supreme Court has expressly held does not exist in the Election Code.

Furthermore, concluding that the term “shall” in Election Code Sections 1306(a) and 3150.16(a) is merely directory rather than mandatory raises serious equal protection concerns. *See, e.g., Pierce v. Allegheny County Bd. of Elections*, 324 F. Supp. 2d 684, 699 (W.D. Pa. 2003). As the Western District of Pennsylvania noted years ago when addressing the “in person” delivery requirement in Election Code Section 3146.6(a): “If the state courts hold that the phrase “in person” is merely directory, then different standards have been employed in different counties across the Commonwealth of Pennsylvania to determine whether an absentee ballot should be counted. That kind of disparate treatment implicates the equal protection clause because uniform standards will not be used statewide to discern the legality of a vote in a statewide election.” *Id.* The same conclusion applies to Election Code Sections 1306(a) and 3150.16(a)’s “fill out” requirement. Voters in Bucks County whose non-conforming ballots the Bucks County Board of Elections has decided to count are being afforded greater voting strength than similarly-situated voters in counties which have decided to follow Election Code Sections 1306(a) and 3150.16(a)’s mandatory “fill out” requirement and not count such non-conforming ballots.

As the Pennsylvania Supreme Court has consistently declared, “the polestar of statutory construction is to determine the intent of the General Assembly.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1230

(citing 1 Pa.C.S. § 1921(a) (court’s sole objective in construing or interpreting a statute remains to “ascertain and effectuate the intention of the General Assembly”); *Hannaberry HVAC v. Workers' Compensation Appeal Bd. (Snyder)*, 834 A.2d 524, 531 (Pa. 2003)). “Generally speaking, the best indication of legislative intent is the plain language of a statute.” *Gilmour Manufacturing*, 822 A.2d at 679. Furthermore, in construing statutory language, “words and phrases shall be construed according to rules of grammar and according to their common and approved usage. ...” *Id.*, (quoting 1 Pa.C.S. § 1903). Thus, “when the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa.C.S. § 1921(b). Accordingly, “all things being equal, the law will be construed liberally in favor of the right to vote but, at the same time, [the courts] cannot ignore the clear mandates of the Election Code.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1231 (citing *In re Nomination Petition of Gallagher*, 359 A.2d 791, 792 (Pa. 1976) (“we cannot permit a resort to sophistry in an effort to avoid the clear mandates of the Election Code.”)).

Here, the common and approved usage of the term “fill out” in the context of Election Code Sections 1306(a) and 3150.16(a) is “to add information such as your name or address in the empty spaces on an official document.” MacMillan Dictionary, definition of “fill out,” available online at

<https://www.macmillandictionary.com/us/dictionary/american/fill-out>. See also Cambridge Dictionary, definition of “fill out,” available online at <https://dictionary.cambridge.org/us/dictionary/english/fill-out> (“fill out” means “to write or type information in spaces that are provided for it”). Thus, the term “fill out” in Election Code Sections 1306.6(a) and 3150.16(a) is not ambiguous, and the trial court erred by not using its common and approved usage which requires an elector to add, write, or type in one’s printed name, address, and date in order to properly cast an absentee or mail-in ballot.

While the within appeal was pending, the Pennsylvania Supreme Court issued an Opinion dated November 23, 2020, holding, “[W]e conclude that the Election Code does not require board of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot’s outer envelope but did not handwrite their name, their address, and/or date where no fraud or irregularity has been alleged.” *In Re: Canvass of Absentee and Mail-In Ballots, et al*, J-118A-2020, J-118B-2020, J-118c-2020, J-118D-2020, J-119E-2020 and J-118F-2020, November 23, 2020. However, Justice Wecht filed a Concurring and Dissenting Opinion, noting: “[I]n future elections, I would treat the date and sign requirement as mandatory in both particulars, with the omission of either item sufficient without more to invalidate the ballot in question. [footnote omitted]. However, under the circumstances in which the issue has arisen, I would

apply my interpretation only prospectively. *Id.* Additionally, in his Concurring and Dissenting Opinion, Justice Dougherty opined: “[I] cannot agree that the obligation of electors to set forth the date they signed the declaration on that envelope does not carry “weight interests.” *Id.* Accordingly, the Supreme Court concluded, on a 4-3 basis, that the date was a mandatory requirement and the ballot cast in that matter should be void. However, Justice Wecht noted that the decision should only be applied on a prospective basis.

The Supreme Court did not address the Equal Protection Argument as outlined by Judge Brobson in the Allegheny appeal (29 WAP 2020) as well as in the appeals of *In re: Canvass of Absentee and Mail in Ballots of November 3, 2020 General Election.* (31 through 35 EAP 2020). Therefore, we incorporate those Equal Protection arguments in the within appeal.

CONCLUSION

This Court has exclusive jurisdiction over the Campaign’s appeal as they involve issues related to the election process and not the right to public office. Moreover, the trial court erred by affirming the Bucks County Board of Elections’ decision to count the 1,995 absentee and mail-in ballots that admittedly failed to conform to the legislative mandates of Election Code Sections 1306(a) and 3150.16(a). To hold otherwise violates the plain and ordinary meaning of the sections mandatory language and creates serious equal protection concerns for

voters throughout the Commonwealth who properly cast absentee and mail-in ballots in the November 3, 2020 General Election.

Accordingly, the Campaign respectfully requests that this Court consider the within arguments including the serious equal protection concerns and reverse the trial court order and remand these appeals with instructions that the Campaign's appeal to the Bucks County Board of Elections' decisions be sustained and that the 1,995 non-confirming absentee and mail-in ballots not be counted as void.

Date: November 23, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the foregoing Brief of Appellant complies with the length requirements of Pa. R.A.P. 2135. According to the word count of the word processing system used to prepare this Brief, the brief contains 7,348 words, not including the supplementary matter as described in Pa. R.A.P. 2135(b).

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CERTIFICATE OF COMPLIANCE

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.

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PROOF OF SERVICE

I hereby certify that on the 23rd day of November, 2020, two true and correct copies of the foregoing Brief were served upon counsel of record by email which satisfies the requirements of Pa.R.A.P. 121:

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**IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA
CIVIL DIVISION**

**IN RE: CANVASS OF ABSENTEE AND/OR
MAIL-IN BALLOTS OF NOVEMBER 3, 2020
GENERAL ELECTION** :
: **No. 20-05786-35**
:
:
PETITION OF DONALD J. TRUMP FOR :
PRESIDENT, ET AL. :

MEMORANDUM AND ORDER

I. Introduction

The above captioned matter is before the Bucks County Court of Common Pleas pursuant to §§ 3146.8 and 3157(a) of the Pennsylvania Election Code. 25 P.S. §§ 3146.8, 3157(a). Petitioners are asking the Court to reverse the Decision of the Bucks County Board of Elections relevant to certain ballots which were received by the Board of Election as part of the General Election which took place November 3, 2020. The Petitioners are Petitioner Donald J. Trump for President, Inc.¹; Petitioner Republican National Committee²; Petitioner

¹ Petitioner Donald J. Trump for President, Inc. is the principle committee for the reelection campaign of Donald J. Trump, the forty-fifth President of the United States of America. Petitioner Donald J. Trump for President, Inc. is bringing this action for itself and on behalf of its candidate President Trump.

² Petitioner Republican National Committee is the national political committee that leads the Republican Party of the United States. It works to elect Republican candidates to State and Federal Offices throughout the United States, including the Commonwealth of Pennsylvania. Petitioner Republican National Committee is bringing this action for itself and on behalf of the Republican Party, all of its members, all registered Republican voters, and all nominated Republican candidates in the November 3, 2020 General Election in Pennsylvania.

N.B. It is the responsibility of all parties to notify all interested parties of the content of this

Appendix A

Case# 2020-05786-26 - JUDGE:35 Received at County of Bucks Prothonotary on 11/19/2020 4:14 PM. Fee = \$0.00. The filer certifies that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Heidelbaugh for Attorney General, Inc.³; and Petitioner Garrity for PA⁴. This matter has also been improperly captioned as "Donald J. Trump for President, Inc., et al. vs. Bucks County Board of Elections". The Respondent is the Bucks County Board of Elections⁵ (hereinafter referred to as "Board"). Parties also include the Democratic National Committee⁶, the Bucks County Democratic Committee⁷, and the Pennsylvania House Democratic Campaign Committee⁸; these parties were permitted to intervene without objection.

³ Petitioner Heidelbaugh for Attorney General, Inc. is the principal committee for the election campaign of Heather Heidelbaugh for the office of Attorney General of Pennsylvania. Heidelbaugh is the Republican candidate for the office of Attorney General of Pennsylvania in the November 3, 2020 General Election. Petitioner Heidelbaugh for Attorney General, Inc. is bringing this action for itself and on behalf of its candidate.

⁴ Petitioner Garrity for PA is the principle committee for the election campaign of Stacy L. Garrity for the Office of Treasurer of Pennsylvania. Stacy L. Garrity is the Republican candidate for the office of the Treasurer of Pennsylvania in the Election of November 3, 2020. Petitioner Garrity for PA is bringing this action for itself and on behalf of its candidate.

⁵ Respondent Bucks County Board of Elections is responsible for overseeing the conduct of elections in Bucks County, including the administration of the pre-canvass and canvass sessions of the Board during which absentee and mail-in ballots were opened, reviewed, and counted, as required by the Election Code.

⁶ The Democratic National Committee is a national committee dedicated to electing local, state, and national candidates of the Democratic Party to public office throughout the United States, including Pennsylvania. The Democratic National Committee has members who submitted absentee and mail-in ballots in the November 3, 2020 General Election.

⁷ The Bucks County Democratic Committee is a local committee with a mission of electing qualified members of the Democratic Party to local office at all levels of government. The Bucks County Democratic Committee has members and constituents across Bucks County who submitted absentee and mail-in ballots in Bucks County in the November 3, 2020 General Election.

⁸ The Pennsylvania House Democratic Campaign Committee is a state committee dedicated to electing local members of the Democratic Party to the Pennsylvania House of Representatives. The Pennsylvania House Democratic Campaign Committee has members and constituents who submitted absentee and mail-in ballots in Bucks County in the November 3, 2020 General Election.

In this appeal, Petitioners argue⁹ that the Board violated State Law when it failed to reject certain specific ballots, and over objection, accepted the ballots as valid votes of Bucks County citizens. The Respondent, as part of its statutory duties, sorted through and reviewed approximately 165,000 total absentee and mail-in ballots. In this process, the Respondent Board deemed a total of 918 ballots to be legally insufficient, and therefore, those specific ballots were not canvassed; in other words, the ballots were rejected. These ballots were not rejected because there was a finding that the person submitting the ballot was not authorized to vote, but rather because of some deficiency required by the Election Code, such as a lack of signature or a lack of privacy envelope.

The actual vote offered on any of those rejected ballots is unknown. Whether or not a specific vote on any of those ballots would be for or against any of the Petitioner candidates, or their opponents is unknown. There are 2,177 ballots are at issue in this case being challenged by the Petitioners.

This decision will be abbreviated because of time constraints caused by the need for a prompt resolution of the issues presented to allow for certification of votes. Should an appeal be filed the Court reserves the right to supplement this Memorandum with additional facts and law¹⁰.

⁹ On the day of the hearing, Petitioners were solely represented by Britain R. Henry, Esquire. Other attorneys had entered their appearance and represent all the Petitioners for purposes of the record. Attorney Henry confirmed that he had the authority to speak for all Petitioners, but that he was proceeding primarily on behalf of Petitioner Donald J. Trump for President, Inc.

¹⁰ While drafting this Memorandum and Order, the Court has learned that the Supreme Court of Pennsylvania has Exercised Extraordinary Jurisdiction over the some of the Commonwealth Courts cases with respect to Election Code issues similar to the ones at issue herein. In Order to expedite the completion of this Memorandum and Order, this

After careful deliberation and study of the relevant statutory and appellate case law, the undersigned is confident that the final decision is correct. However, the electorate and the various county boards of elections would benefit from clear precise legislation on the subjects presented in this appeal. It must be noted that the parties specifically stipulated in their comprehensive stipulation of facts that there exists no evidence of any fraud, misconduct, or any impropriety with respect to the challenged ballots. There is nothing in the record and nothing alleged that would lead to the conclusion that any of the challenged ballots were submitted by someone not qualified or entitled to vote in this election. At no time did Petitioners present evidence or argument to the contrary. The challenges are all to form rather than substance but premised on specific statutory language which Petitioners argue supported the issues presented. There is insufficient time for this Court to construct a comprehensive response to all issues raised but hopefully this decision will provide an explanation for the Court's reasoning.

II. Undisputed factual record

Upon assignment of this case the undersigned issued scheduling orders including an order that the parties meet prior to the date of the hearing on this matter to craft a stipulation of undisputed facts. Counsel for the parties did an excellent job crafting 47 paragraphs of stipulated facts. The stipulation was

Decision will not cite all of the legal authority reviewed and considered and which supports each and every conclusion. The Intervenors in this case, and the Respondent, submitted ample legal authority for their positions, and this Court will presume that all Appellate Judges reviewing this Decision will be familiar with the body of Election Law which defines and establishes broad principles of law, which for purposes of Petitioners' Appeal have not been challenged by any party, but which would normally be cited for completeness as a matter of course.

presented to the court during the on the record conference held the morning of the hearing. Stipulated Facts, Ct. Ex. 1. The hearing was held in the afternoon of November 17th, 2020. The stipulation of facts also included exhibits. During both the conference and the hearing, counsel were frequently questioned whether everyone agreed to something stated by an attorney or the Court. The record has not been transcribed and is not available to the Court at this time, and for that reason, there will be no references to a transcript. However, the Court is confident that the facts stated herein were agreed to by all parties on the record.

On November 7th, 2020 during the course of the canvass meeting of mail-in and absentee ballots, and in the presence of interested authorized representatives of the various candidates, the Respondent Board met to determine whether declarations on the envelopes of certain ballots were "sufficient" pursuant to the mandate of 25 P.S. § 3146.8(g)(3). 3,095 specific ballots had been identified and placed in different categories based on a possible deficiency of the ballot. The physical ballots were separated from the other ballots and secured along with all ballots of the same category. The Board made findings and decisions with respect to ten different categories of ballots, accepting some categories for canvassing and excluding others, as reflected in the Board's written decision made part of the record. The meeting and vote were conducted in the presence of authorized representatives of both Republican and Democratic candidates and parties. No one objected to or challenged the segregation of ballots into the designated categories. No one has appealed the

Board's decision to exclude 918 ballots for various reasons set forth in its written Decision. The only appeal has been from the Board's decision to not exclude certain ballots.

The parties' stipulation of facts identified the six categories which were challenged by Petitioners. During the hearing, counsel for Petitioner withdrew the challenge of category 6 and reduced the challenge of category 4. As a result, the following are the categories at issue for this decision:

- Category 1: 1196 ballots with no date or a partial date handwritten on the outer envelope;
- Category 2: 644 ballots with no handwritten name or address on the outer envelope;
- Category 3: 86 ballots with a partial written address on the outer envelope;
- Category 4: 182 ballots with a mismatched address on the outer envelope; and
- Category 5: 69 ballots with "unsealed" privacy envelopes.

The ballots in category 1 were deemed to be sufficient by the Respondent Board, and as a result they were canvassed. During oral argument the Court inquired whether it would be possible to segregate that category of ballots into two separate groups, one being ballots with no date and the other being ballots with a partial date. The Respondent Board has explained that the ballots were canvassed and cannot be retrieved as two separate groups. This Court believes

that the category as identified should have been segregated into two separate groups, however that was not done. All the ballots in this category are mingled together and a decision on those ballots must now accept this fact. Should this Court or an appellate court conclude that the absence of any date would invalidate a ballot but that a partial date would preserve the ballot the Court would be faced with the fact that invalidating the entire category would disenfranchise voters that had properly submitted their ballot. No record has been created to determine the exact number of ballots with no date versus ballots with a partial date. This Court concluded that to order a further review would be a futile exercise under the circumstances and now accepts the factual situation for what it is.

III. Discussion

Petitioners' Appeal as pled is limited to the argument that the Board's Decision to validate (and not reject) each of the ballots which have been categorized into five separate distinct groups was an "error of law." Petitioners have pled, in their challenge, that each category of ballots represents a violation of a specific provision of the Election Code citing §§ 3146.6(a) and 3150.16(a).

Although all provisions of the Election Code should be strictly enforced, the ultimate goal as confirmed by case law is to enfranchise voters, not to disenfranchise them. In re Wieskerger, 290 A.2d 108, 109 (Pa. 1972). The Court "cannot ignore the clear mandates of the Election Code." In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, 843 A.2d 1223, 1231 (Pa. 2004)

[hereinafter "Appeal of Pierce"]. But, the Court must be flexible in favor of the right to vote. Wieskerger, 290 A.2d at 109; Appeal of Pierce, 843 A.2d at 1231.

In an attempt to balance those two overriding principles, the Pennsylvania Supreme Court has ruled that certain provisions of the Election Code are mandatory, and some are directory. Specifically, the Pennsylvania Supreme Court has identified and explained principles of law which control the argument set forth by the litigants herein, which provides guidance and clear direction to this Court. Ballots should not be disqualified based upon failure to follow directory provisions of the law. Shambach v. Bickhart, 845 A.2d 793, 803 (Pa. 2004) (holding that although the Election Code provides that an elector may cast a write-in vote for any person not printed on the ballot, a write-in vote for a candidate whose name in fact appears on the ballot is not invalid where there is no evidence of fraud and the voter's intent is clear); Wieskerger, 290 A.2d at 109 (holding that the elector's failure to mark the ballot with the statutorily enumerated ink color does not render the ballot invalid unless there is a clear showing that the ink was used for the purpose of making the ballot identifiable or otherwise indicating fraud). There is an important difference between mandatory and directory provisions of law: failure to strictly adhere to the requirements of a directory statute will not nullify the validity of the action involved, whereas mandatory provisions must be followed.

Applying the law to the facts of this case, this Court is mindful of the following facts which are set forth in the parties' stipulation of facts. Petitioners do not

allege that there is any evidence of fraud, misconduct, impropriety, or any undue influence committed with respect to the challenged ballots. There is no suggestion, evidence, or allegation that the electors who cast the ballots at issue were ineligible to vote in this election. There is no suggestion, evidence, or allegation that the challenged ballots were cast by someone other than the elector whose signature was on the outer envelope. No mail-in or absentee ballots were mailed out to electors before October 7th, 2020. The ballots which are the subject of this challenge were timely received by the Respondent Board before 8:00 PM on Election Day, November 3rd, 2020.

Petitioners raise challenges under Section 3146.6 and 3150.16 of the Election Code. These provisions are nearly identical, but one is applicable to absentee ballots while the other is applicable to mail-in ballots. Section 3146.6(a) provides for voting by absentee electors:

Except as provided in paragraphs (2) and (3), at any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election, the elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3146.6(a). Section 3150.16(a) provides for voting by mail-in electors:

At any time after receiving an official mail-in ballot, but on or before eight o'clock P.M. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3150.16(a).

Pursuant to these provisions of the Election Code, Petitioners challenge ballots that were set aside for specific review in the following categories¹¹:

1. No date or partial date,
2. No printed name or address,
3. Partial address,

¹¹ There has been no challenge to the Board's Decision to set aside and not count ballots in the following categories:

- a. 110 ballots that failed to include a signature, which the Board ruled rendered the ballot "insufficient" and therefore it was not canvassed;
- b. 12 ballots where the elector's printed name did not match the name on the label located on the envelope;
- c. 2 ballots which came from the same household where the voters appeared to have inadvertently signed one another's declarations;
- d. 708 ballots which were not placed in a secrecy envelope thereby rendering them to be "naked"; and
- e. 21 ballots which contained secrecy envelopes with writing that revealed the elector's identity.

See Written Decision of Board.

4. Mismatched address, and
5. Unsealed privacy envelopes.

The relevant portion of the Election Code set forth above uses mandatory language which provides that electors "shall" take certain steps when submitting an absentee or mail-in ballot. Importantly, "the elector **shall** . . . fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed 'Official Election Ballot.'" 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added). And, "[t]he elector **shall** then fill out, *date* and *sign* the declaration printed on such envelope." *Id.* (emphasis added). Although not relevant to this decision, there is additional mandatory language in this provision of the Election Code: "[t]his envelope **shall** then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector"; "[s]uch 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.* (emphasis added).

Mandatory language is used throughout the Election Code. "Pennsylvania's Election Code, no less than any other, is steeped with requirements phrased in the imperative, not only in terms of the technical requirements for ballot completion, but also in terms of the overall conduct of elections." *Bickhart*, 845 A.2d at 806 (Saylor, C.J., concurring). Because of the excessive use of imperative language in the Election Code, the Supreme Court has distinguished between provisions that

are directory and those that are mandatory. "It would be unreasonable to assume that the General Assembly thus intended that, unless each and every such requirement [using imperative language] is strictly adhered to by those conducting the elections, election results must be deemed void." Id. If the provisions are read as directory, although "they are intended to be obeyed, and will be enforced if raised before or during an election, [they] do not require invalidation of the election or disenfranchisement of electors where discovered in the election aftermath." Id. at n.2.

Respondent and Intervenors argued that even when imperative language such as "shall" is used in the statute, it is not necessarily mandatory language; it can, in fact, be used in directory provisions. Respondent and Intervenors argued that looking to the consequence of non-compliance with the provision determined whether the provision was mandatory or directory; the inquiry did not end with the plain language of the Election Code.

In support of this argument, Respondent and Intervenors relied on the Pennsylvania Supreme Court's opinion in Boockvar, where the inquiry was to determine whether the Election Code allowed a board to void ballots that were not within a secrecy envelope. Pa. Democratic Party v. Boockvar, No. 133 MM 2020, 2020 Pa. LEXIS 4872, at *57 (Pa. 2020 Sept. 17, 2020). "In determining the propriety of naked ballots, we must ascertain the General Assembly's intention by examining the statutory text of the secrecy envelope provision to determine whether it is mandatory or directory, as that will govern the consequences for non-

compliance." 2020 Pa. LEXIS 4872, at *66. The Court ruled that "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." Id. (quoting JPay, Inc. v. Dep't of Corrs. & Governor's Off. of Admin., 89 A.3d 756, 763 (Pa. Cmwlth. 2014)). The Court distinguished the statutory provision at issue from those involved in cases where imperative language was found to be directory. Specifically, it distinguished Bickhart and Wieskerger. Id. at *68-69. In both of those cases, the Court found that ballots with "minor irregularities" should only be stricken when there is a compelling reason to do so. In Bickhart, the Court counted a ballot where a candidate who was already named on the ballot was written in by the elector. Bickhart, 845 A.2d at 803. In Wieskerger, the Court counted a ballot that was completed in the wrong color ink. Wieskerger, 290 A.2d at 109. "Marking a ballot in voting is a matter not of precision engineering but of an unmistakable registration of the voter's will in substantial conformity to statutory requirement." Id. (quoting Reading Election Recount Case, 188 A.2d 254, 256 (Pa. 1963)).

In contrast, in Appeal of Pierce, where the provision at issue was the "in-person" delivery requirement, the Pennsylvania Supreme Court found this provision "unambiguously provided that 'the elector shall send [the absentee ballot] by mail, postage [prepaid], except where franked, or deliver it in person to [said county] board of election.'" Boockvar, 2020 Pa. LEXIS 4872, at *70. The Court "was unpersuaded by the argument that the language was directory and

declined the invitation to interpret 'shall' as anything less than mandatory." Id. "The word 'shall' carries an imperative or mandatory meaning." Appeal of Pierce, 843 A.2d at 1231. In Appeal of Pierce, the Supreme Court distinguished Wieskerger based on the fact that it was "decided before the enactment of the Statutory Construction Act, which dictates that legislative intent is to be considered only when a statute is ambiguous." Id. The Pennsylvania Supreme Court stated that to construe the provision at issue, which utilized the word "shall," as "merely directory would render its limitation meaningless and, ultimately, absurd." Id. at 1232. The Court stated that "precedent is clear: we cannot simply ignore substantive provisions of the Election Code." Id. at 1234. "[S]o-called technicalities of the Election Code are necessary for the preservation of secrecy and the sanctity of the ballot must therefore be observed." Id.

Being mindful of the Pennsylvania Supreme Court's recent rulings, interpreting the current Election Code, this Court finds the following with respect to each category:

1. Category 1: 1196 Ballots With No Date or a Partial Date Handwritten on the Outer Envelope

As mentioned, when setting aside ballots because of deficiencies in the completion of the declaration, the Board combined those ballots which had a partial date with those that had no date into one category. This category commingles what this Court considers two separate categories: ballots with no dates and ballots with partial dates. There are an undefined number of ballots with

absolutely no date whatsoever and an undefined number of ballots that were dated in some fashion, but where the date was considered to be partial. This Court would, with little hesitation, accept the argument that a deficiency (i.e., a partial date) on an envelope would not invalidate that ballot. The totality of the circumstances confirms that the ballot was signed on a date that qualified the ballot because the parties stipulated in their stipulation of facts at ¶ 44 that "challenged ballots were completed and received between October 7th and November 3rd, 2020." Therefore, these ballots would meet the requirement that the elector "shall fill out, date and sign the declaration" as stated in Sections 3146.6 and 3150.16 of the Election Code. See 25 P.S. §§ 3146.6(a), 3150.16(a). Within this subcategory, the elector would have complied with the law's mandate that "[t]he elector **shall** then fill out, *date* and *sign* the declaration printed on such envelope." Id. (emphasis added).

With respect to a subcategory of ballots which were completely undated, this Court finds that the question before the Court is much more complicated. Respondent and Intervenors passionately argue that the mandate to "date" is directory only and the totality of the evidence proves that the ballots were signed on a date consistent with the law. This Court agrees with the conclusion that the totality of the evidence, stipulated to by the parties, proves that the ballots were signed on some date appropriate to the Election Law; however, the only specific guidance available to this Court, on this subject, is found in In re Nov. 3, 2020, Gen. Election, No. 149 MM 2020, 2020 Pa. LEXIS 5560, at *36 (Pa. Oct. 23, 2020), where

the Pennsylvania Supreme Court specifically ruled on the Board's duty to determine the sufficiency of the Declaration on the envelope. The Pennsylvania Supreme Court has provided this Court, and all Board of Elections, with this mandate:

Both sections [3146.6(a) and 3150.16(a)] require that the elector "fill out, date and sign the declaration." Thus, in determining whether the declaration is "sufficient" for a mail-in or absentee ballot at canvassing, **the county board is required to ascertain whether the declaration on the return envelope has been filled out, dated, and signed.** This is the extent of the board's obligation in this regard. In assessing a declaration's sufficiency, there is nothing in this language which allows or compels a county board to compare signatures. Accordingly, we decline to read a signature comparison requirement into the plain and unambiguous language of the Election Code, as Intervenor urge us to do, inasmuch as the General Assembly has chosen not to include such a requirement at canvassing.

2020 Pa. LEXIS 5560, at *36 (emphasis added).

Intervenor and Respondent argued to this Court that the language of the Pennsylvania Supreme Court was dicta as it relates to the words "dated and signed". Ultimately, an Appellate Court may rule that the language was merely dicta; however, the undersigned feels constrained to follow the clear language of the Pennsylvania Supreme Court's Decision with respect to this issue. A studied review of election law has demonstrated to the undersigned that many sections of the Election Law which were ultimately concluded to be directory rather than mandatory despite the use of the word "shall", went through a gauntlet of judicial opinions with varying views up until the question was resolved by the Pennsylvania

Supreme Court. See Appeal of Pierce, 843 A.2d 1223 (Pa. 2003); Bickhart, 845 A.2d 793 (Pa. 2004).

In reflecting on this issue, the undersigned cannot help but see the irony in the fact that the absence of a signature invalidates the ballot. Respondent refused to Canvass ballots that had not been signed. However, if someone put an obviously false signature on the ballot, the ballot would have been most probably counted because the Court has also ruled that nothing in the language of the Statute compelled a County Board to compare the signature; whereas if someone put a date on the envelope which demonstrated that the vote was made at an improper time, ~~that~~ that fact would be readily apparent to the Board when Canvassing and it would result in a ballot being set aside. During oral argument, the Court pointed out ~~tha~~ that virtually all-important documents are dated when signed. If these two subcategories of ballots had not been co-mingled, and if it were possible to segregate those ballots which had no date at all, this Court would have reflected on the issue further, searched for additional legal authority, but most probably would have ruled that an undated ballot is not sufficient based on the existing law set by the Pennsylvania Supreme Court's ruling in In re Nov. 3, 2020 Gen. Election. However, the ballots were co-mingled and therefore there is no practical way to discard those un-dated ballots without disenfranchising electors whose ballots (partially dated) this Court would conclude are valid.

The act of co-mingling those ballots was done in the presence of both Republican and Democratic representatives. All candidates had the right to

have a representative present when the Board issued its ruling. The representatives present were specifically named in the Stipulated Findings of Fact. Pursuant to this Court's Scheduling Order, those representatives received a copy of Petitioners' Petition and notice of the hearing. Only one of the named representatives participated in the hearing. The undersigned noted, on the record, that he was personally familiar with the lawyers who were acting as representatives and knew them to be bright, articulate people, not shy or reluctant to speak out. Those lawyer/representatives all knew how to contact the Bucks County Court of Common Pleas, and therefore, any or all of them could have insisted on subcategorizing this category of ballots before they were co-mingled.

This issue identified by the undersigned has effectively created a waiver issue for these ballots. This Court specifically finds with respect to these specific ballots that it would be unfair and improper to disenfranchise the undefined number of electors who issued a proper ballot, simply because their ballot was co-mingled with what the undersigned would have felt compelled under current law to deem "insufficient".

Upon review of this issue by an Appellate Court, this Court urges consideration to the issue of co-mingling and this Court's ruling that the issue has been waived. The issue of co-mingling was before the Pennsylvania Supreme Court in Appeal of Pierce, and is noted at footnote 16. See Appeal of Pierce, 843 A.2d at 250, n.16

There, the Court declined to rule on the validity of a co-mingled ballot because the issue was not preserved.

2. Categories 2-4: 644 Ballots With No Handwritten Name or Address on the Outer Envelope, 86 Ballots With a Partial Written Address on the Outer Envelope, and 182 Ballots With a Mismatched Address on the Outer Envelope

The 644 ballots with no handwritten name or address on the outer envelope, the 86 ballots with a partial written address on the outer envelope, and the 182 ballots with a mismatched address on the outer envelope should be counted as these errors are ministerial, technical errors. Failure of the elector to complete this information is not an error of law. Although the provision in question requires an elector to "fill out" the declaration, there is no requirement that filling out the declaration needs to include handwriting the elector's name and address. Even following a strict construction of the Election Code language, as urged by Petitioners, these "errors" (failure to adequately complete information on the outer envelope) are not mandated by the statute. Rather, these errors are "minor irregularities," which should not invalidate ballots. As with the Supreme Court's decision in Bickhart and Wieskerger, the minor irregularity of a lack of a complete handwritten name or address is not necessary to prevent fraud, and there would be no ~~other~~ significant interest undermined by allowing these ballots to be counted.

3. Category 5: 69 Ballots With "Unsealed" Privacy Envelopes

The ballots at issue in this category are not "naked ballots," which would be invalid pursuant to the Supreme Court's decision in Boockvar, 2020 Pa. LEXIS 4872, at *73. Rather, these ballots were enclosed within their respective privacy envelopes; however, those envelopes were not sealed at the time of canvassing. There is no factual evidence that supports a conclusion that the envelopes had not been sealed by the elector prior to that time. In the stipulation of facts at ¶ 46, the parties stipulated "[w]ith respect to Category 5 (69 ballots in "unsealed" privacy envelopes), Defendant could not determine whether the privacy envelopes were initially sealed by the elector but ~~later~~ became unsealed." Therefore, this Court finds there is no evidence that the electors failed to "securely seal [the ballot] in the [privacy] envelope," as required by the Election Code. The elector was provided the envelope by the government. If the glue on the envelope failed that would be the responsibility of the government. There is insufficient evidence to determine whether the specific language of the mandated law was violated. This Court finds it would be an injustice to disenfranchise these voters when it cannot be shown that the ballots in question were not "securely sealed" in the privacy envelope prior to the canvassing of those ballots, and for all of the reasons stated previously, there has been no suggestion or evidence that the absence of a sealed inner envelope in anyway jeopardized the privacy of the ballot.

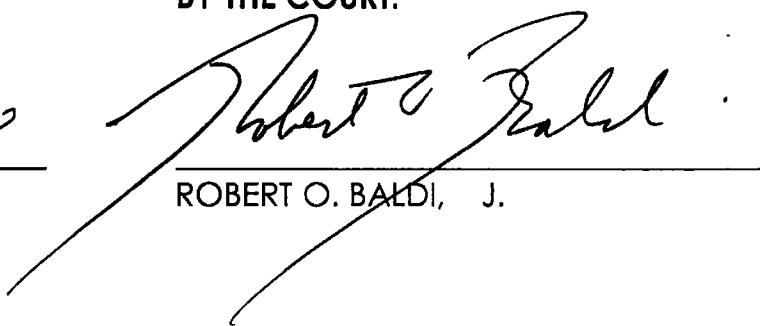
IV. Conclusion

For the reasons set forth herein above, the objections to the ballots of Petitioner Donald J. Trump for President, Inc., et al. are all OVERRULED, the requests for relief made therein are DENIED and the Appeal is DISMISSED.

BY THE COURT:

11/19/20

DATE



ROBERT O. BALDI, J.

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA
CIVIL DIVISION

IN RE: CANVASS OF ABSENTEE AND/OR :
MAIL-IN BALLOTS OF NOVEMBER 3, 2020 : No. 20-05786-35
GENERAL ELECTION :
ELECTION :
:
:
PETITION OF DONALD J. TRUMP FOR :
PRESIDENT, et al. :

ORDER

AND NOW, this 19th day of November, 2020, upon consideration of (1) the Petition for Review of Decision by the Bucks County Board of Elections filed on behalf of Petitioners Donald J. Trump for President, Inc., Republican National Committee, Heidelbaugh for Attorney General, Inc., and Garrity for PA; (2) the responses in opposition thereto filed by Respondent Bucks County Board of Elections, Intervenor Democratic National Committee, and Intervenor Pennsylvania House Democratic Campaign Committee and Bucks County Democratic Committee; and (3) the evidence presented including all stipulations and admissions by counsel as well as the arguments of counsel during the on the record prehearing conference and the hearing on November 17th, 2020, for the reasons set forth in the accompanying Memorandum, it is hereby **ORDERED** and **DECREED** that said Petition for Review is **DENIED**. The Bucks County Board of Elections is **ORDERED** consistent with the Memorandum to count the ballots which are the subject of the Petition:

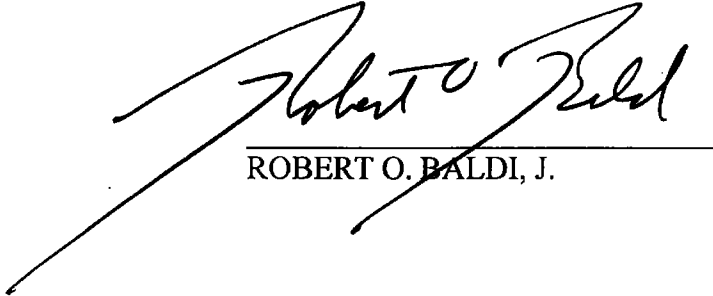
1. 1,196 ballots with no date or a partial date handwritten on the outer envelope;
2. 644 ballots with no handwritten name or address on the outer envelope;
3. 86 ballots with a partial written address on the outer envelope;

N.B. It is the responsibility of all parties to notify all interested parties of the content of this order/decree.

Appendix A

4. 182 ballots with a mismatched address on the outer envelope; and
5. 69 ballots with "unsealed" privacy envelopes.

BY THE COURT:



Handwritten signature of Robert O. Baldi in black ink, written over a horizontal line.

ROBERT O. BALDI, J.

11/19/20

IN THE COURT OF COMMON PLEAS, BUCKS COUNTY PENNSYLVANIA
CIVIL DIVISION

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

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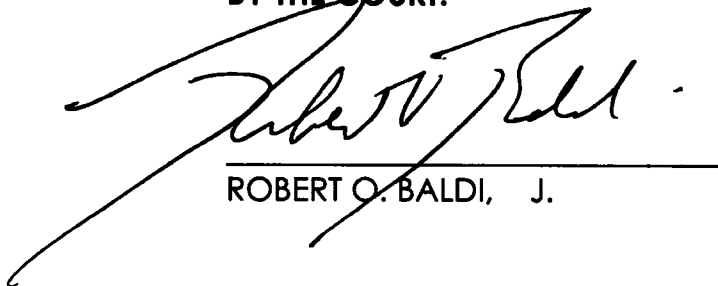
No. 20-05786-35

PETITION OF DONALD J. TRUMP FOR
PRESIDENT, ET AL.

ORDER TO CLARIFY THE RECORD BY STIPULATION

AND NOW the 23rd day of November, 2020, following this Court's issuance of its Memorandum and Order of November 19, 2020, counsel for all parties stipulated that the record should reflect that Petitioner withdrew the challenge of category 4 during the evidentiary hearing, held before the undersigned. A copy of counsels' emails are attached hereto. This Order is issued pursuant to Pa.R.A.P. §1701(b)(1) and is a stipulation in accordance of Pa.R.A.P. §1926.

BY THE COURT:



ROBERT O. BALDI, J.

N.B. It is the responsibility of all parties to notify all interested parties of the content of this order/action

Case# 2020-05786-30 - JUDGE:35 Received at County of Bucks Prothonotary on 11/23/2020 9:27 AM. Fee = \$0.00. The filer certifies that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Schechter, Elizabeth R.

From: Matthew E. Hoover <Mhoover@grimlaw.com>
Sent: Friday, November 20, 2020 3:00 PM
To: Gordon, Matthew P. (Perkins Coie); Britain Henry; Jessica VanderKam; Schechter, Elizabeth R.
Cc: Khan, Joseph J.; Soldano, Austin J.; Harvie, Robert J.; Santoro, Leigha R.
Subject: RE: Petition of Donald J. Trump

I agree on behalf of the remaining intervenors.



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THATCHER

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Subject: RE: Petition of Donald J. Trump

I also concur.

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Subject: RE: Petition of Donald J. Trump

I concur on behalf of petitioner.

Respectfully,
Britain R. Henry, Esq.



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From: Jessica VanderKam <jvanderkam@stuckertyates.com>
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Subject: Re: Petition of Donald J. Trump

Thank you, Ms. Schechter:

We would ask that Judge Baldi's Memorandum and Order be amended. In the Memorandum, the issue is addressed on pages 6 (twice), 11 and 19. On page 6, it should read that Petitioner withdrew the challenge of category 4.

Counsel - kindly confirm.

Jessica

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