
IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. 676 MAL 2020

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

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

Answer to Emergency Petition for Allowance of Appeal from the Order of the
Commonwealth Court entered November 25, 2020, at No. 1191 CD 2020,
Affirming the Order of The Honorable Judge Robert O. Baldi,
In the Court of Common Pleas of Bucks County, Dated November 19, 2020 at
Docket No. 20-05786-35

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INTRODUCTION

Donald J. Trump for President, Inc.’s (the “Campaign”) “emergency” petition to this Court is yet another volley in an apparently bottomless effort to disenfranchise registered Pennsylvania voters. The Commonwealth Court, following this Court’s decision in the consolidated appeals from Philadelphia and Allegheny Counties, already rejected the Campaign’s effort to invalidate 1,995 ballots that were timely cast by registered Bucks County voters and that had not a hint of fraud or impropriety. Nine days later, the Campaign filed its Petition, again seeking to void the same ballots, this time by shifting to a theory—equal protection—that the Commonwealth Court *already held was waived* because the Campaign never raised it in the Court of Common Pleas.

The Campaign’s request is not only waived; it’s also moot. And the Campaign lacks standing to bring this claim to this Court. The votes have been counted and certified—in Bucks County and statewide. President-elect Biden won Pennsylvania by more than 80,000 votes. The Campaign would have this Court ‘un-count’ 1,995 Bucks County votes, but even if those 1,995 voters were retroactively disenfranchised—and even if every one of those voters had voted for the President-elect—it would not help the Campaign because it would not change the outcome of the presidential election.

For all these reasons, this Court should deny the Petition. To be clear: the court’s decision below resolved this elections dispute, and the number of ballots at issue makes clear that, even prior to that resolution, it was not the type of contest or challenge that could bring into doubt the winner of the presidential election or the slate of electors who will represent Pennsylvania at the Electoral College. Still, the Campaign’s decision to wait nearly a week and a half to file this “emergency” petition appears to be an attempt to set up a later argument that Pennsylvania did not meet the “safe harbor” that assures the counting of Pennsylvania’s electoral votes because this appeal was still pending as of the December 8 deadline set by 3 U.S.C. § 5. Though the argument will be incorrect as a matter of law, fidelity to federal and state election law has not been a hallmark of the Campaign’s 2020 legal strategy. When it was faced with a similar effort in 2016 by Jill Stein, however, the Campaign successfully sought cessation of state post-election proceedings before the safe harbor date.¹ The same result should follow here. This Court should accordingly deny the petition straightaway in order to avoid setting the stage for yet another meritless and cynical attack on the results of Pennsylvania’s presidential election.

STATEMENT OF QUESTIONS INVOLVED

- 1.** Whether this Court should grant the Campaign’s emergency petition for allowance of appeal where the Campaign’s basis for appeal was held

¹ See Brief of Donald J. Trump for President, Inc. in Opposition to Plaintiffs’ Motion for Preliminary Injunction, *Stein v. Cortes*, No. 16-CV-06287, ECF No. 38-1 at 4-5 (E.D. Pa. Dec. 8, 2016); *Stein v. Cortes*, 223 F. Supp. 3d 423 (E.D. Pa. 2016).

to be waived by the Commonwealth Court, where the Campaign’s claim is moot, and where the Campaign lacks standing because it has not identified a justiciable injury.

Suggested Answer: No.

STATEMENT OF THE CASE²

I. The Board’s decision.

On November 7, 2020, pursuant to 25 P.S. § 3146.8(g), the Bucks County Board of Elections (the “Board”) held a canvass meeting in the presence of authorized representatives from both the Republican and Democratic parties to consider whether declarations on the outer envelopes of certain ballots were “sufficient.” *See* Ex. A, Commonwealth Court Opinion (“CCO”) at 2. The Campaign subsequently filed a petition for review with the Bucks County Court of Common Pleas, challenging ballots accepted by the Board in the categories below. In each category, the issue identified is the only alleged irregularity.

- Category 1: 1,196 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;

² Because this Court recently reviewed the statutory framework and administrative guidance relevant to county review of mail-in and absentee ballots, that background is not repeated here. *See In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, No. 29 WAP 2020, 2020 WL 6875017 (Pa. Nov. 23, 2020).

- Category 3: 86 ballots with a partial handwritten address on the outer envelope;
- Category 5: 69 ballots with “unsealed” privacy envelopes.

Ex. A, CCO at 2-3.³

The Campaign’s petition for review nowhere mentions equal protection and does not contend that the Board’s decision violated equal protection.

II. What is *not* at issue in this case.

The Campaign admitted and stipulated to the following facts:

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

There is no allegation or evidence of any fraud, misconduct, impropriety, or undue influence in connection with the challenged ballots. Ex. B, Stipulated Facts ¶¶ 27–30.

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

There is no allegation or evidence that any elector was ineligible to vote. *Id.* ¶ 33. There is no allegation or evidence that any of the challenged ballots were cast by, or on behalf of, a deceased person or by someone other than the elector whose signature is on the outer envelope. *Id.* ¶¶ 34–35.

³ Although the Campaign initially challenged ballots in two other categories (identified as Category 4 and Category 6 in the stipulated facts), the Campaign orally withdrew their challenges to those categories at the hearing before the Court of Common Pleas. Ex. A, CCO at 3.

C. No missing signatures or naked ballots.

There is no allegation or evidence that the Board counted any ballots without signatures on the outer envelope or counted “naked ballots” (ballots that did not arrive in a secrecy envelope). *Id.* ¶¶ 31–32.

When the challenged ballots were received by the Board, each was inside a privacy envelope, and the privacy envelope was inside a sealed outer envelope with a voter’s declaration signed by the elector. *Id.* ¶ 45. With respect to Category 5 (the 69 ballots in “unsealed” privacy envelopes), the Campaign agrees that the Board was unable to determine whether the privacy envelopes were initially sealed by the elector but later became unsealed. *Id.* ¶ 46.

D. No challenge to electors’ applications for absentee or mail-in ballots.

The Campaign did not challenge the electors’ applications for the absentee or mail-in ballots on or before the Friday before the November 3rd election. *Id.* ¶ 36.

E. The ballots were timely cast and received.

No mail-in or absentee ballots were mailed to electors before October 7, 2020 and each of the challenged ballots was timely received by the Board before 8:00 p.m. on Election Day, November 3, 2020. *Id.* ¶¶ 37–38. Consequently, each of the challenged ballots was completed, and the outer envelope signed, between October 7 and November 3, 2020.

F. No notice has been provided to the electors whose ballots are being challenged.

The Campaign never notified the electors whose ballots are at issue that it is seeking to have their votes invalidated and not counted. *Id.* ¶ 47.

III. The Court of Common Pleas decision.

On November 17, 2020, the parties participated in an evidentiary hearing before the Court of Common Pleas. Not once during that hearing did the Campaign even mention equal protection or disparate treatment, let alone raise such a claim.

On November 19, 2020, the Court of Common Pleas denied the petition in full. In its written decision, the court noted that the Campaign did not allege fraud, misconduct, impropriety, or undue influence as to the challenged ballots, and that all of the challenged ballots were timely received. Ex. C, Court of Common Pleas Order (“CCPO”) at 9. As to the first category of ballots (the 1,196 ballots with no date or with a partial date handwritten on the outer envelope), the court found that ballots with partial dates complied with statutory requirements and that the Campaign had waived its right to challenge the undated ballots. *Id.* at 15–16. The court also found that the second and third categories of ballots (644 ballots with no handwritten name or address on the outer envelope and 86 ballots with a partial handwritten address on the outer envelope) should be counted because they involved “ministerial, technical errors,” not “error[s] of law.” *Id.* at 19. The court reasoned that a handwritten name and address were “not necessary to prevent fraud,” and that

counting the ballots would not undermine any other significant interest. *Id.* Finally, the court found that the fifth category of ballots (69 ballots with “unsealed” privacy envelopes) should be counted because no evidence showed that they “had not been sealed by the elector prior to” canvassing, and it was possible that the seal had failed through no fault of the voter. *Id.* at 20.

IV. This Court’s November 23 Opinion.

While the Court of Common Pleas’ Order was pending on appeal at the Commonwealth Court, this Court issued an opinion on November 23 that effectively affirmed the Board’s decision to accept nearly all the ballots at issue. *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 2020 WL 6875017. Resolving consolidated appeals arising out of decisions by the boards of elections in Philadelphia and Allegheny Counties to accept many of the same categories of ballots contested here, the Opinion Announcing the Judgment of the Court (“OAJC”) explained, “the Election Code does not require boards 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.” 2020 WL 6875017, at *1.⁴

⁴ This Court unanimously agreed that the Election Code does not prohibit counting ballots in envelopes without a handwritten name or address. As for envelopes missing a date, this Court was divided. In his concurring opinion, Justice Wecht agreed with the outcome but opined that in *future elections*, election officials should

The OAJC expressly recognized that the Bucks County Court of Common Pleas “appropriately applied this Court’s precedent” when it “affirmed the counting of the ballots even though the declarations had not been filled out in full.” *Id.* at *15, n.6.

V. The Commonwealth Court’s Opinion.

On November 25, the Commonwealth Court affirmed the Court of Common Pleas. The court explained that it was “bound by the Supreme Court’s decision, and applying that decision, there was no error in common pleas rejecting Appellant’s challenges to Categories 1 through 3.” Ex. A, CCO at 6 (footnote quoting the Supreme Court’s approval of the Bucks County common pleas decision omitted). The court further determined that the category of ballots in unsealed secrecy envelopes, which was not before this Court in the consolidated appeals from Philadelphia and Allegheny Counties, also should not be invalidated. *Id.* at 14. The court explained that while the Election Code requires secrecy envelopes to be sealed, this interpretation should be applied only prospectively. *Id.* The court noted the “tremendous challenges presented by the massive expansion of mail-in voting, and the lack of precedential rulings on the requirement of a ‘securely sealed’ secrecy envelope”; the parties’ stipulation that the “instructions on the outer envelope for the elector stated only that the ballot should be placed in the secrecy envelope and did

disqualify ballots where the declaration is missing a date, but that this rule should not apply retroactively to the 2020 election. 2020 WL 6875017, at *24 (Wecht, J., concurring and dissenting).

not specify that the envelope needed to be securely sealed or the consequences of failing to strictly adhere to that requirement”; the fact that, “in this case, it cannot be established that the electors did not seal the secrecy envelope”; and, “[i]mportantly . . . there are absolutely **no allegations** of any fraud, impropriety, misconduct, or undue influence, that anyone voted who was not eligible to vote, or that the secrecy of the ballots cast was jeopardized.” *Id.* (emphasis original).

The court expressly declined to adjudicate for the first time on appeal the Campaign’s perfunctory reference to “equal protection”:

To the extent Appellant seeks to “incorporate” Equal Protection arguments into this case that were raised in other cases, **Appellant did not raise such claims before common pleas and, therefore, the Court will not consider them.** Pennsylvania Rule of Appellate Procedure 302(a), Pa. R.A.P. 302(a) (“Issues not raised in the trial court are waived and cannot be raised for the first time on appeal.”).

Id. at 6, n.7 (emphasis added).

VI. Pennsylvania Certifies Election Results.

Meanwhile, every Pennsylvania county, including Bucks County, certified election results by November 23, and the following day, Secretary Boockvar certified the results of the Commonwealth’s presidential election.⁵ Shortly thereafter, Governor Tom Wolf signed the Certificate of Ascertainment for the slate

⁵ Press Release, *Department of State Certifies Presidential Election Results*, Pa. Pressroom (Nov. 24, 2020), <https://www.media.pa.gov/pages/State-details.aspx?newsid=435>.

of electors for Joseph R. Biden as president and Kamala D. Harris as vice president of the United States, and the certificate was submitted to the Archivist of the United States. The Certificate of Ascertainment reflected an 80,555-vote final margin of victory for President-elect Biden.⁶

VII. The Campaign’s appeal.

On December 4, 2020—nine days after the Commonwealth Court issued its decision and ten days after Pennsylvania certified its statewide vote tally—the Campaign filed its “emergency” petition for allowance of appeal from the Commonwealth Court’s decision, arguing that the Board’s acceptance of the challenged ballots violated the constitutional right to equal protection of the laws.⁷

ARGUMENT

I. The Campaign has waived its basis for appeal.

The Petition should be denied at the outset because the Commonwealth Court *already held* that the Campaign waived the sole ground for appeal it raises with this Court. Remarkably, the Campaign does not acknowledge that holding to this Court—nowhere in its 25-page petition is there any mention that the Commonwealth Court already ruled against the Campaign.

⁶ *Id.*

⁷ The Campaign’s Petition never identifies why it is an “emergency” and does not request expedited hearing. In any event, the DNC urges the Court to deny the petition apace given the imminent statutory safe harbor deadline.

The sole issue stated in the Campaign’s petition is an alleged equal protection violation, but as the Commonwealth Court expressly recognized, the Campaign has waived this claim. The Campaign claims that “neither the trial court nor the Commonwealth Court addressed or resolved this [equal protection] issue.” Pet. at 21. The Campaign is half right: the trial court did not address the issue because the Campaign never raised it. But while the Commonwealth Court did not “resolve[]” the issue on the merits, it “addressed” it by rejecting the Campaign’s attempt in its appellate brief to “incorporate” equal protection arguments made in a separate appeal out of Allegheny County, holding that the new line of argument came entirely too late:

To the extent Appellant seeks to “incorporate” Equal Protection arguments into this case that were raised in other cases, Appellant did not raise such claims before common pleas and, therefore, the Court will not consider them. Pennsylvania Rule of Appellate Procedure 302(a), Pa. R.A.P. 302(a) (“Issues not raised in the trial court are waived and cannot be raised for the first time on appeal.”).

Ex. A, CCO at 6, n.7.

The Campaign does not even attempt to argue that the Commonwealth Court got it wrong. Nor could it, because the Commonwealth Court was right—the Campaign made no mention of the issue prior to its appellate brief. Nothing in the Campaign’s petition in the Court of Common Pleas mentioned equal protection, and the 197-page transcript of the merits hearing reveals that the Campaign’s counsel

did not once mention “equal protection,” “disparate treatment,” or anything remotely related to the argument now being pressed in this Court.

Rule 302(a) of the Pennsylvania Rules of Appellate Procedure is mandatory: “Issues not raised in the trial court *are waived and cannot be raised* for the first time on appeal.” Pa.R.A.P. 302(a) (emphasis added). This Court treats it as such, enforcing its command even in capital cases, *see, e.g., Commonwealth v. Powell*, 598 Pa. 224, 245 (2008), and reversing grants of appeal when it discovers that an issue accepted for review has been waived, *see, e.g., Commonwealth v. Brown*, 645 Pa. 160, 162 (2018). Indeed, this case illustrates the wisdom behind requiring claims to first be aired in the trial court so that, among other things, parties can develop the factual record necessary to adjudicate its merits. The Campaign *now* alleges that voters across the state have been treated differently because “[w]hen Bucks County voted to accept ballots with missing or partial dates, or missing or partial names or addresses, or unsealed privacy envelopes, it applied a standard different than that applied in Pennsylvania’s other counties.” Pet. at 19. The Campaign repeats this assertion—that things were different in Bucks County—numerous times throughout its brief. But it never once identifies any evidence that any other counties did anything differently. And there was no such evidence presented at any point in this case. Indeed, there was no discovery or factfinding on this issue, and the extensive stipulated facts negotiated among counsel make no mention of it. Moreover, the

parallel litigation in Philadelphia and Allegheny Counties reveal that other counties followed the *same* interpretation of the Election Code as Bucks County for determining the sufficiency of a voter's completion of the declaration on the outer envelope. Nevertheless, the Campaign would have this Court find an equal protection violation, and order the disenfranchisement of nearly 2,000 Bucks County voters, *without a single pled allegation, much less a shred of evidence of disparate treatment.*

This case presents no reason for exception to waiver, and the Campaign does not even try to muster one. As the Commonwealth Court held, any equal protection argument is foreclosed, and the Campaign's appeal should be dismissed for that reason alone.

II. This case is moot.

Even if this Court were inclined to overlook the Campaign's clear waiver, the Petition should still be denied because the case is moot. For a case to be justiciable, an actual controversy must exist at all stages of the case, including on appeal. *See In re Gross*, 476 Pa. 203, 209 (1978) (noting that "a legal question can become moot on appeal as a result of an intervening change in the facts of the case"). And "[i]t is well settled that [the] Court will not decide moot questions." *Rogers v. Lewis*, 540 Pa. 299, 302 (1995) (lawsuit relating to a mayor's right to occupy his office mooted when the mayor's term expired).

The sole issue the Campaign raises in the Petition is plainly moot. The Campaign asks the Court to order the ‘un-counting’ of 1,995 absentee and mail-in ballots that were cast in Bucks County during the 2020 general election. *See* Pet. at 29 (asking the Court to direct that the 1,995 ballots at issue “not be counted as void”). But the general election has been over for weeks. Bucks County certified its vote tally on November 23, in accordance with Pennsylvania law. All other Pennsylvania counties likewise certified their results by the statutory deadline. Secretary Boockvar certified statewide results on November 24, and Governor Wolf then signed the Certificate of Ascertainment and submitted it to the Archivist of the United States. There is no longer any controversy to resolve because the votes have been counted, and the count has been certified. *See, e.g., Wood v. Raffensperger*, 20-14418, 2020 WL 7094866, *6 (11th Cir. Dec. 5, 2020) (“We cannot turn back the clock and create a world in which the 2020 election results are not certified.” (cleaned up)). Thus, the Court should deny the Petition because the issues it raises are moot.

The Petition does not fall within any exception to the mootness doctrine. For example, it does not raise issues that are “capable of repetition but likely to evade review,” which can sometimes arise in the post-election context. *Cf. In re Canvassing Observation*, No. 30 EAP 2020, 2020 WL 6737895, at *5 n.7 (Pa. Nov. 17, 2020). As the Campaign acknowledges, both the Commonwealth Court and this Court have granted prospective relief this election cycle on issues related to the

treatment by county boards of mail and absentee ballot envelopes. *See 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 (Pa. Nov. 23, 2020); *In re: Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, No. 1191 C.D. 2020 (Commw. Ct. Nov. 23, 2020) (Br. at 1, 5-6). Appropriate plaintiffs remain free to raise future pre-election challenges to state and county election procedures before the next election. This is not the sort of dispute where an issue, *if* properly and timely raised, would be capable of repetition while evading review. *See Wood*, 2020 WL 7094866, at *7 (courts do not apply mootness exception “if there is some alternative vehicle through which a particular policy may effectively be subject to complete review” (quotation and internal quotation mark omitted)).

Nor does the Campaign raise an issue of great public importance (or one that would fall within any other possible exception to the mootness doctrine). Instead, the Campaign raises a discrete—and ultimately meritless—challenge to 1,995 ballots that, even if invalidated, would have no effect on the outcome of the election. President-elect Biden won Pennsylvania by more than 80,000 votes, more than 40 times the number of ballots the Campaign now challenges. And the Campaign inexplicably waited ten days to bring this Petition, even though it knew the federal safe harbor deadline (December 8) and Electoral College vote (December 14) were fast approaching, a delay that further undercuts any argument on public importance.

III. The Campaign lacks standing.

The Campaign has failed—again—to raise an equal protection claim that it has standing to pursue. To establish standing, a plaintiff must have an interest in the litigation that is “substantial,” “direct,” and “immediate.” *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 191 (1975). For an interest to be “substantial,” “there must be some discernible adverse effect to some interest other than the abstract interest of all citizens.” *Id.*, 464 Pa. at 195, 346. That is, “it is not sufficient for the person claiming to be ‘aggrieved’ to assert the common interest of all citizens in procuring obedience to the law.” *Id.*, 464 Pa. at 192. These requirements—that a litigant’s interest be substantial, immediate, and direct—mirror the federal requirements to maintain standing under Article III. Indeed, “in determining issues of standing, [Pennsylvania courts] ha[ve] looked to the federal courts’ interpretation of Article III of the United States Constitution.” *Hous. Auth. of Cnty. of Chester v. Pa. State Civil Serv. Comm’n*, 556 Pa. 621, 629-30 (1999) (recognizing “the federal courts may entertain suits only where a plaintiff alleges a particularized, concrete injury *to himself* which is causally traceable to the complained-of action by the defendant and which may be redressed by the judicial relief requested.”). *Id.*

A. The Campaign has not suffered a redressable injury.

The Campaign lacks standing to maintain this action because its new equal protection argument fails to allege any injury at all, let alone one that is redressable by this Court. As the Third Circuit recently explained, to show a cognizable injury, the Campaign must show “that a greater proportion of [defective] ballots” were cast for President-elect Biden. *Bognet v. Sec’y Commonwealth of Pa.*, No. 20-3214, 2020 WL 6686120, at *8 (3d Cir. Nov. 13, 2020). And to establish redressability, the Campaign would have to show that the votes at issue here were cast in “sufficient . . . number[s] to change the outcome of the election to [Trump’s] detriment.” *Id.*

The Campaign can clear neither hurdle. The Campaign does not even suggest that invalidating the ballots at issue here would net President Trump a single vote. And even if it somehow turned out that every one of the 1,995 contested ballots had been cast for President-elect Biden, invalidating those ballots would do nothing to alter an election that he won by 80,555 votes. *See Sibley v. Alexander*, 916 F. Supp. 2d 58, 62 (D.D.C. 2013) (“even if the Court granted the requested relief, Sibley would still fail to satisfy the redressability element [of standing] because enjoining defendants from casting the . . . votes would not change the outcome of the election”) (quoted in *Bognet*, 2020 WL 6686120, at *8).

Further, if the Campaign were concerned by county-by-county variations for accepting absentee and mail-in ballots across the Commonwealth, suing only *one* of

Pennsylvania's 67 county boards of elections could not possibly remedy that variation unless Bucks County were the *only* county to accept these categories of disputed ballots. But the only indication before this Court suggests the opposite: at least three counties—Bucks, Allegheny, and Philadelphia—accepted ballots contained in outer envelopes that lacked a handwritten name, date, or address, and there is no evidence that any county took a different approach. Even if such evidence were a part of this record, the Campaign could redress the “injury” of differential treatment only by joining *every* county board that tallied votes against the Campaign’s wishes, or by suing a statewide officer with authority over the boards’ decision-making. The Campaign did neither, and so this solitary action is incapable of eliminating alleged statewide discrepancies in how counties may have interpreted the Election Code’s requirements for the ballots at issue. Absent a redressable injury, there is no standing.

B. The Campaign cannot assert an injury on behalf of others.

Rather than anywhere asserting any injury the Campaign suffered itself, the Petition’s only suggestion of mistreatment is that “[v]oters 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” not to count ballots enclosed in an unsealed secrecy envelope or in an outer envelope where the declaration is missing a handwritten name, date,

or address. Pet. at 22. It thus appears the Campaign seeks to adopt as its own an injury allegedly suffered by voters outside of Bucks County whose ballots were not counted (and, according to the Campaign, should not have been counted). But no theory of standing permits this.

It is entirely unclear (because this claim has never before been raised in this litigation) which, if any, doctrine of candidate- or third-party standing the Campaign intends to assert. The most likely argument may be “associational standing,” which allows an entity to bring suit on behalf of members upon a showing that, among other requirements, “its members would otherwise have standing to sue in their own right,” and “the interests it seeks to protect are germane to the organization’s purpose.” *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1997). The Campaign cannot satisfy either prong.

1. The Campaign does not have members who have standing to bring this claim in their own right.

First, individuals outside Bucks County whose ballots were discarded would not have standing to sue the Bucks County Board of Elections to discard the ballots challenged in Bucks County, as the Campaign seeks. If these non-Bucks County voters’ ballots were lawfully discarded—as the Campaign believes—then they suffered no injury at all; and if their votes were unlawfully discarded, then the Bucks County Board neither caused nor could possibly redress that injury. *See Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078, 2020 WL 6821992, at

*6 (M.D. Pa. Nov. 21, 2020) (rejecting standing based on the cancellation of votes because “[n]one of Defendant Counties received, reviewed, or discarded Individual Plaintiffs’ ballots. Even assuming that Defendant Counties unconstitutionally allowed *other* voters to cure their ballots, that alone cannot confer standing on Plaintiffs who seek to challenge the denial of *their* votes.”), *aff’d sub nom. Donald J. Trump for President, Inc. v. Pennsylvania*, No. 20-3371, 2020 WL 7012522 (3d Cir. Nov. 27, 2020).

The Campaign claims that “every illegal vote that is counted in an election undermines democracy and disenfranchises an American citizen who cast a legal vote [sic].” Pet. at 17. It is unclear if this is just distracting rhetoric or an attempt at identifying a justiciable injury, but if the latter, it fails. An abstract interest in “democracy” is a non-justiciable “generalized grievance” that is common to all members of the public. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575 (1992). And as the Third Circuit recently explained, an illegal vote “has a mathematical impact on the final tally and thus on the proportional effect of every vote, but no single voter is specifically disadvantaged.” *Bognet*, 2020 WL 6686120, at *12. Even if we assume that 1,995 Bucks County voters somehow received an undeserved benefit by having their votes counted, any resulting harm is “is shared in substantially equal measure by a large class of citizens, [and therefore] is not a

particularized injury” necessary to support standing. *Wood*, 2020 WL 7094866, at *5.

2. The Campaign’s “purpose” is re-election, not defending voters’ alleged rights to equal protection.

Second, any constitutional interests of individual voters to have their votes treated equally with other votes cast across the state are not germane to the Campaign’s “purpose.” *Hunt*, 432 U.S. at 343. As courts consistently have held, the Campaign “represents only Donald J. Trump and his ‘electoral and political goals’ of reelection.” *Boockvar*, 2020 WL 6821992, at *8, quoting *Donald J. Trump for President, Inc. v. Cegavske*, No. 220CV1445JCMVCF, 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) (noting “[b]y statutory definition, a federal election candidate’s ‘principal campaign committee’ is simply a reserve of funds set aside for that campaign. *See* 52 U.S.C. § 30102”). As a result, “while the Trump Campaign might achieve its purposes through its member voters, the ‘constitutional interests of those voters are wholly distinct’ from that of the Trump Campaign.” *Boockvar*, 2020 WL 6821992, at *8 (quoting *Cegavske*, 2020 WL 5626974, at *4).

Simply put, the Campaign cannot assert associational standing on this claim. Nor can it succeed on other theories that are far afield: it does not have “competitive standing,” because this case does not seek “to challenge the *inclusion of an allegedly ineligible rival on the ballot*,” *id.* (collecting cases); or “prudential standing,” because there is no “‘hindrance’ to the [voters’] ability to protect [their] own

interests,” *Bognet*, 2020 WL 6686120, *7, quoting *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004); or any other doctrine of third-party standing the Campaign may have asserted had this claim been raised and briefed in the Court of Common Pleas.⁸

CONCLUSION

For all of these reasons, the Campaign’s emergency motion for allowance of appeal should be denied.

⁸ Other recent cases where the Campaign’s equal protection claims were dismissed for lack of standing include *Donald J. Trump for President, Inc. v. Pennsylvania*, No. 20-3371, 2020 WL 7012522 (3d Cir. Nov. 27, 2020); *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-CV-966, 2020 WL 5997680 (W.D. Pa. Oct. 10, 2020); and *Cegavske*, No. 2020 WL 5626974, at *2.

Dated: December 7, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Pennsylvania Rule of Appellate Procedure 1115(f), I hereby certify that this PETITION FOR ALLOWANCE OF APPEAL has a word count of 5,185 words, as counted by Microsoft Word's word count tool.

/s/ Michael R. McDonald

Michael R. McDonald

**CERTIFICATE OF COMPLIANCE WITH CONFIDENTIAL
INFORMATION RULE**

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.

/s/ Michael R. McDonald

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Petition for Allowance of Appeal was served upon counsel of record, on the 7th day of December, 2020, by Electronic Mail as follows:

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EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Canvass of Absentee	:	
and/or Mail-in Ballots of	:	
November 3, 2020 General Election	:	
	:	
v.	:	No. 1191 C.D. 2020
	:	Submitted: November 23, 2020
Appeal of: Donald J. Trump for	:	
President, Inc.	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
JUDGE COHN JUBELIRER**

FILED: November 25, 2020

Donald J. Trump for President, Inc. (Appellant) appeals from the Order of the Court of Common Pleas of Bucks County (common pleas) that overruled the Appellant’s objections to certain absentee and/or mail-in ballots, denied Appellant’s requested relief, and dismissed Appellant’s appeal from the Bucks County Board of Elections’ (Board) determination that the challenged ballots were valid and could be counted in the General Election of November 3, 2020 (Election).¹ Appellant argues the Board violated the Election Code² (Code) when it did not reject and, over objection, accepted 2,177 ballots on the basis that they did not comply, in some way, with Sections 3146.6 or 3150.16 of the Code, 25 P.S. §§ 3146.6 (absentee electors),

¹ Others challenged the Board’s decision to common pleas, but only Appellant has filed a notice of appeal from the common pleas’ Order.

² Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2601-3591.

3150.16 (mail-in electors). Appellant has since withdrawn some of the challenges, and of the remaining challenges, all but 69 ballots are resolved by a recent decision of the Supreme Court; common pleas' Order with regard to those ballots is, therefore, affirmed for that reason. The remaining 69 ballots were received with secrecy envelopes that were "unsealed." The statute unambiguously requires that secrecy envelopes shall be "securely seal[ed]," 25 P.S. §§ 3146.6(a), 3150.16(a), and that the board of elections shall "break the seals" on these envelopes before counting the ballots. Section 3146.8(g)(4)(iii) of the Code, 25 P.S. § 3146.8(g)(iii).³ Therefore, in future elections, the sealing requirement should be treated as mandatory and if unsealed secrecy envelopes are received, this will invalidate the ballots contained therein. However, because of the facts and circumstances in this case, this interpretation will be applied prospectively. Common pleas' Order is, therefore, affirmed with regard to those 69 ballots.

The parties filed a joint stipulation of facts with common pleas setting forth the following facts relevant to the Court's resolution of this appeal. On November 3, 2020, the Board met to pre-canvass absentee and mail-in ballots as set forth in Section 3146.8(g) of the Code. (Stip. ¶ 17.) During the course of the Board's canvass meeting on November 7, 2020, and with Authorized Representatives present and given an opportunity to provide argument, the Board considered whether certain voter declarations on the outer envelope were "sufficient" to meet the requirements of Section 3146.8(g). (*Id.* ¶ 18.) The Board separated the ballots into 10 different categories, and accepted some of the categories for canvassing and rejected others. (*Id.* ¶ 19.) Of the categories accepted for canvassing, Appellant challenged six to common pleas. Those six categories were:

³ This section was added by Section 11 of the Act of March 6, 1951, P.L. 3.

- Category 1: 1,196 ballots whose outer envelopes did not contain a handwritten date or contained only a partial handwritten date.
- Category 2: 644 ballots whose outer envelopes did not include a handwritten name or address.
- Category 3: 86 ballots whose outer envelopes contained a partial written address.
- Category 4: 246 ballots whose outer envelopes contained mismatched addresses.
- Category 5: 69 ballots with “unsealed” secrecy envelopes.
- Category 6: 7 ballots whose secrecy envelopes had markings that did not identify the elector’s identity, political affiliation, or candidate preference.

(*Id.* ¶ 24.) During the hearing before common pleas, Appellant withdrew its challenges to Categories 4 and 6, (Hr’g Tr. at 114-15; common pleas’ op. at 6; common pleas’ November 23, 2020 Order Clarifying the Record.) Therefore, these challenges will not be discussed further.

The parties stipulated that “[w]hen received by [the Board,] each of the challenged ballots was inside a [secrecy] envelope, and the [secrecy] envelope was inside a sealed outer envelope with a voter’s declaration that had been signed by the elector.” (Stip. ¶ 45.) On the outer envelope “is a checklist for the voter, asking: “Did you . . . [p]ut your ballot inside the secrecy envelope and place it in here?” (*Id.* ¶ 10). With regard to Category 5 ballots, the parties stipulated that the Board “could not determine whether the [secrecy] envelopes were initially sealed by the elector but later became unsealed.” (*Id.* ¶ 46.) The electors whose ballots are being challenged have not been notified. (*Id.* ¶ 47.) The stipulation clearly establishes that Appellant does not allege, and there is no evidence of, fraud, misconduct, impropriety, or undue influence. (*Id.* ¶¶ 27-30.) Further, Appellant does not allege,

and there is no evidence, that the Board counted ballots that did not contain signatures on the outer envelope or “‘naked ballots,’ (ballots that did not arrive in a secrecy envelope).” (*Id.* ¶¶ 31-32.) Last, Appellant does not allege, and there is no evidence, that the electors who cast these votes were ineligible to vote, that votes were cast by or on the behalf of a deceased elector, or that votes were cast by someone other than the elector. (*Id.* ¶¶ 33-35.)

In addition to these stipulated facts, common pleas held a hearing, at which Thomas Freitag, the Board’s Director (Director), testified. (Hr’g Tr. at 63-64.) Director testified about the Board’s process in reviewing the ballots in general, the challenged ballots, and the Board’s determinations to accept or reject challenged ballots that were missing information on the outer envelopes. (*Id.* at 68-96.) Relevant specifically to Category 5 challenges, Director indicated that “the privacy of the ballots [were not] jeopardized in any manner[,]” there was no “view of the ballots” “to his knowledge,” and that there was no “way to determine by the Board whether or not [the secrecy envelope] had been sealed at one point and became unsealed.” (*Id.* at 97-98.) He testified that the Board provided the envelopes, including the secrecy envelopes, which were the type that had “to be either moistened by licking or water or glue,” and agreed that people would have to rely on the type of envelopes provided by the Board as to the quality of the seal. (*Id.* at 98-99.) Director agreed that the Board discussed the possibility that voters may have concerns about licking the envelopes, given the pandemic, which appeared to be a factor in its decisions. (*Id.* at 99.) He further agreed that the “ballots that were enclosed within unsealed [secrecy] envelopes” were “enclosed within [the] outer envelope.” (*Id.*) Director was subjected to limited cross-examination., but not on this issue. The parties then provided argument on the various challenges. Following

the hearing, common pleas issued an opinion and order rejecting the challenges and dismissing the appeal of the Board's decision. Appellant now appeals to this Court.⁴

As to Categories 1 through 3, which challenged the ballots on the basis of a deficiency on the outer envelopes, common pleas held that the information missing was not mandatory under the Election Code, but directory and, therefore, its absence would not invalidate those ballots. (Common pleas' op. at 14-19.) Appellant challenges these determinations before this Court. However, after the filing of the appeal, the Supreme Court of Pennsylvania rejected these same legal challenges in *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election* (Pa., Nos. 31-35 EAP 2020 and 29 WAP 2020, filed November 23, 2020) (*Philadelphia/Allegheny*), slip op. 19-32.⁵ In doing so, the Supreme Court "conclude[d] that the . . . Code does not require boards 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." *Id.*, slip op. at 3. Appellant acknowledges this holding in its brief, but points out that, per a majority of the Supreme Court, dating the outer envelope is a mandatory requirement, but would be applied prospectively. (Appellant's Brief (Br.) at 27.)

⁴ Common pleas' decision is reviewed on appeal "to determine whether the findings are supported by competent evidence and to correct any conclusions of law erroneously made." *In re Reading Sch. Bd. Election*, 634 A.2d 170, 171-72 (Pa. 1993). Issues involving the proper interpretation of the Code is a question of law, and the Court's standard of review is de novo and scope of review is plenary. *Banfield v. Cortes*, 110 A.3d 155, 166 (Pa. 2015.)

⁵ DNC Services Corporation/Democratic National Committee, an appellee here, filed an application for extraordinary relief with the Supreme Court requesting the Supreme Court exercise its extraordinary jurisdiction powers over this appeal, but this application was denied by the Supreme Court by order dated November 24, 2020.

This Court is bound by the Supreme Court’s decision,⁶ and, applying that decision, there was no error in common pleas rejecting Appellant’s challenges to Categories 1 through 3.⁷

The sole remaining issue before this Court is whether the ballots identified in Category 5, which are those ballots that were enclosed, but did not appear to be “sealed,” in the secrecy envelope, must be invalidated under the Code. In rejecting Appellant’s challenge to this category, common pleas explained that the ballots at issue were not “naked ballots,” which would have been invalid pursuant to the Supreme Court’s decision in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 378-80 (Pa. 2020). Common pleas held that “[t]here is no factual evidence that supports a conclusion that the envelopes had not been sealed by the elector prior to” the time of canvassing. (Common pleas op. at 20.) Instead, common pleas pointed to the parties’ stipulation that “[w]ith respect to Category 5 . . . [the Board] could not determine whether the [secrecy] envelopes were initially sealed by the elector but later became unsealed.” (*Id.* (quoting Stip. ¶ 46).) Accordingly, common pleas found “there [was] no evidence that the electors failed to ‘securely seal [the ballot] in the [secrecy] envelope,’ as required by the . . . Code.” (*Id.* (first and third alteration added).) It explained that “[t]he elector was provided the envelope by the government” and “[i]f the glue on the envelope failed[,] that would be the responsibility of the government.” (*Id.*) Therefore, common pleas held “[t]here

⁶ Notably, the Supreme Court referenced common pleas’ decision in this matter and held that common pleas “appropriately applied th[e Supreme] Court’s precedent” in affirming the counting of these ballots. *Philadelphia/Allegheny*, slip op. at 32-33 n.6.

⁷ To the extent Appellant seeks to “incorporate” Equal Protection arguments into this case that were raised in other cases, Appellant did not raise such claims before common pleas and, therefore, the Court will not consider them. Pennsylvania Rule of Appellate Procedure 302(a), Pa.R.A.P. 302(a) (“Issues not raised in the trial court are waived and cannot be raised for the first time on appeal.”).

[was] insufficient evidence to determine whether the specific language of the mandated law was violated” and “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 [secrecy] envelope prior to the canvassing of those ballots,” particularly where “there ha[d] been no suggestion or evidence that the absence of a sealed inner envelope in anyway jeopardized the privacy of the ballot.” (*Id.*)

Appellant, citing *Boockvar*, argues that the requirements of Sections 3146.6(a) and 3150.16(a) are mandatory, not directory. According to Appellant, the Supreme Court has recognized that these requirements of the Code “are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed -- particularly where . . . they are designed to reduce fraud.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1234 (Pa. 2004) (*Appeal of Pierce*). Therefore, Appellant argues, “absentee or mail-in ballots cast in contravention of the requirements of [Section 3146.6(a) and 3150.16(a) of the Code] are ‘void’ and cannot be counted.” (Appellant’s Br. at 23 (quoting *Appeal of Pierce*, 843 A.2d at 1234).)

The Board, as an appellee, argues that the deficiencies set forth in Category 5 are minor technical deficiencies related to the sealing of the secrecy envelopes and should be treated like other minor mistakes that do not require that the ballots be stricken. The Board maintains that there is no evidence that these 69 electors did not comply with the statutory language or that the secrecy of the ballots was in any way compromised. *Boockvar*, the Board asserts, requires that the ballots must be **enclosed** in the secrecy envelopes or the ballots should be disqualified. 238 A.3d at 380. Here, there is no dispute that the ballots were fully enclosed in the secrecy envelopes, consistent with the holding in *Boockvar*, and, as a factual matter, there

could be no determination as to whether the secrecy envelopes were sealed by the electors and later became unsealed. Given that the Court cannot tell whether the electors made errors in casting their ballots, and the lack of any allegation of fraud, the Board argues there is no compelling reason to disenfranchise these electors. *Appeal of James*, 105 A.2d 64, 66 (Pa. 1954).

Appellee DNC Services Corporation/Democratic National Committee (DNC) asserts there is no statutory requirement that the voter must seal the secrecy envelope in order for the ballot to be counted. Further, it asserts that the word “seal” is not a term of art and is not defined by the Code, is ambiguous and, per a dictionary definition, commonly means “to close” or “to make secure,” and there is no allegation that the secrecy envelopes were not closed or the ballots were not secure in the envelopes. (DNC’s Br. at 16-17.) DNC argues that noncompliance with this requirement does not justify disenfranchisement because, unlike with “naked ballots,” the identity of the electors was protected, which is consistent with the statutory purpose.⁸

Relevant here are Sections 3146.6(a), 3150.16(a), and 3146.8(g)(4)(ii) and (iii) of the Code. Section 3146.6(a) states, in pertinent part:

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

⁸ DNC argues this Court does not have jurisdiction to consider this matter; however, our Supreme Court’s order denying DNC’s request for that Court to exercise its powers of extraordinary jurisdiction confirms this Court’s jurisdiction.

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) (emphasis added). Section 3150.16(a) contains the nearly identical statement that “**the mail-in elector shall**, in secret, proceed to mark the ballot . . . and then fold the ballot, **enclose and securely seal the same in the envelope** on which is printed, stamped or endorsed ‘Official Election Ballot’” and “[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” 25 P.S. § 3150.16(a) (emphasis added).

Section 3146.8(g)(4)(ii) and (iii), governing “Canvassing of official absentee ballots and mail-in ballots,” specifies that

(4) All absentee ballots which have not been challenged under section 1302.2(c) and all mail-in ballots which have not been challenged under section 1302.2-D(a)(2) and that have been verified under paragraph (3) shall be counted and included with the returns of the applicable election district as follows:

. . . .

(ii) If any of the envelopes on which are printed, stamped or endorsed the words “Official Election Ballot” contain any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.

(iii) **The county board shall then break the seals of such envelopes, remove the ballots and count, compute and tally the votes.**

25 P.S. § 3146.8(g)(4)(ii), (iii) (emphasis added).

The parties present three legal interpretive approaches to whether these 69 ballots were properly accepted by the Board when they were enclosed, but not sealed, in the secrecy envelope at the time of canvassing. Appellant argues this requirement is mandatory and allows for **no** exception. The Board and DNC argue that this requirement is directory and noncompliance with that requirement is a minor defect that should be excused. The Board alternatively argues, in accordance with common pleas’ reasoning, that as a factual matter, a violation of this requirement by the electors has not been established, and, in the absence of compelling reasons, such as allegations of fraud or infringement on the electors’ secrecy, the electors should not be disenfranchised.

“[T]he polestar of statutory construction is to determine the intent of the General Assembly.” *Appeal of Pierce*, 843 A.2d at 1230. Generally, “the best indication of the legislative intent is the plain language of a statute.” *Id.* (citation omitted). In construing that language, “[w]ords and phrases shall be construed according to the rules of grammar and according to their common and approved usage” *Id.* (citation omitted). The Court is mindful that, “[w]hen 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.” *Id.* (citation omitted). It is only when the words of the statute “are not explicit” that the Court may then “resort to other considerations, such as the statute’s perceived ‘purpose,’ in order to ascertain legislative intent.” *Id.* (citation omitted). The Court is likewise mindful that, as our Supreme Court has explained, “all things being equal, the [Code] will be construed liberally in favor of the right to vote but, at the same time, we cannot ignore the clear mandates of the . . . Code.” *Id.* at 1231.

The operative provisions at issue here involve the statutory direction that “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). At canvassing, “[t]he county board shall then **break the seals** of such envelopes, remove the ballots and count” 25 P.S. § 3146.8(g)(4)(iii) (emphasis added).

The provisions that are at issue here are contained within sections that our Supreme Court has found to contain both mandatory and directory provisions. However, particularly applicable here, the Supreme Court in *Boockvar* held that “the secrecy provision language in Section 3150.16(a) is **mandatory** and the mail-in elector’s failure to comply with such requisite by enclosing the ballot in the secrecy envelope renders the ballot invalid.” *Boockvar*, 238 A.3d at 380 (emphasis added). In *Boockvar*, our Supreme Court considered whether county boards of election should be required to “clothe and count naked ballots,” that is, place ballots that were returned to the county board without the secrecy envelopes into an envelope and count them. 238 A.3d at 374. As here, the Supreme Court was presented with conflicting assertions that this requirement was directory or mandatory. After examining the statutory text, the Court concluded that the legislative intent was for the “**secrecy envelope provision**” to be mandatory, citing article VII, section 4 of the Pennsylvania Constitution, providing that “secrecy in voting shall be preserved,” PA. CONST. art. VII, § 4, and Section 3146.8(g)(4)(ii). The Supreme Court explained that the two statutory provisions, dealing with the same subject, “must be read *in pari materia*.” *Boockvar*, 238 A.3d at 378. Based on that statutory language, the Supreme Court held that it was clear that the legislature intended “that, during the collection and canvassing processes, when the outer envelope in which the ballot

arrived is unsealed and **the sealed ballot** removed, it should not be readily apparent who the elector is, with what party [the elector] affiliates, or for whom the elector has voted.” *Id.* (emphasis added). Per the Court, “[t]he secrecy envelope properly unmarked **and sealed** ensures that result, unless it is marked with identifying information, in which case that goal is compromised” and that “[t]he omission of a secrecy envelope defeats this intention.” *Id.* at 378, 380 (emphasis added). The Supreme Court in *Boockvar* found the matter analogous to the issue in *Appeal of Pierce*, where there was a challenge to absentee ballots that were delivered to the county board of election by third persons in violation of the Code’s “in-person” delivery requirement. *Id.* at 379. In *Appeal of Pierce*, the Supreme Court held that the “so-called technicalities of the . . . Code,” such as the requirement that an elector personally deliver the elector’s absentee ballot, “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.” 843 A.2d at 1234. Therefore, the Court in that case, found that the in-person delivery requirement was mandatory and the absentee ballots delivered in contravention of this mandatory provision were void. *Id.*

The Court recognizes that the unsealed envelopes here could be viewed as a less substantial noncompliance than an elector’s failure to use the secrecy envelope, as the ballots here were actually enclosed in the secrecy envelope and then in the sealed outer envelope. However, the language relating to securely sealing the secrecy envelope is encompassed within the provision directing the use of the secrecy envelope, which the Supreme Court found mandatory in *Boockvar*. That the legislature intended the secrecy envelopes to remain sealed until the ballots are counted is further evidenced by the directive in Section 3146.8(g)(4)(iii) that “[t]he

county board **shall then break the seals of such envelopes**, remove the ballots and **count**” 25 P.S. § 3146.8(g)(4)(iii) (emphasis added). Such language, when read *in pari materia* with Sections 3146.6(a) and 3150.16(a), reflects that the legislature intended the secure sealing of the secrecy envelope to be mandatory. *Boockvar*, 238 A.3d at 378. Accordingly, Appellant’s argument that this directive is mandatory such that an elector’s noncompliance results in a ballot that is not valid is supported by the statutory language and *Boockvar*.

The parties stipulated that these challenged ballots were “unsealed” in the secrecy envelopes when canvassing of the ballots was to begin. The text of the Code unambiguously states that the elector “shall . . . enclose and securely seal the [ballot] in the envelope . . . ,” 25 P.S. §§ 3146.6(a), 3150.16(a), and that, at canvassing, “[t]he county board shall then break the seals of such envelopes, remove the ballots and count,” 25 P.S. § 3146.8(g)(4)(iii). The legislature did not merely require the envelope to be sealed, but specified that it be “**securely**” sealed. 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added). The Code unambiguously requires the envelopes remain sealed until the county board of elections can “break the seals” of the secrecy envelopes. 25 P.S. § 3146.8(g)(4)(iii). When the text of the statute is clear and unambiguous, those words best reflect the legislative intent, and “the letter of [the unambiguous language] is not to be disregarded under the pretext of pursuing its spirit.” *Appeal of Pierce*, 843 A.2d at 1230 (citation omitted).

Justice Wecht recently in *Philadelphia/Allegheny* highlighted that there are times a Court should give prospective application to a ruling under the Code. Slip op. at 17-18 (Wecht, J., concurring). Citing *In Appeal of Zentner*, 626 A.2d 146 (Pa.1993), as precedent, Justice Wecht concurred in the decision of the Court to count the ballots that were undated, and would prospectively apply a more strict

interpretation of the statute favored by three other justices. As did Justice Wecht, this Court recognizes the tremendous challenges presented by the massive expansion of mail-in voting, and the lack of precedential rulings on the requirement of a “securely sealed” secrecy envelope. Moreover, the parties stipulated in this case reveals that the instructions on the outer envelope for the elector stated only that the ballot should be placed in the secrecy envelope and did not specify that the envelope needed to be securely sealed or the consequences of failing to strictly adhere to that requirement. *See Philadelphia/Allegheny*, slip op. at 20 (Wecht, J., concurring). Moreover, in this case, it cannot be established that the electors did not seal the secrecy envelope. Importantly, the Court must point out that there are absolutely **no allegations** of any fraud, impropriety, misconduct, or undue influence, that anyone voted who was not eligible to vote, or that the secrecy of the ballots cast was jeopardized. For these reasons, the decision of the Court will be applied prospectively, and the 69 ballots will not be invalidated.

Accordingly, common pleas’ Order is affirmed.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Canvass of Absentee :
and/or Mail-in Ballots of :
November 3, 2020 General Election :
: :
v. : No. 1191 C.D. 2020
: :
Appeal of: Donald J. Trump for :
President, Inc. :

ORDER

NOW, November 25, 2020, the Order of the Court of Common Pleas of Bucks County, entered in the above-captioned matter, is **AFFIRMED** in accordance with the foregoing opinion.

RENÉE COHN JUBELIRER, Judge

EXHIBIT B

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**Motion for Admission Pro Hac Vice Pending*

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

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA

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

Petitioners,

v.

BUCKS COUNTY BOARD OF ELECTIONS,

Defendant,

No. 2020-05786

DNC SERVICES CORP. / DEMOCRATIC
NATIONAL COMMITTEE,

Intervenor-Defendant

STIPULATED FACTS

Petitioners Donald J. Trump for President Inc., the Republican National Committee, Heidelbaugh for Attorney General, Inc., and Garrity for PA (“Petitioners”), Bucks County Board of Elections (“Defendant” or the “Board”), DNC Services Corp./Democratic National Committee (“DNC”), by and through their undersigned counsel, hereby stipulate to the following facts as follows:

BACKGROUND

1. On November 13, 2020, Petitioners certify that a true and correct copy of the following documents were served pursuant tot 25 P.S. § 3157 upon Jessica VanderKam; Matt Hoover; Christopher Serpico; Ronnie E. Fuchs; Matthew I. Vahey; Thomas Panzer; and Joseph Cullen:

- the Order of Pre-trial Conference and Stipulation of Facts;
- the Order scheduling a Hearing for the 17th day of November, 2020, at 2:00 p.m. in Courtroom #410 of the Bucks County Justice Center; and
- the Petition for Review of the Decision by the Bucks County Board of Election.

2. Electors of the Commonwealth of Pennsylvania may choose to cast their vote in any primary or election by absentee ballot or by mail-in ballot.

3. In both instances, the elector who desires to cast a vote either by absentee ballot or mail-in ballot must submit an application for such a ballot from the county board of elections, in this case, Defendant.

4. In submitting such application, the elector must supply the address at which they registered to vote and sign a declaration affirming, among other things, that they are “eligible to vote by mail-in [or absentee] ballot at the forthcoming primary or election,” and that “all of the information” supplied in the mail-in or absentee ballot application is “true and correct.”

5. An elector who wishes to vote by mail or absentee must submit an application for mail-in or absentee ballot prior to each election unless they elect to receive such ballots for the whole year, in which case they must submit an application the following year if they wish to receive another mail-in or absentee ballot.

6. Before sending an absentee or mail-in ballot to the elector, the county board of elections must confirm the elector’s qualifications, including the elector’s address inputted on the application.

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

THE CHALLENGED BALLOTS

8. When Defendant sent balloting materials to the elector, pre-printed on the reverse side of the outer envelope is a voter’s declaration.

9. Underneath the voter’s declaration is the directive: “Voter, sign or mark here.”

10. Above the declaration, on the envelope flap, is a checklist for the voter, asking:

“Did you....

- Sign the voter’s declaration in your own handwriting?
- Put your ballot inside the secrecy envelope and place it in here?”

11. Pre-printed on the same side of the outer envelope as the voter's declaration is a unique nine-digit bar code that links the outer envelope to the voter's registration file contained in the Statewide Uniform Registry of Electors ("SURE") system.

12. After receiving a mail-in or absentee ballot envelope, Defendant scans the unique nine-digit bar code on the envelope linking to the SURE system.

13. The elector's name and address is also pre-printed on a label affixed approximately one inch below the voter's declaration.

14. On the front side of the outer envelope is preprinted the Defendant's address where the ballot is to be sent as well as blank lines in the upper left-hand corner where the elector may indicate his or her return address by writing it in the allotted space or affixing an address label.

15. The General Assembly delegated to the Secretary of State the authority to determine the form of the voter declaration for absentee and mail-in ballots.

16. On September 11, 2020, the Secretary of State issued Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes ("9.11.20 Guidance"). A true and correct copy of the 9.11.20 Guidance is attached as Exhibit A.

17. On November 3, 2020, Defendant met to prec canvass mail-in and absentee ballots pursuant to 25 P.S. § 3146.8(g).

18. On November 7, 2020, during the course of the canvass meeting and in the presence of any and all interested Authorized Representatives who were provided an opportunity to present argument, Defendant met to determine, pursuant to 25 P.S. § 3146.8(g)(3), whether certain declarations on the outer envelopes of certain ballots were "sufficient." Authorized Representatives Joseph Cullen, Thomas Panzer, Matthew Hoover, Ronnie Fuchs, and Chris Serpico, were present at the meeting.

19. 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 attached hereto as Exhibit B.

20. The Board did not accept 110 outer envelopes that lacked an elector's signature.

21. The Board did not accept 13 outer envelopes which reflected a different voter's name than what was printed on the envelope's label.

22. The Board did not accept 708 ballots that were not contained within a secrecy envelope.

23. The Board did not accept 21 ballots that had markings on the privacy envelopes that did identify of the elector.

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

- Category 1: 1,196 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: 246 ballots with a mismatched address on the outer envelope;
- Category 5: 69 ballots with "unsealed" privacy envelopes;
- Category 6: 7 ballots with markings on the privacy envelope that did not identify the identity of the elector, the elector's political affiliation, or the elector's candidate preference.

25. A list of all electors whose ballots have been challenged by Petitioner is attached hereto as Exhibit C through Exhibit F.

26. Exemplars of Declarations of challenged ballots are attached hereto as Exhibit G.
27. Petitioners do not allege, and there is no evidence of, any fraud in connection with the challenged ballots.
28. Petitioners do not allege, and there is no evidence of, any misconduct in connection with the challenged ballots.
29. Petitioners do not allege, and there is no evidence of, any impropriety in connection with the challenged ballots
30. Petitioners do not allege, and there is no evidence of, any undue influence committed with respect to the challenged ballots.
31. Petitioners do not allege, and there is no evidence, that Defendant counted ballots without signatures on the outer envelope.
32. Petitioners do not allege, and there is no evidence, that Defendant counted “naked ballots” (ballots that did not arrive in a secrecy envelope).
33. Petitioners do not challenge the eligibility of the electors who cast the ballots at issue, and there is no evidence that any of the electors was ineligible to vote in the election.
34. Petitioners do not allege, and there is no evidence, that any of the challenged ballots were cast by, or on behalf of, a deceased person.
35. Petitioners do not allege, and there is no evidence, that any of the challenged ballots were cast by someone other than the electors whose signature is on the outer envelope.
36. Petitioners did not challenge the electors’ applications for the absentee or mail-in ballots on or before the Friday before the November 3rd election.
37. No mail-in or absentee ballots were mailed out to electors before October 7, 2020.

38. Excluding the 627 ballots subject to the order issued by Justice Alito of the U.S. Supreme Court as discussed below, each of the remaining challenged ballots in the instant Petition was timely received by Defendant before 8:00 p.m. on Election Day, November 3, 2020.

39. Petitioners challenged all ballots received after 8:00 p.m., on the Tuesday November 3, 2020, which were set aside and separated into five (5) categories as follows: (1) Ballots Postmarked November 3rd or earlier; (2) Ballots with Illegible Postmarks; (3) Ballots with No Postmark; (4) Ballots Postmarked after November 3rd; and (5) Miscellaneous.

40. The Pennsylvania Supreme Court in *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644, (Pa. Sept. 17, 2020) held that all mail-in ballots which were postmarked on or prior to November 3, 2020, or that did not bear a postmark, and were received on November 3, 2020 after 8:00 p.m. and before 5:00 p.m. on Friday November 6, 2020, must be counted.

41. Defendant found that 627 ballots received after 8:00 p.m. on November 3, 2020 must be counted under this decision.

42. Defendant determined all other ballots received after 8:00 p.m. on November 3, 2020 could not be canvassed under the above-referenced Pennsylvania Supreme Court decision.

43. The court must deny Petitioners challenge to the 627 ballots received after 8:00 p.m., on November 3, 2020 due to the current Pennsylvania Supreme Court precedent. However, all parties agree that Defendant must segregate and canvass these ballots in a manner compliant with the United States Supreme Court Order of Justice Samuel Alito.

44. Excluding the 627 ballots subject to the order issued by Justice Alito of the U.S. Supreme Court, the remaining challenged ballots were completed and received between October 7 and November 3, 2020.

45. When received by Defendant, each of the challenged ballots was inside a privacy envelope, and the privacy envelope was inside a sealed outer envelope with a voter's declaration that had been signed by the elector.

46. With 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.

47. The electors whose ballots are being challenged in this case have not been notified that their ballots are being challenged.

48. Relevant statutes include the following sections of the Pennsylvania election code:

- 25 P.S. § 3146.4
- 25 P.S. § 3146.6
- 25 P.S. § 3146.8
- 25 P.S. § 3150.16

49. Relevant case law includes:

- *Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952);
- *Appeal of James*, 105 A.2d 64 (Pa. 1954);
- *Ross Nomination Petition*, 190 A.2d 719, 719 (Pa. 1963);
- *Weiskerger Appeal*, 290 A.2d 108, 109 (1972);
- *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004);

- *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *30 (Pa. Sept. 17, 2020);
- *In re Nov. 3, 2020 Gen. Election*, No. 149 MM 2020, 2020 WL 6252803 (Pa. Oct. 23, 2020).

Dated: November 16, 2020

Respectfully submitted,

PERKINS COIE, LLP

By: /s/_____

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**Motions for Admission Pro
Hac Vice Pending*

EXHIBIT C

**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 :
 :
 :
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 order/action

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's 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's 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

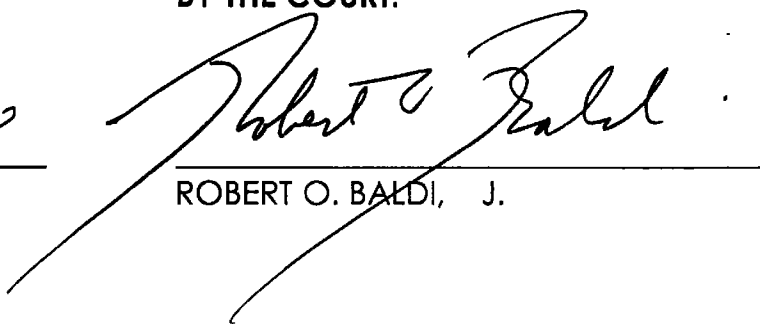
The ballots at issue in this category are not "naked ballots," which would be invalid pursuant to the Supreme Court's decision in Boockvar, 2020 Pa. LEXIS 4872, at *73. Rather, these ballots were enclosed within their respective privacy envelopes; however, those envelopes were not sealed at the time 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

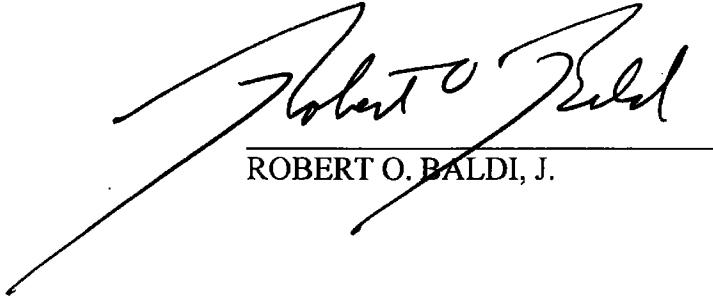
AND NOW, this 19th day of November, 2020, upon consideration of (1) the Petition for Review of Decision by the Bucks County Board of Elections filed on behalf of Petitioners Donald J. Trump for President, Inc., Republican National Committee, Heidelbaugh for Attorney General, Inc., and Garrity for PA; (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/action

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

BY THE COURT:



ROBERT O. BALDI, J.

11/19/20