

COMMONWEALTH COURT OF PENNSYLVANIA

Docket No. 1094 C.D. 2020

IN RE: CANVASSING OBSERVATION

**BRIEF OF APPELLEES THE CITY OF PHILADELPHIA
BOARD OF ELECTIONS**

Appeal from the Order of the Philadelphia Court of Common Pleas of
Philadelphia County, Per the Honorable Judge Stella Tsai,
Dated November 3, 2020, at November Term, 2020 No. 07003

CITY OF PHILADELPHIA LAW DEPT.
Marcel S. Pratt, City Solicitor
Sean J. McGrath, Assistant City Solicitor
1515 Arch Street, 17th Floor
Philadelphia, PA 19102-1595
(215) 683-5444

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER
Mark A. Aronchick (I.D. No. 20261)
Robert A. Wiygul (I.D. No. 310760)
One Logan Square, 27th Floor
Philadelphia, PA 19103
Telephone: (215) 496-7050
Email: maronchick@hanglely.com

Counsel for Appellees

I.	COUNTER-STATEMENT OF SCOPE AND STANDARD OF REVIEW	1
II.	COUNTER-STATEMENT OF THE QUESTIONS PRESENTED.....	2
III.	COUNTER-STATEMENT OF THE CASE	2
	A. Procedural History	2
	B. Factual History	4
IV.	SUMMARY OF ARGUMENT	8
V.	ARGUMENT.....	9
	A. The Challenged Access Regulations Were Issued by the Board Pursuant to Its Broad Discretionary Authority Under the Election Code	9
	B. As the Court of Common Pleas Correctly Held, the Board’s Access Regulations Comply With the Applicable Statutory Requirement	12
	C. The Election Code Does Not Allow Candidates, Parties, or Their Representative to Make <i>Any</i> Time-of-Canvassing Challenges	18
	D. Appellant Has No Access Rights Beyond What the Express Terms of the Election Code Provide	21
	E. The Court of Common Pleas’ Decision Is Consistent With Decisional Authority.....	22
	CONCLUSION	<u>26</u>

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Baer v. Meyer</i> , 728 F.2d 471 (10th Cir. 1984).....	22
<i>Commonwealth v. \$23,320.00 U.S. Currency</i> , 733 A.2d 693 (Pa. Commw. Ct. 1999)	11
<i>Cotz v. Mastroeni</i> , 476 F. Supp. 2d 332 (S.D.N.Y. 2007)	22
<i>Donald J. Trump for President, Inc. v. Boockvar</i> , No. 20-966, --- F. Supp. 3d ----, 2020 WL 5997680 (W.D. Pa. Oct. 10, 2020).....	14, 22
<i>Donald J. Trump for President, Inc. v. Boockvar</i> , No. 20-966 (W.D. Pa.)	13
<i>Election Integrity Project Cal. Inc. v. Lunn</i> , No. 56-2020-00540781 (Cal. Super. Ct. filed Sept. 15, 2020).....	25
<i>Gentex Corp. v. W.C.A.B. (Morack)</i> , 23 A.3d 528 (Pa. 2011)	1, 11
<i>Gwynedd Dev. Grp., Inc. v. Dept. of Labor & Indus.</i> , 666 A.2d 365 (Pa. Commw. Ct. 1995)	10
<i>Harris v. Conradi</i> , 675 F.2d 1212 (11th Cir. 1982).....	22
<i>Kraus v. Cegavske</i> , No. 20 OC 00142 1B (Nev. Dist. Ct. filed Oct. 29, 2020)	23, 24
<i>Kraus v. Cegavske</i> , No. 82018 (Nev. Filed Nov. 3, 2020)	24
<i>Messina v. East Penn Twp.</i> , 62 A.3d 363 (Pa. 2012)	1

<i>In re November 3, 2020 General Election,</i> No. 149 MM 2020, --- A.3d ----, 2020 WL 6252803 (Pa. Oct. 23, 2020)	19, 20
<i>Otter v. Cortés,</i> 980 A.2d 1283 (Pa. 2009)	10
<i>Pa. Democratic Party v. Boockvar,</i> No. 133 MM 2020, --- A.3d ----, 2020 WL 5554644 (Pa. Sept. 17, 2020)	21
<i>Republican Party of Pa. v. Cortés,</i> 218 F. Supp. 3d 396 (E.D. Pa. 2016).....	22
<i>Rogele, Inc. v. Workers’ Comp. Appeal Bd.,</i> 969 A.2d 634 (Pa. Commw. Ct. 2009)	17
<i>SEPTA v. City of Phila.,</i> 159 A.3d 443 (Pa. 2017) (Wecht, J., concurring)	18
<i>Turchi v. Phila. Bd. of License & Inspection Review,</i> 20 A.3d 586 (Pa. Commw. Ct. 2011)	18
Statutes	
Act of December 11, 1968, No. 375, sec. 8, § 1308(e), 1968 Pa. Laws. 1183, 1200	19
25 P.S. § 3146.8.....	3, 21, 26
25 Pa. Stat. § 2602(q.1).....	12, 13
25 Pa. Stat. § 2641	9
25 Pa. Stat. § 2650	12
25 Pa. Stat. § 2687	12
25 Pa. Stat. § 3050	12
25 Pa. Stat. § 3146.8(b).....	<i>passim</i>
25 Pa. Stat. §§ 3146.8(b), (g)(1.1), (2)	12, 14, 18

25 Pa. Stat. § 3146.8(g)(4)(ii)16

Other Authorities

Pa. Dept. of State, Supplemental Results Dashboard, available at
<https://www.votespa.com/About-Elections/Pages/Counting-Dashboard.aspx> (last accessed Nov. 5, 2020).....7

United States Constitution First Amendment22

I. COUNTER-STATEMENT OF SCOPE AND STANDARD OF REVIEW

In reviewing a mixed question of fact and law, to the extent that factual findings and credibility determinations are at issue, an appellate court will accept the trial court's conclusions insofar as they are supported by the record. *Messina v. East Penn Twp.*, 62 A.3d 363, 366 (Pa. 2012). To the extent that a legal question is at issue, a determination by the trial court will be reviewed de novo. *Id.* Thus, the more fact intensive a determination is, the more deference a reviewing court should give to the conclusion below when ruling on mixed question of law and fact. *Gentex Corp. v. W.C.A.B. (Morack)*, 23 A.3d 528, 534 (Pa. 2011).

II. COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

Whether, given the specific facts and scope of Philadelphia County’s canvassing process; the configuration, contents (machines and personnel) and workflow dynamics of the room in which that process is occurring; and the practical challenges of ensuring ballot security, voter confidentiality, operational efficiency, and safety in the time of a pandemic, the trial court correctly concluded that the Board’s access regulations complied with applicable statutory requirements set forth in the Election Code?

Answer below: Yes

Suggested Answer: Yes

III. COUNTER-STATEMENT OF THE CASE

A. Procedural History

At 7:45 A.M. on Election Day, November 3, 2020, the Trump Campaign (“Appellant”) first brought this action in the Election Court of the Court of Common Pleas of Philadelphia County, challenging the location of observers in Philadelphia’s ballot processing facility. Appellant then withdrew the action without prejudice and waited until 9:40 P.M., to raise the issue again, to raise the issue again. Appellant did not alleged that anything about the observers’ location changed in the intervening 13 hours.

Appellant presented one witness in the renewed proceeding, a lawyer for the Trump campaign who was observing the ballot-counting process at the Philadelphia

Convention Center. Election Court Judge Stella Tsai heard testimony and argument from Appellant, the City of Philadelphia Board of Elections (“Appellee”), and the Pennsylvania Democratic Party. Based on this evidence and argument, Judge Tsai denied Appellant’s Petition, holding that Appellee had complied with requirements under 25 P.S. § 3146.8. For reasons Appellant has not explained, it then waited another 12 hours, until the afternoon of November 4, 2020, to do so.¹

At the Court’s recommendation, late in the evening on November 4, Appellee conferred with Appellant about the potential to resolve this issue. Appellee provided a settlement proposal to Appellant. To the extent that Appellee’s physical and operational constraints allowed it, the proposal was consistent with what Appellant requested at the hearing and with Judge Tsai’s Order. Appellant has refused this offer to resolve the matter and, as of the time of this filing, has been unwilling to engage in substantive settlement discussions.

¹ This Court scheduled a telephonic status conference that began at 7:00 p.m. on November 4, 2020. During the conference, Appellant asked the Court to issue an order setting a deadline of 9:00 a.m., November 5, 2020, for the filing of Appellant’s brief. Because Appellant did not file papers below, and because this appeal raises important legal issues that require extensive briefing, Appellee’s counsel requested a short amount of time to review Appellants’ brief before filing a responsive brief. At approximately 9:12 p.m. on November 4, 2020, this Court issued an Order requiring Appellant and Appellee to file simultaneous briefs by no later than 8:00 a.m. the following morning. In light of this briefing schedule, any issues, arguments, or requests for relief that Appellant did not squarely raise and develop in the Court of Common Pleas should be deemed waived and forfeited.

B. Factual History

Philadelphia County's pre-canvass and canvassing operation is being conducted in Hall F at the Philadelphia convention center. Tr. at 20:22-21:2. This is a massive operation; since 7:00 a.m. on Election Day, the Board of Elections has been reviewing, opening and counting more than 350,000 mail-in and absentee ballots, as well as processing election returns from in-person polling sites. This endeavor requires a great deal of space, because of the physical volume of the ballots involved and the need to ensure social distancing protocols among the facility's hundreds of workers. Because of the need for staff to circulate unimpeded and the security and privacy concerns involved with handling ballots, the Board cannot permit outsiders to wander freely through this workspace. Accordingly, the Board has set up a location from which candidates and party representatives, potentially in large numbers, can view the room without impeding the operation.

Jeremy Mercer is an attorney for the Trump Campaign who has been designated as a representative of the campaign at the Board of Election's pre-canvass. Nov. 3, 2020 Tr. at p. 20:24-21:2. Mr. Mercer testified that he had been observing the pre-canvass all day on November 3, 2020, from approximately 7:00 A.M. until his testimony, which occurred at approximately 10:00 P.M. the same day. Tr. at 21:3-6.

Mr. Mercer admitted that, from his vantage point in the room where pre-

canvassing and canvassing occurs, he was able to perceive the full sweep of the Board's operation at the Convention Center. This operation is taking place in a "very, very large hall" that is "divided width wise into four discrete sections for the four discrete processes." Tr. at. 21:25-22:1-5. Each process is conducted in a section, some of which contain roughly 35 tables. Tr. at 22:14, 24:1-25:1. Behind those sections are areas for the storage and sorting of ballots as well as processing and receiving stations for the ballots. Tr. at 22:3-5. A waist-high crowd-control fence, with metal vertical pickets with spaces between each, separates the observers from the workers. Tr. at 25:5-10. Despite the scale of this operation, Mr. Mercer testified that he was able to walk back and forth across the width of the hall and watch the ballot envelopes going from beginning of the process all the way through the scanning of the ballots that are in the envelopes. Tr. at 21:7-12.

Mr. Mercer said the first section had three rows about fifteen tables deep. Tr. at 21:20-25. His vantage point, which he estimated to be between fifteen and eighteen feet from the first table, allowed him to observe the envelope review process. Tr. at 27:9-19. He could see these workers take ballot envelopes out of one tray, look at the back of the envelope where the declaration is located, and then either place them in a different tray or back in the initial tray. Tr. at 27:9-19. He stated that the workers were looking at the back of the ballot envelopes, but that he was not able to see what was written on the envelopes. Tr. at 27:9-19. Each subsequent table

was approximately five to six feet behind the previous one, depth-wise. Tr. at 24:1-5. Each worker sat approximately six feet from any other worker, but could occasionally be shoulder to shoulder with a supervisor who may have been called over. Tr. at 25:23-26:11.

In the next section, Mr. Mercer was able to observe what he labeled as the “extraction stage”. Tr. at 28:12-21. He described watching a very quick process in which ballot envelopes go through a machine that slices them open, another envelope being pulled out of the outer envelope, and then at a set of similar machines, the inner secrecy envelope going through the same process so the ballot can be removed. Tr. at 28:12-21. Mr. Mercer claimed that he was between eighteen and twenty-two feet from the nearest envelope machine, with seven rows of three desks each. Tr. at 29:1-6. Mr. Mercer was able to see the first full rows of machines clearly, such that he could determine if the worker had discovered a naked ballot (one in a larger envelope but without a secrecy envelope). Tr. at 30:2-5. He was also able to see different trays for naked ballots versus the opened or unopened secrecy envelopes and also the process for workers to move each tray to its designated area. Tr. at 30:16-24. Mr. Mercer claimed binoculars would not be useful to help him better determine whether all requirements were being followed. Tr. at 32:6-10. Despite this observation, over approximately twelve hours, Mr. Mercer did not testify that he had observed any problems or issues with the pre-

canvass.

Mr. Mercer also could not identify any obstructions to his view other than the distance between himself and the workers. Tr. at 34:6-11. He also admitted that workers used the space between the first row of desk and the crowd control fence as a walk-thru space whenever they needed to leave their area, such as the beginning and end of their shifts and for any breaks. Tr. at 35:11-36:3.

Mr. Mercer then testified that he wanted to see more of the declaration reviewing process so that he could determine if the date or name on the ballot was incorrect. Tr. at 38:19-38:11. He claimed that this would allow him to file objections to specific ballots. Tr. at 38:5-11. Mr. Mercer also testified he wanted to be able to determine whether any ballot has any markings on it because the statute would require those ballots to be set aside. Tr. at 38:12-22. When asked what he would need to change to better observe these processes, Mr. Mercer stated that he wanted to be closer to the desks in the first row and to also be permitted to have an observation area either next to the left most row or right most row of desks. Tr. at 33.

It is important to note that Appellant's complaints about distance come during a pandemic, during which hundreds of workers are operating in shifts, 24 hours a day, to complete the processing of over 350,000 ballots as efficiently and safely as possible. See Pa. Dept. of State, Supplemental Results Dashboard, available at

<https://www.votespa.com/About-Elections/Pages/Counting-Dashboard.aspx>.

IV. SUMMARY OF ARGUMENT

As the Philadelphia County Board of Elections files this brief, it is carrying out a complex and massive responsibility: to accurately, safely, and securely count hundreds of thousands of mail-in and absentee ballots, under intense time pressure and pandemic conditions, all while complying with the detailed provisions of the Pennsylvania Election Code. The Board has applied its substantial expertise to design a facility and a system under which hundreds of employees carry out this task. Now, however, a political campaign has brought a belated challenge to the processes the Board has put in place, asking the courts to somehow redesign the Board's entire facility, based solely on the observations of one lawyer-witness.

The Court of Common Pleas rejected the campaign's request.

This decision was correct; the campaign presented no evidence that the Board abused its broad discretionary authority or that its canvassing facilities violate the Election Code. The accommodations provided to the campaign are entirely consistent with statutory and decisional authority. Accordingly, the Board respectfully requests that the Court defer to the trial court's factual findings and to the Board's decisionmaking, and affirm. In the alternative, because the campaign has not presented evidence that any particular remedy is appropriate, the Court should remand to the trial court for additional factfinding.

V. ARGUMENT

A. The Challenged Access Regulations Were Issued by the Board Pursuant to Its Broad Discretionary Authority Under the Election Code

The standard of review applicable to this appeal is doubly deferential. As set forth in the Pennsylvania Election Code, the General Assembly granted boards of elections broad “jurisdiction over the conduct of primaries and elections in [their respective counties].” 25 Pa. Stat. § 2641. In connection with this grant of jurisdiction, the Philadelphia County Board of Election is charged with exercising “all powers granted to [it]” and “perform[ing] all duties imposed upon [it]” by the Election Code. *Id.* § 2642. Those duties include the crucial, overarching responsibility to ensure that elections are “honestly, efficiently, and uniformly conducted.” *Id.* § 2642(g). To fulfill these critical duties, the Code vests the Board with broad discretion “[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of ... elections officers and electors.” *Id.* § 2642(f).

Accordingly, to prevail below, Appellant had to show that the access regulations at issue were “inconsistent with law.” Put differently, although Appellant fails to acknowledge it, Appellant’s claim seeks mandamus relief; it seeks an order requiring the Board to allow representatives of parties and candidates to penetrate further into the room in which the canvassing of ballots is occurring. But “a writ of mandamus will issue only to compel performance of a public official’s

mandatory and non-discretionary duty.” *Otter v. Cortés*, 980 A.2d 1283, 1285 (Pa. 2009). But Appellant did not—and cannot—identify any statutory requirement that the access regulations violate. And such an order would substitute Appellant’s opinion about where observers can stand and how they can circulate around a room where 350,000 ballots are being counted without compromising ballots security and secrecy.

In the absence of any such violation of a clear statutory requirement, Appellant must, at a minimum, show that that Board abused the broad discretionary authority granted to it by the Election Code. *See Gwynedd Dev. Grp., Inc. v. Dept. of Labor & Indus.*, 666 A.2d 365, 369 (Pa. Commw. Ct. 1995) (“It is well settled that in reviewing discretionary acts of an agency, this court is limited to determining whether there has been a manifest and flagrant abuse of discretion or purely arbitrary execution of the agency’s function or duties.”); *see also id.* at 371 (“[I]t is well settled that an administrative agency has wide discretion when establishing rules, regulations and standards and also in the performance of its administrative duties and functions.... This court cannot overturn an agency’s exercise of its discretion absent proof of fraud, bad faith, or blatant abuse of discretion.”). “The fact that the reviewing court may have a different opinion is not sufficient to interfere with the agency’s action and judicial discretion may not be substituted for administrative discretion.” *Id.* at 370.

Of course, this Court is not reviewing the access regulations directly. Instead, it is reviewing the Court of Common Pleas’ decision, based on live witness testimony and fact finding, to uphold the Board’s actions. The review thus involves another layer of deference. The question the court decided—whether the Board’s access regulations complied with applicable statutory requirements *given the specific facts and scope of Philadelphia County’s canvassing process; the configuration, contents (machines and personnel) and workflow dynamics of the room in which that process is occurring; and the practical challenges of ensuring ballot security, voter confidentiality, operational efficiency, and safety in the time of a pandemic*. Because of the fact-intensive nature of that mixed question of fact and law, the Court of Common Pleas’ answer is entitled to substantial deference. *Gentex Corp. v. W.C.A.B. (Morack)*, 23 A.3d 528, 534 (Pa. 2011). And the Court’s underlying factual findings must of course be upheld so long as they are “supported by competent evidence.” *Commonwealth v. \$23,320.00 U.S. Currency*, 733 A.2d 693, 696 n.1 (Pa. Commw. Ct. 1999); *see also id.* (“The trial court’s findings of fact are entitled to the same deference as those of a jury, and it is axiomatic that as factfinder the trial court is empowered to decide what evidence is credible and to draw and reasonable inferences from all of the evidence.”).

As shown below, there is no basis for disturbing the Court of Common Pleas’ determination that the Board’s access regulations were a permissible exercise of

discretion that (a) respect candidates and political parties' their statutory right to be in the room where canvassing occurs while (b) taking account of the imperatives of ballot security, operational efficiency, voter confidentiality and safety.

B. As the Court of Common Pleas Correctly Held, the Board's Access Regulations Comply With the Applicable Statutory Requirement

As shown by the plain language of the Election Code, the Board's access regulations comply with the Code's requirements. In arguing that the Board's access restrictions are "inconsistent with law," Appellant has relied on two different statutory provisions. The first states that "[w]atchers shall be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded." 25 Pa. Stat. § 3146.8(b). The term "watchers" refers to people that, under the Election Code, candidates and political parties can appoint to, among other things, observe certain activities at polling places on election day. *See* 25 Pa. Stat. §§ 2650, 2687, 3050. The second statutory provision states that "[o]ne authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed" and "canvassed." 25 Pa. Stat. § 3146.8(g)(1.1), (2).²

² "Pre-canvassing" is defined in the Election Code as "the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots." 25 Pa.

In fact, only the second provision is applicable to this case—as Appellant itself admitted in a recent federal case, *Donald J. Trump for President, Inc. v. Boockvar*, No. 20-966 (W.D. Pa.). As Appellant candidly acknowledged, “[a]lthough Election Code Section 3146.8(b), 25 P.S. § 3146.8(b), provides that ‘[w]atchers shall be permitted to be present when the envelopes containing official absentee and mail in ballots are opened and when such ballots are counted and recorded,’ *poll watchers are not identified as being authorized to attend th[e] pre-canvass meeting*” or “*the post-election canvass meeting. Rather, only one ‘representative’ for each candidate and political party can be present*” Second Amended Complaint ¶¶ 98-99, *Donald J. Trump for President, Inc. v. Boockvar*, No. 20-966 (W.D. Pa. filed Sept. 23, 2020) (citing 25 Pa. Stat. § 3146.8(g)(1.1), (2)) (emphasis added).

Indeed, in his recent decision dismissing all of Appellant’s claims in that case, United States District Judge J. Nicholas Ranjan agreed that “[t]he Election Code provisions pertaining to the ‘pre-canvass’ and ‘canvass’ do not make any separate reference to poll watchers, instead referring only to the ‘authorized representatives’

Stat. § 2602(q.1). “Canvassing” is defined as “the gathering of ballots after the final pre-canvass meeting and the counting, computing and tallying of the votes reflected on the ballots.” *Id.* § 2602(a.1). The primary if not exclusive distinction between the two is that pre-canvassing, because it takes place before the polls are closed, includes the counting but not “the recording or publishing of the votes reflected on the ballots.” *Id.* § 2602(q.1); *see also id.* § 3146.8(g)(1.1) (“No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.”).

of parties and candidates.” *Donald J. Trump for President, Inc. v. Boockvar*, No. 20-966, --- F. Supp. 3d ----, 2020 WL 5997680, at *25 (W.D. Pa. Oct. 10, 2020). As Judge Ranjan explained, that wording of the pre-canvassing and canvassing provisions—and, in particular, the *exclusion* of watchers from the pre-canvassing and canvassing meetings—reflected the legislature’s concern to protect the pre-canvassing and canvassing process from the risk of interference and encroachment (even if unintentional) by proxies of the candidates and parties:

Plaintiffs complain that poll watchers may not be present during the pre-canvass and canvass meetings for absentee and mail-in ballots. But the Election Code provides that authorized representatives of each party *and* each candidate can attend such canvassing. That means if, for example, 15 Republican candidates appear on ballots within a particular county (between both the state and federal elections), there could be up to 16 “authorized representatives” related to the Republican Party (one for each candidate and one for the party as a whole) present during canvassing. Adding poll watchers to that mix would just be forcing unnecessary cooks into an already crowded kitchen.

Id. at 73 (citation omitted). Put simply, to the extent Appellant now seeks to argue that the “watcher” provision in 25 Pa. Stat. § 3146.8(b) applies to the Board’s access regulations governing pre-canvass and canvass meetings, those arguments are (a) contrary to its earlier admissions and (b) simply wrong—as Judge Ranjan explained.

In any event, the Board’s regulations plainly do not violate either § 3146.8(g)(1.1), (2) *or* § 3146.8(b). As noted, the former requires only that “authorized representative[s]” of the candidates and parties “be permitted to remain in the room in which” the pre-canvassing and canvassing of absentee and mail-in

ballots takes place. It is undisputed that the Board's access regulation permits exactly that. Moreover, this is not case in which—to use the hypothetical example Appellant invoked below—the access to the room is illusory because there is a blanket or other barrier obstructing the representatives' lines of sight. As set forth in the Court of Common Pleas' well-supported factual findings, representatives can see the entire set up of the canvassing room, and can perceive “in detail the various stages of the process,” from the sorting and examination of the ballot envelopes, to the extraction of the inner secrecy envelope from the outer envelope (“including the separation of so-called ‘naked ballots,’ which do not have inner secrecy envelopes”), to the extraction of the ballot from the inner secrecy envelope, to the scanning of the ballots themselves. (Opinion at 2-4; *see supra* § III.B .)

In short, the evidence makes clear that candidate and party representatives can observe every portion of the precanvassing and canvassing process. They can vouchsafe that the only ballots being scanned and tabulated are those that have been removed from security envelopes that in turn have been removed from outside envelopes that in turn have been sorted and inspected for sufficiency. The representatives can determine when various stages of that process are proceeding or paused, as well as the relative rate of speed at which they are proceeding. They can perceive how many Board staff are present at any time to carry out the canvassing process.

Assuming *arguendo* that the Board’s access regulations are subject to § 3146.8(b) (as they are not), they satisfy the requirements of that provision as well, as the Court of Common Pleas found. That provision “explicitly allows only for the watchers to ‘be present’ for three activities: (1) the opening of the envelopes containing the ballots, (2) the counting of the ballots, and (3) the recording of the ballots.” (Opinion at 4.) *See* 25 Pa. Stat. § 3146.8(b). As the Court found—as the record clearly shows—the Board’s access regulations indisputably allow the representatives of the candidates and parties to “‘be present’ to watch the **opening** of the ballots or to watch the **counting and recording** of the ballots.” (Opinion at 4.)

The only record evidence of anything specific a candidate representative cannot do—but would like to do—under the current access regulations is to (1) read the declarations on individual envelopes so that the representative can make his own determination of whether the individual declaration is “sufficient” and (2) determine whether individual secrecy envelopes bear markings that identify the voter, the voter’s political affiliation, of for whom the voter voted.³ (Tr. 37:19-38:11.) Even there, the representative witness conceded that he was able to see *that* the canvassing

³ *See* 25 Pa. Stat. § 3146.8(g)(4)(ii) (“If any of the [secrecy] envelopes ... 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.”).

staff was examining individual declaration envelopes; he simply could not perceive what was written on those individual envelopes. (Tr. 37:13-18.)

The witness testified that he wanted access to that individual-ballot-envelope detail so that he could make his own assessment of whether each declaration was “sufficient” and, if he deemed it insufficient, make “an objection to th[e] processing of that ballot.” (Tr. 37:22-38:4.) In fact, as explained below, the Code does not permit *any* time-of-canvassing challenges or objections from candidates, parties, or their representatives. Independently, however, it is dispositive that nothing in §§ 3146.8(b) or 3146.8(g)(1.1), (2) require that representatives or watchers be given sufficient access to allow them to read the text printed on individual ballots. The General Assembly could, of course, easily have codified such a right. But it did not. It required only that candidate and party representatives “be permitted to remain in the room in which the ... ballots are” pre-canvassed and canvassed, § 3146.8(1.1), (2), or, assuming *arguendo* that § 3146.8(b) applies, to “be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded.” Endorsing Appellant’s argument would require the courts to interpolate additional language into the statute that the Legislature did not see fit to add. It is well settled that such judicial legislation is improper. *See Rogele, Inc. v. Workers’ Comp. Appeal Bd.*, 969 A.2d 634, 638 (Pa. Commw. Ct. 2009) (“First and foremost, this Court is not authorized to engraft

language onto a statute.”); accord *SEPTA v. City of Phila.*, 159 A.3d 443, (Pa. 2017) (Wecht, J., concurring) (“Should the General Assembly wish to enact such language, it may do so. We may not engraft such language onto a statute that lacks it through an act of judicial fiat.”).⁴

C. The Election Code Does Not Allow Candidates, Parties, or Their Representative to Make *Any* Time-of-Canvassing Challenges

As discussed, the deficiency Appellant purports to identify in the Board’s access regulations is that they do not allow representatives to get close enough to read the declarations or markings on individual envelopes, and thus deprives representatives of the ability to raise “objections ... to ballots.” (Tr. 38:5-11. (“We’d like to be able to see whether there are objections that could or should be made to ballots; that perhaps the name is not on there, the date is missing or wrong.”). But the history of the Election Code, as well as a very recent decision from the Pennsylvania Supreme Court, make clear that the current Code does not allow such objections/challenges to the sufficiency of a declaration. Indeed, it does not allow *any* challenges at the time of canvassing.

⁴ Appellee respectfully submits that its challenged regulations clearly and unambiguously comply with the plain language of 25 Pa. Stat. §§ 3146.8(b), (g)(1.1), (2). But even if there were some ambiguity about the requirements of those provisions (which there is not), the Board’s interpretation would be entitled to deference. See *Turchi v. Phila. Bd. of License & Inspection Review*, 20 A.3d 586, 592-93 (Pa. Commw. Ct. 2011) (The “administrative actor should possess authoritative interpretive powers” because it “has the greater number of encounters with the issues and is, therefore, more likely to develop the expertise relevant to assessing the effect of a particular regulatory interpretation” and because of the “administrative actor’s authority over the legislation or regulations it is charged to administer.” (internal citations omitted)).

The relevant history begins with the 1968 amendments to the Code. Those amendments added language making clear that the *only* permissible grounds for challenging an absentee ballot during the canvassing process were those expressly identified in the canvassing provision itself. *See* Act of December 11, 1968, No. 375, sec. 8, § 1308(e), 1968 Pa. Laws. 1183, 1200 (“All absentee ballots not challenged for any of the reasons provided herein shall be counted and included with the general return of paper ballots or voting machines, as the case may be as follows.”) At that time, the identified grounds for challenge were “(1) that the absentee elector is not a qualified elector; or (2) that the absentee elector was within the county of his residence on the day of the primary or election during the period the polls were open, except where he was in military service or except in the case where his ballot was obtained for the reason that he was unable to appear personally at the polling place because of illness or physical disability; or (3) that the absentee elector was able to appear personally at the polling place on the day of the primary or election during the period the polls were open in the case his ballot was obtained for the reason that he was unable to appear personally at the polling place because of illness or physical disability.” *Id.*; *see In re November 3, 2020 General Election*, No. 149 MM 2020, --- A.3d ----, 2020 WL 6252803, at *13 (Pa. Oct. 23, 2020) (“Prior to the recent Code amendments,” “[t]here were three permissible grounds for challenge[.]”). Notably, insufficiency of the ballot-envelope declaration was not an

identified basis for challenging an absentee ballot.

As our Supreme Court recently explained, “when the legislature first allowed for no-excuse mail-in voting in 2019, the legislature simultaneously reduced the bases on which canvassing challenges could be made by eliminating the present-in-his-municipality objection Then, in 2020, the legislature eliminated time-of-canvassing challenges *entirely* from Section 3146.8(g)(3).... Accordingly, the Election Code presently provides no mechanism for time-of-canvassing challenges by candidate or party representatives.” *In re November 3, 2020 General Election*, 2020 WL 6252803, at *14 (second emphasis added). The Court further noted that the purpose for eliminating challenges was likely tied directly to the anticipated effect of no-excuse mail-in voting on the size and scope of the canvassing process: “Presumably, in expanding voting my mail, the legislature sought to streamline the process for canvassing such ballots, perhaps to avoid undermining the expansion effort by eliminating the prospect that voters—including a potentially large number of new mail-in voters—would be brought before the board or the courts to answer third-party challenges.” *Id.*

In sum, the Election Code does not allow party or candidate representatives to raise objections to the sufficiency of particular ballot envelopes or to make *any* other time-of-canvassing challenges. Accordingly, Appellant cannot avoid the plain text of § 3146.8(g)(1.1), (2) and § 3146.8(b)—which requires only that

representatives “be permitted to remain in the room” or “be present” during canvassing—by arguing that representatives need to be within six feet of every canvasser to avail themselves of a statutory right to raise objections to the processing of particular ballots; no such right exists.

D. Appellant Has No Access Rights Beyond What the Express Terms of the Election Code Provide

The Board keeps returning to the language of § 3146.8 of the Election Code because it alone is sufficient to require affirmance. Notably, Appellant does not dispute that any right of access it has to the canvassing room is solely a creation of statutory law—and its scope and limits are therefore defined by the Election Code.⁵ Nor could Appellant reasonably dispute this. It is well established that there is no constitutional right to “poll watch.” Indeed, both the Pennsylvania Supreme Court and Judge Ranjan have so held in rejecting arguments advanced by Appellant. *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, --- A.3d ----, 2020 WL 5554644, at *30 (Pa. Sept. 17, 2020) (citing approvingly *Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 408, 415 (E.D. Pa. 2016)) (“there is no individual constitutional right to serve as a poll watcher; rather, the right to do so is

⁵ Appellant made reference to only one potential constitutional argument in the proceedings in the Court of Common Pleas, stating that because “Pennsylvania is a commonwealth with 67 counties,” “if Philadelphia is precluding a candidate from having a meaningful observation of what is occurring, then that’s an equal protection argument.” (Tr. 45:10-15.) Any such equal protection argument, even if it had been sufficiently developed to preserve it (as it was not), would fail for a number of independent reasons. One of the most obvious is that there is absolutely no evidence in the record about the canvassing practices of any other Pennsylvania counties during the November 2020 general election.

conferred by statute”; nor does poll watching implicate anyone’s First Amendment rights); *Trump*, 2020 WL 5997680, at *72 (same); *accord Harris v. Conradi*, 675 F.2d 1212, 1216 n.10 (11th Cir. 1982); *Baer v. Meyer*, 728 F.2d 471, 476 (10th Cir. 1984); *Cotz v. Mastroeni*, 476 F. Supp. 2d 332, 364 (S.D.N.Y. 2007); *Republican Party*, 218 F. Supp. 3d at 414 (“Because the Pennsylvania Election Code, not the United States Constitution, grants parts the ability to appoint poll watchers, the state is free to regulate their use”). This case law is equally applicable to this case.

Once again, the statutory provisions at issue give Appellant only the right “to remain in the room” and to “be present” where and when the canvassing occurs. The Board has indisputably honored that right, but, as confirmed by the record, has also afforded Appellant’s representatives the ability to observe every stage of the canvassing process. The Election Code does *not* say that representatives have the right to be able to read the language written on each ballot declaration or otherwise to make their own determinations of declaration sufficiency with respect to individual ballots. No such right exists.

E. The Court of Common Pleas’ Decision Is Consistent With Decisional Authority

Finally, the decision below is also directly support by recent case law, which is particularly on point because it also involves canvassing during the COVID-19 pandemic. Within the last week, a Nevada state court rejected the petition for

mandamus filed by the plaintiffs—including Appellant—who similarly complained about the amount of access they were given to the canvassing process. *See* Order Den[y]ing Emergency Petition for Writ of Mandamus, or, in the Alternative, Writ of Prohibition, *Kraus v. Cegavske*, No. 20 OC 00142 1B (Nev. Dist. Ct. filed Oct. 29, 2020) (attached as **Exhibit 3**). Appellant contended that it had “a right to observers having meaningful observation under [certain Nevada statutes regarding the canvassing process].” *Id.* at 10. Notably, those statutes provided, if anything, *more specific* rights than the Pennsylvania Election Code provide Appellant here. One of the Nevada statutes required the county to “allow members of the general public to observe the counting of the ballots.” *Id.* at 8. Another provided that “the counting procedure must be public.” *Id.* at 9. As the court pointed out—as is also true of the Pennsylvania Election Code—the Nevada statutes “do not use the modified ‘meaningful.’”

The court rejected Appellant’s argument for reasons equally applicable here.

A portion of the opinion is worth quoting in full:

The Nevada Legislature codified the right of the public to observe the ballot counting procedure in [the aforementioned statutes].... [The statutes] require[] each county to annual submit a plan to the Secretary of State.... The statutory requirements of the plan are very general. The legislature left to the election professionals, the Secretary of State and the county elections officials, wide discretion in establishing the specific of the plan. Petitioners failed to prove either [the Secretary of State] or [the relevant county election official] exercised their discretion arbitrarily or through mere caprice.

...

Petitioners seem to request unlimited access to all areas of the ballot counting area and observation of all information involved in the ballot counting process so they can verify the validity of the ballot, creating in effect a second tier of ballot counters and/or concurrent auditors of the ballot counting election workers. Petitioners failed to cite any constitutional provision, statu[t]e, rule, or case that supports such a request. The above-cited statutes created observers not counters, validators, or auditors. Allowing such access creates a host of problems. Ballots and verification tools contain confidential voter information that observers have no[] right to know. Creating a second tier of counters, validators, or auditors would slow a process the Petitioners failed to prove is flawed. The request if granted would result in an increase in the number of persons in the ballot processing areas at a time when social distancing is so important because of the COVID-19 pandemic.

Petitioners have failed to prove [the respondent county official] has interfered with any right they or anyone else has as an observer.

Id. at 10-11.⁶

The same analysis applies here—if anything, even more so. The Pennsylvania Election Code does not *even* refer to “observers.” And it certainly does not vest representatives with the right effectively to be “auditors.” Just as the respondent count official in the Nevada acted well within the proper scope of her discretion in

⁶ Appellant here appealed the Nevada state court decision to the Nevada Supreme Court and also sought a stay of the decision pending appeal. Order Granting in Part and Denying in Part Motion for Stay and to Expedite Appeal, *Kraus v. Cegavske*, No. 82018 (Nev. Filed Nov. 3, 2020) (attached as **Exhibit 2**). On November 3, the court denied the stay request, on the grounds that, among other things, “appellants have not demonstrated a sufficient likelihood of success” on the merits. *Id.* at 2. The court set a briefing schedule such that Respondents/Appellees’ brief is due on November 9, 2020. *Id.*

issuing an enforcing the challenged access regulations in that case, so too did the Board here.

To the same effect is the decision of a California court in September 2020. Minute Order, *Election Integrity Project Cal. Inc. v. Lunn*, No. 56-2020-00540781 (Cal. Super. Ct. filed Sept. 15, 2020) (Exhibit 4). There, the California Election Code “authorize[d] the presence of observers for the ballot counting process.” *Id.* at 1. The defendant official “established certain protocols which include having observers stay in certain designated areas in the ballot counting area, prohibiting observers from communicating with election workers, and requiring that observers request permission to move from one designated area to another.” *Id.* Like Appellant here, the plaintiff “concede[d] that these protocols allow[ed] them to observe, but not sufficiently so that they can lodge a challenge if they believe that an election workers has made an error in accepting a mail ballot.” *Id.* The court rejected plaintiff’s position because the statute did not require what plaintiffs demanded: “The court finds that the defendant’s procedures in place are reasonable considering the need to effectively conduct the business of counting ballots and the restrictions imposed by the distancing requirements of the Covid pandemic.... [T]he court finds that the role of the observer is observation of the process, and does not extend to challenging the decisions of the election workers.” *Id.* at 2. Here, as in that case, the court’s conclusion rested on factual findings made after a hearing with

live witnesses. (See Opinion at 8 (“[W]e conclude, based on the witness’s testimony, that the Board of Elections has complied with the observations requirements under 25 P.S. § 3146.8 and that Appellant is not entitled to the relief he seeks.”). There is no basis to disturb that conclusion on appeal.

CONCLUSION

For the foregoing reasons, the City of Philadelphia Board of Elections respectfully requests that this Court affirm the trial court’s order of November 3, 2020.

Dated: November 5, 2020

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

By: /s/ Mark A. Aronchick
Mark A. Aronchick (I.D. No. 20261)
Robert A. Wiygul (I.D. No. 310760)
One Logan Square, 27th Floor
Philadelphia, PA 19103
Telephone: (215) 496-7050
Email: maronchich@hangleys.com

CITY OF PHILADELPHIA
LAW DEPT.
Marcel S. Pratt, City Solicitor
Sean J. McGrath, Assistant City Solicitor
1515 Arch Street, 16th Floor
Philadelphia, PA 19102-1595
(215) 683-5444
Sean.McGrath@phila.gov

Counsel for Appellees

CERTIFICATION OF COMPLIANCE WITH RULE 2135(d)

This brief complies with the type-volume limitation of Pennsylvania Rule of Appellate Procedure 2135, because this brief contains 5792 words.

Date: November 5, 2020

/s/ Mark A. Aronchick
Mark A. Aronchick

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: November 5, 2020

/s/ Mark A. Aronchick
Mark A. Aronchick