

IN THE SUPREME COURT OF PENNSYLVANIA

DOCKET NO. _____ OF 2020

IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF
NOVEMBER 3, 2020 GENERAL ELECTION; BUCKS COUNTY COURT OF
COMMON PLEAS NO. 2020-05786

DNC SERVICES CORPORATION/DEMOCRATIC NATIONAL
COMMITTEE'S APPLICATION FOR THE COURT TO EXERCISE
EXTRAORDINARY JURISDICTION

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INTRODUCTION

As part of its increasingly desperate attempt to change the outcome of the Presidential election, and flouting statutory law and the longstanding policy in the Commonwealth to protect the elective franchise, Donald J. Trump for President, Inc., (the “Campaign”), continues to hunt for trivial reasons to disenfranchise voters and invalidate thousands of ballots in Bucks County and other counties the Campaign believes to be unfavorable for its candidate. As this case makes clear, no perceived irregularity is too minor for the Campaign to latch onto as a basis for suppressing the valid vote tallies.

Here, the Campaign seeks to disenfranchise nearly 2,000 registered and qualified Bucks County voters who made the effort to cast their votes in the midst of an ongoing pandemic. The Campaign *admits* that the ballots were cast by lawfully-registered voters and *admits* that there is not one iota of evidence that any of the ballots are tainted by fraud or any other misconduct. Moreover, all agree that the voters whose ballots are in jeopardy timely requested an application to vote by mail or absentee and timely filled out and submitted their ballots. And each voter complied with the instructions on the outer envelope—to sign the voter’s declaration and enclose the ballot in the secrecy envelope. After considering those facts, the Bucks County Board of Elections (the “Board”) correctly decided to count these ballots. And yet the Campaign appealed to the Court of Common Pleas to invalidate

the ballots and disenfranchise 1,995 voters based solely on minor technicalities. After briefing and full argument, the Court of Common Pleas of Bucks County upheld the decision of the Board in a 21-page opinion. Continuing its quixotic quest, the Campaign appealed again to the Commonwealth Court.

Because this Court has already exercised its extraordinary jurisdiction over similar matters now before this Court from the Philadelphia and Allegheny County Boards of Elections, because these issues are too important and too urgent to be left to regular procedures, and because Monday, November 23, 2020 is the deadline for the election to be certified, Intervenors respectfully suggest that this Court should immediately exercise extraordinary jurisdiction over this matter and promptly resolve these pressing questions of Pennsylvania law.

As the court below held, the Board correctly accepted the ballots at issue here, and the Campaign's challenges are about merely immaterial issues, none of which provides reason to invalidate ballots and disenfranchise the voters who cast them. First, there is no statutory requirement that voters must write their name and address on the outer envelope containing the ballot, or that voters seal the privacy envelope in order to be counted. Second, unlike elsewhere in the Election Code, there is no statutory requirement that these the Campaign identifies nothing in the Election Code requiring that these ballots be voided for such minor issues or for a missing date. The Campaign would have this Court read into the Election Code consequential

language that General Assembly chose not to include and invalidate the ballots for minor trivialities, in direct contravention of longstanding and oft-repeated direction from the Pennsylvania Supreme Court. Third, the Campaign identified *no interest*, let alone a compelling or weighty interest, that is served by imposing the harsh sanction of disenfranchisement here.

And that, if nothing else, is fatal to the Campaign's effort to suppress the vote tally: as this Court has consistently held, ballots with "mere minor irregularities should only be stricken for compelling reasons." *Shambach v. Bickhart*, 845 A.2d 793, 795 (Pa. 2004). That is because "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen." *Perles v. County Return Bd. of Northumberland County*, 202 A.2d 538, 540 (Pa. 1964).

STATEMENT OF JURISDICTION

For the reasons discussed below, the Court has jurisdiction to take this case through its Extraordinary Jurisdiction. *See* 42 Pa. C.S. § 726; Pa.R.A.P. 3309.

STATEMENT OF QUESTIONS INVOLVED

1. Whether the Pennsylvania Supreme Court should assume extraordinary jurisdiction over the matter, given the immediate and significant public importance of the issues raised by this case and the need to promptly finalize election results.

The Court of Common Pleas did not address this question.

2. Whether a qualified elector's vote must be canceled where the elector failed to handwrite the full date on the outer envelope of an absentee or

mail-in ballot, even where there is no dispute that the ballot was timely submitted and received before 8:00 p.m. on Election Day.

The Court of Common Pleas correctly answered this question in the negative.

3. Whether a qualified elector's vote must be canceled where the elector failed to handwrite his or her name and complete address on the outer envelope of an absentee or mail-in ballot, even where there is no requirement in the Election Code to do so and where the elector's name and address are otherwise identifiable from the envelope.

The Court of Common Pleas correctly answered this question in the negative.

4. Whether a qualified elector's vote must be canceled where the secrecy envelope is "unsealed" in some unidentified way, but where (a) the elector securely placed the ballot inside a secrecy envelope and placed the secrecy envelope inside a sealed outer envelope as directed by statute; (b) the secrecy of the elector's identity was maintained; and (c) the Board was unable to determine whether the envelope became "unsealed" after the elector sealed it.

The Court of Common Pleas correctly answered this question in the negative.

STATEMENT OF THE CASE

I. Background on absentee and mail-in application and voting procedures.

A. Absentee and mail-in application procedures.

Electors in the Commonwealth who wish to vote absentee or by mail must submit applications for such ballots to their county board of elections. In submitting such applications, electors must supply the address at which they are 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.”

Before sending an absentee or mail-in ballot to the elector, the county board of elections must confirm the elector’s qualifications and verify that the elector’s address on the application matches the elector’s registration. There is no allegation that did not occur here.

B. Balloting materials, elector declaration, and the voting procedure.

Upon approval of the application, the elector is provided: 1) the ballot; 2) instructions for completing and returning the ballot; 3) an inner secrecy envelope into which the ballot is placed; and 4) an outer envelope into which the secrecy envelope containing the ballot is placed and returned to the board. On one side of the outer envelope is a pre-printed voter’s declaration, and the elector’s name and address are pre-printed below the declaration, just below 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. After receiving a mail-in or absentee ballot envelope, the board scans the bar code to identify and record the elector that submitted the enclosed ballot.

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. 25 P.S.

§ 3146.4. On September 11, 2020, the Secretary of State issued Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes (“9.11.20 Guidance,” attached as Exhibit A).

II. Procedural history.

A. The Board’s decision.

On November 7, 2020, during the course of the canvass meeting, the Board met to determine, pursuant to 25 P.S. § 3146.8(g)(3), whether the declarations on the outer envelopes of certain ballots were “sufficient.” *See* Exhibit B (Stipulated Facts, attached without exhibits) ¶ 18. “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.” Exhibit C, Order at 5.

The Campaign challenges 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, Ex. C, Order at 6;
- Category 2: 644 ballots with no handwritten name or address on the outer envelope, *id.*;
- Category 3: 86 ballots with a partial handwritten address on the outer envelope, *id.*; and

- Category 5: 69 ballots with “unsealed” privacy envelopes, *id.*¹

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

The Campaign admitted and stipulated to the following facts.

1. 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.

2. 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. 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.

¹ 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. *Compare* Hearing Tr. at 114–15 (attached as Exhibit D), *with* Ex. B, Stipulated Facts ¶ 24.

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.

4. 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.

5. 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.

6. 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 19, 2020, the Bucks County Court of Common Pleas denied the Petition in full. In its written decision, the court “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 the Campaign present evidence or argument to the contrary. The challenges are all to form rather than substance[.]” Ex. C, Order at 4.

The court acknowledged two “overriding principles” that govern the interpretation of the Election Code: strict enforcement and flexible interpretation “in favor of the right to vote.” *Id.* at 7–8. It explained that this Court has balanced these principles by distinguishing between “mandatory” and “directory” provisions in the code. *Id.* at 8. And under longstanding Court precedent, “[b]allots should not be disqualified based upon failure to follow directory provisions of the law.” *Id.* (citing *Shambach*, 845 A.2d at 803, and *Weiskerger Appeal*, 447 Pa. 418, 421, 290 A.2d 108, 109 (Pa. 1972)).

The court then applied the law to the stipulated facts. It 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., Order 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. Order 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. It reasoned that a handwritten name and address were “not necessary to prevent fraud,” and counting the ballots would not undermine any other significant interest. *Id.* Finally, the court found that the fourth 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 glue on the envelope had failed. *Id.* at 20.

IV. The Campaign’s appeal.

On November 20, 2020, the Campaign appealed the Court of Common Pleas’ ruling to the Commonwealth Court.

BASIS FOR EXTRAORDINARY JURISDICTION

The Court should assume extraordinary jurisdiction over this case because the underlying dispute “involves an issue of immediate public importance,” there is an unquestionable need to “expedite the proceedings,” and the rights of the DNC are clear. 42 Pa. C.S. § 726 (first quotation); *Commw. v. Morris*, 771 A.2d 721, 731 (Pa. 2001) (second quotation); *see also Bd. of Revision of Taxes v. City of Phila.*, 4 A.3d 610, 620 (Pa. 2010) (extraordinary jurisdiction allows the Court to assume “plenary jurisdiction over a matter of immediate public importance that is pending before another court of this Commonwealth”).

First, this matter unquestionably involves issues of immediate public importance. *See* 42 Pa. C.S. § 726. The outcome of this appeal will determine whether 1,995 voters in Bucks County will have their timely-cast, timely-received absentee and mail-in ballots rejected solely because of minor trivialities, even though there are no allegations of fraud, misconduct, impropriety, or undue influence. The DNC asks the Court to hold that the Election Code does not require county boards of elections to discard such ballots, and that the decision whether to do so lies within the sound discretion of the county boards, who are delegated the responsibility for examining the outer envelope and determining whether the declaration is “sufficient.” 25 P.S. § 3146.8(g)(3); *see Appeal of McCracken*, 370 Pa. 562, 565, 88 A.2d 787, 788 (1952) (observing that county election boards have “plenary powers

in the administration of the election code”); *see also Appeal of Petrucci*, 38 Pa. D. & C.2d 675, 677 (C.P. Luzerne Cty. 1965) (“The court, in reviewing the rulings of the board, may reverse the board of elections only for a mistake of law or for a clear abuse of discretion, including a capricious disregard of the testimony.”). The resolution of this question will affect 1,995 qualified Bucks County voters in this election, untold numbers of qualified voters in future elections, and the administration of mail-in and absentee voting across Pennsylvania.

Second, time is of the essence. *See Morris*, 771 A.2d at 731 (extraordinary jurisdiction is appropriate when the Court’s plenary jurisdiction is needed to expedite the proceedings). Under Pennsylvania law, Bucks County must certify its election results by November 23, 2020—just 2 days from now. 25 P.S. § 2642. There simply isn’t time for this case to wend its way through the ordinary appellate process. *Cf. In re 2003 Election for Jackson Twp. Sup’r*, 840 A.2d 1044, 1046 (Pa. Commw. Ct. 2003) (“The Election Code reflects a clear intention of the General Assembly to expeditiously resolve election disputes and provide for the prompt certification of the vote.”). And timely certification is critically important because federal law sets additional deadlines for determining electors and the Electoral College vote. *See 3 U.S.C. §§ 1 et seq.*

Third, for the reasons explained below, the DNC has a clear right to relief. *Bd. of Revision of Taxes*, 4 A.3d at 620. The legislature, through the Election Code, has

not directed the Board to reject the ballots at issue. There is no statutory requirement that voters print their full names and addresses on the outer envelope, nor is there a statutory requirement that voters seal the secretary envelope before placing it in the outer envelope. *See infra* pp. 16–21. And even if the Election Code explicitly directed voters to write their full names and addresses on the outer envelope and seal the inner one, there is still no statutory basis for rejecting ballots that fail to follow such technical requirements. *See infra* pp. 21–25. This is for good reason: doing so not only serves no compelling interest, it also offends federal law. *See infra* pp. 25–34.

Allowing this appeal would be consistent with the Court’s recent acceptance of King’s Bench and extraordinary jurisdiction over two similar cases addressing overlapping issues. In *In Re: Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, Nos. 31–35 EAP 2020 (Pa. 2020), the Court exercised its extraordinary jurisdiction to determine whether “the Election Code require[s] county boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed their ballot’s outer envelopes but did not handwrite their name, their address, and/or a date, where no fraud or irregularity has been alleged[.]” *Id.* And just yesterday, the Court granted a Petition for Allowance of Emergency Appeal in *In Re: 2,349 Ballots in the 2020 Gen. Election*, 337 WAL 2020 (Pa. Nov. 20, 2020), to decide whether “the Election Code require the Allegheny County Board of

Elections to disqualify mail-in ballots submitted by qualified electors who signed their ballot's outer envelopes but did not handwrite a date, where no other fraud or irregularity has been alleged, and the ballot is timely received[.]” *Id.*

This Application involves similar and equally weighty questions of public importance. There is a “longstanding and overriding policy in this Commonwealth to protect the elective franchise.” *Shambach*, 845 A.2d at 798 (citations omitted); *see also Petition of Ross*, 190 A.2d 719, 720 (Pa. 1963) (“The Election Code must be liberally construed so as not to deprive . . . the voters of their right to elect a candidate of their choice.”). The Campaign’s arguments, if credited, would disenfranchise 1,995 qualified voters in Bucks County for nothing more than a missing date or address on their signed outer envelopes, or an unsealed secrecy envelope—otherwise immaterial omissions since these voters’ ballots were timely received and there are no allegations of fraud or impropriety. Review is thus warranted, and the Application should be granted, pursuant to 42 Pa. C.S. § 726.

ARGUMENT

The Court of Common Pleas correctly held that the Election Code does not require the rejection of the ballots at issue here. First, no provision of the Election Code requires a voter to handwrite their name or their address on the outer envelope, or to seal the inner envelope, of an absentee or mail-in ballot, let alone ensure that it remains sealed while in transit to the board of elections. Second, while the Election

Code states that a voter “shall” input the date on the envelope, no provision mandates that ballots be disqualified for lack of a date on an envelope, especially in the absence of fraud or wrongdoing, and particularly given that these ballots were all received timely, before 8:00 p.m. on Election Day. Third, despite the Campaign’s dogged push to suppress the votes of thousands of registered Pennsylvania voters, it has identified *no interest*, let alone a compelling or weighty interest, that the harsh sanction of disenfranchisement for these minor irregularities would further.

The Campaign’s argument, made clear at the hearing in the Court of Common Pleas, is premised on the misguided notion that a voter must input their name, a date, and their address on the outer envelope, and seal the inner envelope, “in order for the vote to be counted.” *See* Ex. D, Hearing Tr., at 191-94. There is no such language is absent from the Election Code. Moreover, the directions on the outer envelope say nothing of the sort—they direct the voter only to sign the declaration and enclose the ballot in the secrecy envelop. Disenfranchising voters for such trivialities, particularly were they were not instructed that such steps were required to have their votes count, would be a grave injustice contrary to the “longstanding and overriding policy in this Commonwealth to protect the elective franchise” and to the repeated direction from this that the “goal must be to enfranchise and not to disenfranchise the electorate.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 360–61 (Pa. 2020) (quoting *Shambach*, 845 A.2d at 798 and *Weiskerger Appeal*, 290 A.2d at 109).

To ensure that thousands of eligible registered voters are not so disenfranchised, the Court should affirm the Court of Common Pleas and make clear that the Election Code does not require invalidation of these ballots. This is particularly important here where the voters have not been provided notice that their ballots are in jeopardy of not being counted.

I. There is no statutory basis to invalidate ballots that comply with all statutory instructions.

A. There is no statutory instruction that voters print their full name and address on the outer envelope.

The Board correctly denied the Campaign’s challenges to ballots in Category 2, with no printed name or address, and to ballots in Category 3, with a partial address, because the Election Code does not require voters to provide this information. The relevant statutes instruct that, after marking the ballot, “[t]he elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.” 25 P.S. § 3146.6(a) (absentee ballots); 25 P.S. § 3150.16(a) (same instructions for mail-in ballots).

Nowhere in these instructions is a requirement that voters handwrite their name and address under their declaration. Notably, the General Assembly chose to include such a requirement elsewhere in the same section, in the provision

addressing voters unable to sign their declaration due to illness or physical disability. *That* section requires that a witness provide, along with their signature, their complete address. *See* 25 P.S. § 3146.6a(3); 25 P.S. § 3150.16(a.1). But for voters who are able to sign their declaration, there is no such instruction. *See Sivick v. State Ethics Comm’n*, No. 62 Map 2019, 2020 WL 5823822, at *10 (Pa. Oct. 1, 2020) (noting “it is axiomatic that we may not add statutory language where we find the extant language somehow lacking” and that “under the doctrine of *expressio unius est exclusio alterius*, the inclusion of a specific matter in a statute implies the exclusion of other matters”).

While sections 3146.6(a) and 3150.16(a) state that the voter shall “fill out” the declaration, they do not specify what that entails, and the General Assembly expressly delegated to the Secretary the determination of the form of such declaration, requiring only that it include “a statement of the elector’s qualifications, together with a statement that the elector has not already voted in the primary or election.” 25 P.S. § 3150.14(b). The Secretary has, in turn, issued guidance to the county boards of elections about the examination of absentee and mail-in envelopes, generally, and about the declaration, specifically. *See* Ex. A, 9.11.20 Guidance. The Secretary’s guidance instructs that ballot return envelopes must be set aside and not counted if the declaration is “blank,” but otherwise, “[i]f the Voter’s Declaration on the return envelope is signed and *the county board is satisfied that the declaration*

is sufficient, the mail-in or absentee ballot should be approved for canvassing[.]” *Id.* at 3 (emphasis added).

Moreover, the instructions to electors on the outer envelope direct a voter only to sign the declaration, not to input their name or address. Under the declaration on the outer envelope is the directive: “Voter, sign or mark here.” Ex. B, Stipulated Facts ¶ 9. And 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 [and] Put your ballot inside the secrecy envelope and place it in here?” *Id.* at ¶ 10.

The Campaign does not dispute that each outer envelope at issue here includes a declaration signed by the voter. Each envelope thus includes the information specifically required by the Election Code and directed by the instructions on the outer envelope. *See* 25 P.S. § 3146.6. The Campaign admits that the voter’s name and address is already printed on the envelope below the declaration. Ex. B, Stipulated Facts ¶ 13. The only potential deficiency with these envelopes is the lack of a *complete handwritten* name and address below the voter’s signature. But because a name and address are not specified in statute; because the Secretary has made clear that an outer envelope must be set aside only if the declaration is blank; and because the county board otherwise determines whether the declaration is sufficient, the Board here did not act unlawfully in deciding that the ballots inside

these envelopes, all containing the printed name and address of the voter, should be counted.

B. There is no statutory requirement that the secrecy envelopes be sealed; the challenged ballots comply with both the language and intent of the statute.

The Campaign challenges 69 ballots (Category 5) on grounds that they were enclosed in secrecy envelopes that were “unsealed.” The Campaign does not allege that the secrecy envelopes were tampered with in any way or that the lack of a seal compromised ballot secrecy at all. To the contrary, the Campaign agrees that when the challenged ballots were received by the Board, each of the 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. The Campaign also concedes that there is no basis for determining whether the privacy envelopes were initially sealed by the elector, but later became unsealed. *See* Ex. B, Stipulated Facts ¶¶ 42, 43. Indeed, as the Court of Common Pleas noted, there is no evidence showing that the envelopes “had not been sealed by the elector prior to” canvassing, and it was possible that envelopes had been sealed and the glue simply failed. Ex. C, Order, ¶ 9. In the absence of a showing that voters did not seal their envelope, the Campaign cannot demonstrate that the Board acted unlawfully by accepting these ballots.

Moreover, the relevant statute does not even require that the inner envelope be sealed; it requires that the *ballot* be secure within the envelope: “the mail-in

elector shall . . . mark the ballot . . . and then fold the *ballot*, enclose and securely seal *the same* in the envelope[.]” 25 P.S. § 3150.16(a) (emphases added); 25 P.S. § 3146.6(a) (same). It is all the more clear that the statute does not require the voter to seal the inner envelope when, just sentences later, it expressly requires the voter to seal the *outer* envelope. 25 P.S. § 3150.16(a) (“This envelope shall then be placed in the second one . . . *Such [second] envelope shall then be securely sealed.*”) (emphasis added); 25 P.S. § 3146.6(a) (same). As used in the reference to the ballot inside the inner envelope, securely sealing the ballot in the envelope could mean little more than placing it in the inner envelope so that it does not fall out in transit or otherwise. That could be accomplished by folding the flap over, by tucking the flap inside the envelope, or by fastening the flap with glue. Significantly, the word “seal”—which is not statutorily defined—is not a term of art. It is a commonly used word meaning “to close” or “to make secure.” *See Merriam-Webster Dictionary.* There is no allegation here that the envelopes were not closed or that the ballots were not made secure within the envelopes.

When the Legislature intends that an envelope be sealed, it unequivocally states so. *See, e.g.,* 25 P.S. §§ 3014(a), 3049(b)(3), 3152(a), 3146.7(c). Indeed, in the relevant statute here—Section 3150.16(a)—the Legislature clearly differentiated between directing the elector to securely seal *the ballot* in the inner envelope and directing the elector to seal *the outer envelope*:

[T]he 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.’ This envelope shall then be placed in the second one . . . *Such [second] 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 elections.

25 P.S. § 3150.16(a) (emphases added); 25 P.S. § 3146.6(a) (same). Because the plain language of the statute does not require the secrecy envelope to be sealed, the Board correctly counted the ballots.

Here, each of the 69 challenged ballots was securely contained in an unmarked secrecy envelope and further contained in an outer sealed envelope. When the secrecy envelope was removed from the outer envelope, the identity of the elector remained secret. As a result, unlike with naked ballots, counting the ballots here—where the elector’s identity is protected—is not contrary to the statutory purpose. *See Pa. Democratic Party*, 2020 WL 5554644, at *25 (purpose of the two-envelope statutory requirement is to ensure that “secrecy in voting [is] protected”).

II. There is no basis in the law to invalidate ballots based solely on an immaterial technicality.

Even if the relevant statute directs that voters shall take a certain action—as it does for the date on the envelope—the question is whether noncompliance with that directive alone requires the harsh sanction of disenfranchisement. Nothing in the Election Code mandates that consequence, and this Court has made clear that not

every failure to comply with an instruction in the Election Code is grounds to reject a ballot. *E.g.*, *Weiskerger Appeal*, 290 A.2d at 109 (refusing to invalidate ballots marked in red or green ink); *Shambach*, 845 A.2d at 803 (refusing to invalidate ballots where voter wrote in name of candidate in contravention of statute). “The power to throw out a ballot for minor irregularities . . . must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons.” *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945); *see also In re Duquesne Appeals from Cty. Bd. of Elections*, 39 Pa. D. & C.2d 545, 557 (C.P. Allegheny Cty. 1965) (same).

The General Assembly has provided no instruction—explicitly or implicitly—that ballots lacking a handwritten name, address, or date on the outer envelope must be rejected and disqualified. Moreover, no section of the Election Code and no weighty interest would be undermined or defeated if the ballots at issue were counted—voiding these ballots would serve no compelling state interest.

In contrast, the General Assembly has identified elsewhere in the Election Code particular instances in which an absentee ballot must be rejected or set aside and not counted:

1. The ballot of a deceased elector “shall be rejected by the canvassers,” 25 P.S. § 3146.8(d), and “set aside,” *id.* § 3146.8(g)(3).

2. If the secrecy envelope contains any marking that identifies the elector’s identity, political affiliation, or candidate preference, “the envelopes and the ballots contained therein shall be set aside and declared void.” *Id.* § 3146.8(g)(4)(ii).
3. Where the eligibility of an elector has been challenged, the elector’s ballot “shall be placed unopened in a secure, safe and sealed container” until the challenge is resolved. *Id.* § 3146.8(g)(5).

None of these issues is implicated here. The Campaign does not challenge whether an elector is deceased or ineligible to vote; it likewise does not allege that any secrecy envelopes at issue contain identifying markings. Thus, the contested ballots do not fall within any of the discrete categories of ballots that the Legislature has instructed not be counted.²

² Comparison with a separate section of the Election Code lends further support for the conclusion that the General Assembly knows how to impose specific consequences for a missing date. Because dated signatures on candidate nominating petitions are essential to determining whether and which signatures are valid under the statutory scheme governing such petitions—unlike for absentee and mail-in ballots, which can be voted as soon as they are issued, one cannot lawfully sign a nominating petition *prior* to a particular date—the General Assembly has provided, “*no signature shall be counted unless it bears a date affixed not earlier than the thirteenth Tuesday nor later than the tenth Tuesday prior to the primary.*” 25 P.S. § 2868 (emphasis added). There is no parallel statutory prohibition on counting undated absentee and mail-in ballots.

A. The statutory language does not require invalidating the challenged ballots.

The lack of a prescribed consequence for ballots that do not flawlessly comply with Sections 3150.16(a) and 3146.6(a) is a telltale sign of the Legislature’s intent for two reasons.

First, when construing a statute, this Court not only reviews what a statute says; it “must also listen attentively to what it does *not* say.” *Com. v. Giulian*, 141 A.3d 1262, 1268 (Pa. 2016). The Legislature knew how to command when to set aside a ballot. It chose not to here, and it is not for courts to guess that the Legislature meant what it did not say. *See id.* (“[C]ourts should not add, by interpretation, a requirement not included by the General Assembly.”).

And second, it is axiomatic that the Legislature drafts statutes against the backdrop of this Court’s prior interpretation of statutory language and other decisional law. As this Court has explained: “[T]he words of a statute are to be interpreted in light of antecedent case law, and the legislative intent to effectuate a drastic change in the law is not to be inferred by mere omission and implication.” *Fonner v. Shandon, Inc.*, 724 A.2d 903, 906 (Pa. 1999). The Commonwealth’s policy favoring enfranchisement is “longstanding.” *Shambach*, 845 A.2d at 798; *see also Ross*, 190 A.2d at 720. So is the Court’s practice to “liberally construe voting laws in the absence of fraud.” *Wieskerger*, 290 A.2d at 109. The Court should not

presume that the Legislature intended to impose the severe sanction of disenfranchisement where the statutes say no such thing.

These ballots fall within the category of valid ballots with “mere minor irregularities,” which “should only be stricken for compelling reasons[.]” *Shambach*, 845 A.2d at 795. No such compelling reason exists here.

B. There is no compelling reason to invalidate ballots with omitted handwritten names and addresses because, in addition to there being no such statutory requirement, the same information already is available on the outer envelope.

As noted, the statute does not direct voters to handwrite their name and address on the outer envelope. But even if there were such an instruction, there would be no compelling reason to disenfranchise the voters here because that information already is available on the outer envelope. First, outer envelopes contain, on the same side as the voter’s declaration, a unique nine-digit bar code that links the envelope to the voter’s registration file contained in the SURE system, and the specific voter’s information—including name and address—is visible when scanned. *See* Ex. A, 9.11.20 Guidance, at 2. Further, the voter’s address is pre-printed on the outer envelope. *See* Board Decision, ¶ 3 (attached as Exhibit E).

The fact that the voter’s name and address is readily identifiable would make throwing out these ballots a grave injustice. Requiring voters to handwrite their name and address below their signature serves no “weighty interest,” and there is no “concrete provision” that would be rendered ineffective if these ballots were

counted. *Cf. Pa. Democratic Party*, 2020 WL 5554644, at *26. Indeed, whatever the interest is in having the voter's name and address identifiable from the outside of the ballot is met here because the voter's name and address is identifiable in at least one (and more often multiple) ways from the ballot envelope.

The lack of any weighty interest that would be undermined by allowing these ballots to be counted makes this case most analogous to *Weiskerger Appeal*, 290 A.2d 108, where this Court held that ballots marked in a different color ink from those enumerated in the statute should be counted. The Court held that the purpose underlying the limitation on marking ballots in certain colors was to ensure that individual ballots were not identifiable. *Id.* Given that there was no indication the ballots at issue were marked in a different color for the purpose of making the ballot identifiable or otherwise indicating fraud, the Court held they should be counted. *Id.* As in *Weiskerger*, the Campaign offers no suggestion that the failure to include a complete address here was an effort at committing voter fraud, and such an attempt would be virtually impossible given that the voter's address is identifiable in at least one way on the outer envelope of each of these ballots. Disenfranchising voters based on this minor technicality, when every voter's address is still readily identifiable to the Board, would be directly contrary to the "longstanding and overriding policy in this Commonwealth to protect the elective franchise." *Shambach*, 845 A.2d at 798.

C. There is no compelling reason to invalidate ballots when the Election Code does not require invalidation and there is no allegation that the ballots were untimely or fraudulent.

While the Election Code states that a voter “shall” date the outer envelope, as noted above, when the General Assembly intended for a ballot to be “set aside” and not counted, it expressly said so—four times. *See supra* Section II (setting forth statutes). Failure to handwrite the date on the outer envelope is not one of them.

Given the absence of any express provision disqualifying ballots submitted in undated ballot envelopes, it is clear that the General Assembly did not intend a missing date to cause disenfranchisement. As this Court’s analysis in *Pennsylvania Democratic Party v. Boockvar* illustrates, noncompliance with a “shall” provision in the Election Code does not automatically require rejection of the voter’s ballot. Instead, the outcome turns on legislative intent and the nature of the interest served by the directive, which in the absence of a sanction for noncompliance are determined by reviewing the statutory language in context.

At the extreme, “where legislative intent is clear and supported by a weighty interest like fraud prevention,” or the General Assembly has “signaled beyond cavil” that an issue implicated by the directive, like ballot secrecy, is “so essential” to the voting process, noncompliance merits disqualification. *Pa. Democratic Party v. Boockvar*, 238 A.3d at 380. But “ballots containing mere minor irregularities should only be stricken for compelling reasons” and this Court has consequentially

“refuse[d] to read an all-out prohibition into [statute] where one is not explicitly required, particularly given this Commonwealth’s longstanding policy to protect the elective franchise.” *Shambach*, 845 A.2d at 798, 802.

The date requirement in this case is markedly different from the secrecy-envelope requirement that the Court concluded was mandatory in *Pennsylvania Democratic Party*.³ There, the Court found that Section 3150.16(a)’s directive to use a secrecy envelope, when “read *in pari materia*” with Section 3146.8(g)(4)(ii)’s directive to “set aside and declare[] void” ballots in envelopes with markings that compromised secrecy, “ma[d]e clear the General Assembly’s intention that . . . it should not be readily apparent who the elector is, with what party he or she affiliates, or for whom the elector has voted,” and that any contravention of that goal required the invalidation of the ballot. *Pa. Democratic Party*, 238 A.3d at 378; *accord In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1232 (Pa. 2004) (emphasizing the General Assembly’s commitment to votes “remain[ing] secret and inviolate” in interpreting ban on third-person delivery as mandatory, not directory). Only *after* considering multiple sections of the Election Code regarding secrecy envelopes—and the fact that ballot secrecy is “protected expressly by Article

³ This requirement—that ballots be put in a secrecy ballot and then that secrecy ballot be put in a second outer ballot—is not the issue in this case. Here, the Campaign concedes that each challenged ballot was in a secrecy ballot, it simply contends that the secrecy ballot was not sealed.

VII, Section 4 of th[e] Court’s state charter”—did the Court conclude that the General Assembly had “signaled beyond cavil that ballot confidentiality . . . *is so essential* as to require disqualification.” *Pa. Democratic Party*, 238 A.3d at 379–80 (emphasis added).

No similar interest justifies voiding a ballot for a missing handwritten date on the outer envelope. Under the Election Code, a ballot must be voted before 8:00 p.m. the day of the primary or election to be counted. 25 P.S. § 3150.16(a). Thus, while the date on the ballot envelope may in some circumstances further the purpose of allowing election officials to confirm that the ballot was timely voted, there is no dispute here, as the Campaign crucially admits, these ballots were received before 8:00 p.m. on Election Day. Indeed, the receipt date of the ballots is verifiable. The County Board “stamp[s] the date of receipt on the ballot-return” and “record[s] the date the ballot is received” in the SURE system. *See* Ex. A, 9.11.20 Guidance, at 2. The date stamp provides an objective indicator of timeliness that renders any handwritten date superfluous. Once the County Elections Division, acting under guidance issued by the Secretary of State, scans ballots upon receipt and separately time-stamped them, the legislative purpose had been met—there can be no doubt that the 1,196 challenged ballots were timely cast. *Pa. Democratic Party*, 238 A.3d at 356 (“[T]he Election Code should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice.”). And there simply

is no legislative interest served by invalidating the lawful votes of eligible voters under these circumstances. *See Weiskerger Appeal*, 290 A.2d at 109 (“[t]he proper interpretation of this portion of the statute considering the occasion for its enactment, the mischief to be remedied, and the policy to liberally construe voting laws in the absence of fraud, is that the ballot is valid unless there is a clear showing that the ink used was for the purpose of making the ballot identifiable”)⁴

Because the timeliness of the ballots is not in dispute, requiring strict compliance would serve no purpose other than to disenfranchise 1,196 registered and qualified voters who timely cast their votes in the midst of an ongoing pandemic. Instead, “[e]very rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.” *Appeal of Norwood*, 382 Pa. 547, 552, 116 A.2d 552, 554–55 (1955).

D. The Court’s denial of a cure process in *Pennsylvania Democratic Party* does not require the invalidation of ballots contained in outer envelopes that lack a dated declaration.

On November 19, 2020, a split Commonwealth Court panel ordered the Allegheny County Board of Elections to exclude 2,349 absentee and mail-in ballots

⁴ For this reason, a voter’s failure to comply with the requirement that he or she “date” the declaration may logically carry different consequences than a failure to comply with the requirement that he or she “sign” the declaration. A voter’s failure to date a declaration—at least in the context of an absentee or mail-in ballot—may be remedied by clear evidence that the vote was timely cast. The same is not true where a voter fails to sign the declaration at all.

solely because they were submitted in outer envelopes that had undated declarations. *In Re: 2,349 Ballots in the 2020 General Election*, No. 1162 C.D. 2020 (Pa. Commw. Ct. Nov. 19, 2020). The opinion was issued over the strong dissent of Judge Wojcik, and it relied on a flawed legal analysis of this Court’s decision in *Pennsylvania Democratic Party*. The Commonwealth Court decision is now on appeal before this Court in a different proceeding. *See In Re: 2,349 Ballots in the 2020 Gen. Election*, 337 WAL 2020 (Pa. Nov. 20, 2020). Because the Commonwealth Court’s reasoning could be read to apply to the issues in this appeal, and because it is currently pending before this Court on appeal, the DNC briefly explains why the majority opinion is wrong, and the Court should take this opportunity to clarify that *Pennsylvania Democratic Party* does not require the invalidation of the ballots at issue here.

In *Pennsylvania Democratic Party*, the petitioners asked this Court to create a process that would (1) notify voters of technical imperfections on the envelopes of their absentee or mail-in ballots and (2) give them an opportunity to “cure” the defect. The Court ultimately rejected their request. The Commonwealth Court interpreted this holding to mean that ballots with uncured technical errors should not be counted at all. But nothing in *Pennsylvania Democratic Party* compels that result—and it is wrong, for at least three reasons.

First, the Court’s analysis did not discuss what would happen to a ballot with a minor facial defect if no cure process existed. Instead, the Court considered

whether there was a legal *requirement* to provide a cure process (it found there was none). The Court declined to create a cure process without statutory authorization, which it thought was a policy task best suited for the Legislature. *Pa. Democratic Party*, 238 A.3d at 372. This case presents a different question: whether the courts should defer to the Board’s decisions to count certain ballots with minor deficiencies. It does not require the Court to legislate new election procedures in the first instance.

Second, *Pennsylvania Democratic Party*’s discussion of minor facial defects makes clear that the Court did not suppose every such defect would require invalidation. The Court provided two examples of minor errors: “not completing the voter declaration[,] or using an incorrect ink color to complete the ballot.” *Id.* But in doing so, the Court could not have meant that a ballot would be discarded for being marked in an ink color not permitted by statute; well-established precedent says the opposite. *See Weiskerger Appeal*, 290 A.2d at 109 (refusing to invalidate ballots marked in red or green ink). Thus, while *some* errors on the outer envelope, such as the lack of a signature on the declaration, can invalidate a ballot if they are not cured, that does not mean *all* errors will result in a ballot’s rejection.

Third, Justice Wecht’s concurrence in *Pennsylvania Democratic Party* appropriately recognized that “adequate instructions for completing the declaration of the elector—including conspicuous warnings regarding the consequences of

failing strictly to adhere—could mitigate against the risk of ballot invalidation caused by “objective[ly]” defective ballots. 238 A.3d at 389 (Wecht, J., concurring) (emphasis added). Where a conspicuous warning was provided, he reasoned, a notice and cure process might not be necessary. But here, voters received no “conspicuous warning[]” that a failure to date their declarations could lead to invalidation. Instead, voters were simply reminded to “[s]ign the voter’s declaration in your own handwriting” and “[p]ut your ballot inside the secrecy envelope and place it in here.” Ex. B, Stipulated Facts ¶ 10. The Campaign has provided no evidence that the Secretary or the Board conspicuously communicated to voters that their absentee or mail-in ballot would not be counted if the declaration was not dated. As Justice Wecht recognized by implication, discarding these ballots without an appropriate warning is not compelled by statute.

III. Not allowing the challenged ballots potentially violates federal law.

Interpreting the Election Code to deny the right to vote for minor, immaterial omissions on absentee or mail-in ballot envelopes would also potentially violate federal law. Nobody acting under color of state law may deny anyone the right to vote “in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B). Here, the omission

of a handwritten date is not material in determining whether the elector was a qualified voter. No party contests that the outer envelope SURE barcode provides a readily available means to determine that all ballots at issue were cast by voters “qualified under State law to vote in such election” and further allows the Board and the Commonwealth to confirm each voter’s name and address among other information. And the handwritten date in the declaration is not material to determining whether an individual is qualified to vote, not allowing these votes to count would violate federal law.

CONCLUSION

Due to the public importance of the issues presented and the need for immediate resolution, the DNC respectfully requests that this Court assume extraordinary jurisdiction over this matter and affirm that the Election Code does not require county boards of elections to disqualify ballots for the technical minor defects at issue in this case.

Dated: November 21, 2020

Respectfully submitted,

/s/ Michael R. McDonald

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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 8,331 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

Michael R. McDonald

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 21st day of November, 2020, by this Court's electronic filing system to the following:

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Exhibit A

TLP: WHITE



**GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND
MAIL-IN BALLOT RETURN ENVELOPES**

Date: September 11, 2020

Version: 1.0

EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES

1 BACKGROUND:

The Pennsylvania Election Code describes processes that a qualified voter follows to apply for, receive, complete and timely return an absentee or mail-in ballot to their county board of election. These processes include multiple secure methods used by the voter’s county board of election to verify that the qualified voter’s absentee or mail-in application is complete and that the statutory requirements are satisfied. These include voter identification verification confirmed by either a valid driver’s license number, the last four digits of the voter’s social security number or other valid photo identification, and unique information on the application including the voter’s residence and date of birth. Before sending the ballot to the applicant, the county board of elections confirms the qualifications of the applicant by verifying the proof of identification and comparing the information provided on the application with the information contained in the voter record. If the county is satisfied that the applicant is qualified, the application must be approved. This approval shall be final and binding, except that challenges may be made only on the grounds that the applicant was not a qualified voter, and those challenges must be made to the county prior to five o’clock p.m. on the Friday prior to the election.

Once the qualified voter’s absentee or mail-in application is approved, the voter is mailed a ballot with instructions and two envelopes. The outer envelope includes both a unique correspondence ID barcode that links the envelope to the qualified voter’s application and a pre-printed Voter’s Declaration that the voter must sign representing that the voter is qualified to vote the enclosed ballot and has not already voted. This Guidance addresses the examination of the Voter’s Declaration on the ballot return envelope. This Guidance assumes that the voter has satisfactorily completed the steps described above as to application for, receipt and return of an absentee or mail-in ballot.

2 RECORDING THE DATE, RETURN METHOD AND BALLOT STATUS FOR RETURNED BALLOTS:

County boards of elections should have processes in place to record the date, return method, and ballot status for all voted ballots received. County boards of elections must store and maintain returned ballots in a secure location until the ballots may be pre-canvassed or canvassed.

The county board of elections should stamp the date of receipt on the ballot-return. County boards of elections should record the receipt of absentee and mail ballots daily in the SURE system. To record a ballot as returned, the staff should scan the correspondence ID barcode on the outside of the envelope. The correspondence ID on the envelope is unique to each absentee or mail-in voter and each issuance of a ballot to a voter. Once a correspondence ID has been returned in the SURE system, it cannot be returned again. Further, if a ballot issuance record is cancelled by the county board of elections (e.g. voided to reissue a replacement ballot) in the SURE system, the correspondence ID on the cancelled ballot will become invalid. If the same barcode is subsequently scanned, the SURE system will not allow the returned ballot to be marked as being approved for counting.

The county boards of elections should record the date the ballot is received (not the date that the returned ballot is processed). In the event a county board of elections is entering the ballot on a date other than the date the ballot was received, the county personnel should ensure that the SURE record reflects the date of receipt, rather than the date of entry, since by default, SURE will automatically populate both the 'Date Received' and 'Vote Recorded' fields with the current date and time unless users manually correct the date to reflect the date received.

3 EXAMINATION OF DECLARATION ON BALLOT RETURN ENVELOPES:

The county board of elections is responsible for approving ballots to be counted during pre-canvassing.

To promote consistency across the 67 counties, the county boards of elections should follow the following steps when processing returned absentee and mail-in ballots.

After setting aside ballots of elector's who died prior to the opening of the polls, the county board of elections shall examine the Voter's Declaration on the outer envelope of each returned ballot and compare the information on the outer envelope, i.e., the voter's name and address, with the information contained in the "Registered Absentee and Mail-in Voters File, the absentee voter's list and/or the Military Veterans' and Emergency Civilians Absentee Voters File."

If the Voter's Declaration on the return envelope is blank, that ballot return envelope must be set aside and not counted. If the board determines that a ballot should not be counted, the final ballot disposition should be noted in SURE. The ballot return status (Resp Type) should be noted using the appropriate drop-down selection.

If the Voter's Declaration on the return envelope is signed and the county board is satisfied that the declaration is sufficient, the mail-in or absentee ballot should be approved for canvassing unless challenged in accordance with the Pennsylvania Election Code.

The Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections.

| Version | Date | Description | Author |
|---------|-----------|-----------------------------|--------|
| 1.0 | 9.11.2020 | Initial document release | |

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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/ Democratic National
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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
GENERAL ELECTION** :
: **No. 20-05786-35**
:
:
**PETITION OF DONALD J. TRUMP FOR
PRESIDENT, ET AL.** :

MEMORANDUM AND ORDER

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Undisputed factual record

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

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

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

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

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

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

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

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

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

III. Discussion

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

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

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

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

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

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

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

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

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

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

25 P.S. § 3150.16(a).

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

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

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

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

See Written Decision of Board.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Both sections [3146.6(a) and 3150.16(a)] require that the elector "fill out, date and sign the declaration." Thus, in determining whether the declaration is "sufficient" for a mail-in or absentee ballot at canvassing, **the county board is required to ascertain whether the declaration on the return envelope has been filled out, dated, and signed.** This is the extent of the board's obligation in this regard. In assessing a declaration's sufficiency, there is nothing in this language which allows or compels a county board to compare signatures. Accordingly, we decline to read a signature comparison requirement into the plain and unambiguous language of the Election Code, as Intervenor'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.

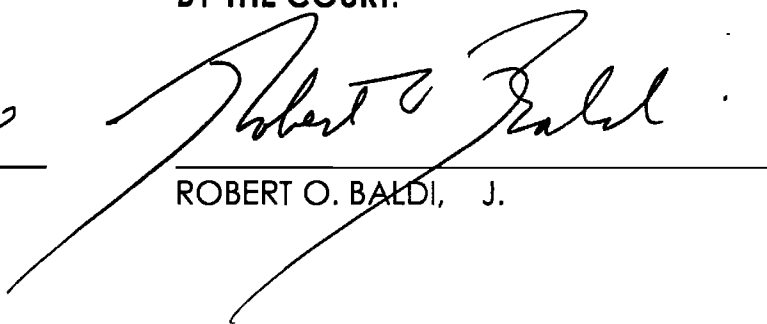
IV. Conclusion

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

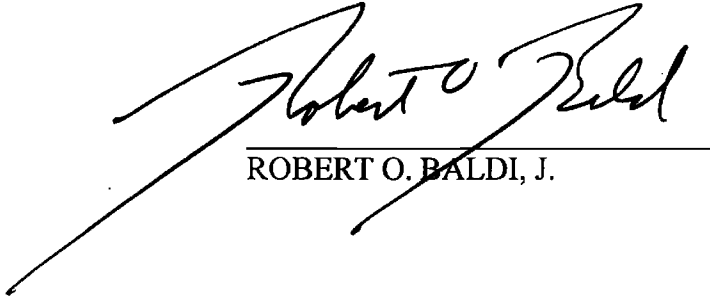
AND NOW, this 19th day of November, 2020, upon consideration of (1) the Petition for Review of Decision by the Bucks County Board of Elections filed on behalf of Petitioners Donald J. Trump for President, Inc., Republican National Committee, Heidelbaugh for Attorney General, Inc., and Garrity for PA;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

Exhibit D

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

* * *

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

* * *

BEFORE: THE HONORABLE ROBERT O. BALDI, J.

* * *

BUCKS COUNTY JUSTICE CENTER
COURTROOM NO. 410
DOYLESTOWN, PENNSYLVANIA

Tuesday, November 17, 2020

APPEARANCES:

BRITAIN R. HENRY, ESQ.,
Representing the Petitioners

JESSICA L. VANDERKAM, ESQUIRE
Representing the Respondent

MATTHEW P. GORDON, ESQ.
MICHAEL R. McDONALD, ESQ.,
Representing Intervenor Democratic National C.

MATTHEW E. HOOVER, ESQ.,
Representing Intervenor PHDC and BCDC

Joanne I. Luongo, RPR
Official Court Reporter

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1 THE COURT: All right. We
2 have microphones around the room. It's
3 very important that you use your
4 microphone, otherwise the stenographer
5 could have trouble hearing you. So
6 listen for your voice to come over the
7 sound system. If you don't hear your
8 voice coming over the sound system,
9 then get closer to the mic.

10 Now, I'm going to take my mask
11 off unless any of the parties here
12 would prefer me not to, and my feelings
13 will not be hurt. The reason I'm
14 taking my mask off is because I'm so
15 far away from you, I think you're
16 relatively safe. But I would only do
17 it if I was satisfied that no one had
18 an objection to it and no one had a
19 concern.

20 I think you're far enough away
21 from me. I would take it off out of
22 respect for you, not out of disrespect.
23 I would take it off because you can see
24 my face, and it just seems a more
25 respectful thing so you know whether

1 I'm smiling, grimacing or whatever, and
2 I think that that may be an important
3 thing at times.

4 Does anyone here -- and,
5 again, do not be shy about this. It
6 won't bother me at all. Does anyone
7 here prefer that I leave my mask on?

8 Okay. I see no response to
9 that. So then I'll take it off. All
10 right. I'm going to ask all the
11 parties to identify themselves, and
12 I'll just go from right to the left.
13 Counsel.

14 MR. HENRY: Good morning, Your
15 Honor. Britain Henry and the law
16 partners on behalf of the Petitioner
17 Donald J. Trump.

18 THE COURT: All right. Now,
19 you just said the Petitioner Donald J.
20 Trump. There are four Petitioners,
21 correct?

22 MR. HENRY: That is correct.
23 The other three are in this case for
24 two-fold -- for whatever reason, but
25 when on appeal, it would only be the

1 Trump Campaign that was appealing. So
2 I am here on behalf of all four, but
3 it's really at this point, Your Honor,
4 only one party who has an interest in
5 this case.

6 THE COURT: Okay. But you
7 have the authority to speak for all
8 four parties?

9 MR. HENRY: Yes, Your Honor.

10 THE COURT: Okay. Thank you.

11 And, Miss VanderKam, who is at
12 your desk and table? And tell me who
13 you represent.

14 MS. VANDERKAM: Good morning,
15 Your Honor. Jessica VanderKam for the
16 Bucks County Board of Elections with
17 Mr. Austin Soldano.

18 MR. SOLDANO: Good morning,
19 Your Honor.

20 THE COURT: Good morning.
21 That's fine. Thank you.

22 And then the -- I'll look up
23 at you counsel, if you will introduce
24 yourselves for me, please.

25 MR. McDONALD: Hello, Your

1 Honor. Michael McDonald --

2 THE COURT: And, by the way, I
3 appreciate you're standing. It's
4 difficult to speak into the microphones
5 at your desk. So if you -- if it's a
6 natural thing that you always stand up
7 when you speak to a Judge, you're
8 welcome to -- if you feel more
9 comfortable standing up at first, but
10 you're welcome to sit and speak.

11 The other thing is if you're
12 going to speak for any length of time,
13 you have a podium here with a
14 microphone. So that is available to
15 you as well.

16 I'm sorry. Counsel, you're
17 Michael McDonald?

18 MR. McDONALD: I am, Your
19 Honor, and I'm here on behalf of
20 Intervenor Democratic National
21 Committee.

22 THE COURT: All right. And
23 also at your table is?

24 MR. GORDON: Good morning,
25 Your Honor. Matthew Gordon, also on

1 behalf of Intervenor DNC.

2 THE COURT: Thank you.

3 Counsel, and who are you?

4 MR. HOOVER: Matt Hoover here,
5 Your Honor, on behalf of the Intervenor
6 Bucks County Democratic Committee and
7 the Pennsylvania House Democratic
8 Committee.

9 THE COURT: All right. Thank
10 you, Mr. Hoover.

11 MR. HOOVER: Thank you.

12 THE COURT: Counsel, the
13 reason why I wanted to have a
14 conference before we had a hearing was
15 because I thought we could put some
16 stuff on the record, we could make sure
17 that we accomplish those things that
18 are not -- you can explain to me what's
19 -- what you agree to and what you don't
20 agree to, and then we can talk about
21 how we'll proceed with how the record
22 will be made and created and what's
23 necessary for it. And I'm looking for
24 guidance from you.

25 Let's, first, but before we go

1 further, let's talk about some matters
2 that are outstanding. I have requests
3 for admission of counsel pro hac vice.
4 And I'm assuming everyone's had an
5 opportunity to see them. One is for
6 Mr. Gordon.

7 Does anyone object to my
8 admitting Mr. Gordon pro hac vice? No,
9 no one objects, and the paperwork
10 certainly suggests that he should be
11 admitted. So I'm issuing that order.

12 Now, there is also some other
13 requests for admission of pro hac vice,
14 and I don't know the extent to which
15 they're necessary, but I'm not saying
16 that they're not. There's a request
17 for admission of Marc Elias. Is that
18 still requested?

19 MR. GORDON: Yes, Your Honor,
20 it is.

21 THE COURT: Is there any
22 objection to his being admitted?
23 There's no objection. All right,
24 admitted. And then we have one for
25 Uzoma Nkwonta.

1 MR. GORDON: Yes, Your Honor.

2 THE COURT: How did I do with
3 the pronunciation?

4 MR. GORDON: Very well. It's
5 just a slight modification, Uzoma
6 Nkwonta.

7 THE COURT: Thank you. All
8 right. Now, will they be participating
9 at the hearing today?

10 MR. GORDON: I don't
11 anticipate they will be participating
12 at the hearing today, Your Honor.

13 THE COURT: Okay. Thank you.
14 All right, they are all admitted.

15 Now, there have been petitions
16 to intervene filed. The first one I'll
17 take up is -- and the allegation is
18 it's unopposed, and I'm not suggesting
19 it's not, but the petition of the
20 Democratic National Committee. Is
21 there any objection to the Democratic
22 National Committee having standing here
23 and being admitted?

24 MR. HENRY: No, Your Honor.

25 THE COURT: No objection.

1 They are now admitted.

2 Now, is there any objection to
3 the petition to intervene by the Bucks
4 County Democratic Committee and the
5 Pennsylvania House Democratic
6 Committee? Any objection? No
7 objection. They are admitted. All
8 right. I think that is all the
9 outstanding orders.

10 Don't be shy. Does anyone
11 know of any other order that is
12 outstanding that needs to be signed by
13 me for us to proceed or that needs --
14 or would be appropriate to sign right
15 now?

16 Okay. So you're all here
17 officially attached to this hearing.
18 Let me give you some instructions.
19 First of all, I never think I'm the
20 smartest person in the room, and I
21 prove that point regularly. I would
22 ask that you not be afraid to -- don't
23 assume that I know anything. Assume
24 that I'm -- you know, maybe graduated
25 from high school, the first year in

1 college. So you might start all your
2 arguments in that level.

3 I have read every -- I have
4 read the pleadings, I have read law on
5 the issues, but I think that these are
6 important matters and I think they
7 deserve very specific attention.

8 I issued an Order requiring
9 you all to have a meeting yesterday.
10 I'm assuming that took place.
11 Miss VanderKam, did that take place?

12 MS. VANDERKAM: That's
13 correct.

14 THE COURT: Okay. And were
15 you able to create a stipulation as I
16 requested or, actually, as I ordered?

17 MS. VANDERKAM: We were, and
18 that was emailed to your chambers late
19 last evening.

20 THE COURT: Okay. The
21 stipulation was?

22 MS. VANDERKAM: Yes.

23 THE COURT: Okay. Have you
24 seen the stipulation?

25 MS. SCHECTER: I have not.

1 THE COURT: I'm not sure that
2 we received it. But, okay.

3 MS. VANDERKAM: We also have a
4 copy for you now.

5 THE COURT: That would be
6 great. Why don't you hand it up. So I
7 haven't read the stipulation,
8 obviously, because I didn't see it.

9 We will make this Court
10 Exhibit 1.

11 * * *

12 (Court Exhibit 1 was marked
13 for identification.)

14 * * *

15 THE COURT: Thank you. If you
16 just give me a moment. Does anyone
17 here anticipate having other attorneys
18 appear for the hearing this afternoon
19 that aren't here today?

20 MS. VANDERKAM: On behalf of
21 the Board of Elections, I believe we
22 may have Mr. Joseph Khan here this
23 afternoon.

24 THE COURT: Well, let me just
25 say this. When we have the hearing and

1 also for now, I'm expecting you to have
2 a lead attorney who will be doing all
3 of the speaking unless there's --
4 unless it's brought to my attention or
5 a record is made that someone else is
6 going to speak on something. But each
7 party is -- there are a number of
8 attorneys of record for the various
9 parties, but each party has one
10 attorney and it should be, I believe,
11 one voice so that I can -- if there are
12 objections or whatever else, it's the
13 one lawyer that makes the objections.

14 What is going to be necessary
15 in terms of creating a record in this
16 matter? And I'll let Petitioner tell
17 me, first, what you think. What's
18 going to be necessary beyond the
19 stipulation? If anything. I'm not
20 saying there is. I don't know. Since
21 I haven't read the stipulation, I don't
22 know how thorough you folks were.

23 MR. HENRY: I mean, outside of
24 the -- you know, there's certainly
25 variations on the ballots. You know,

1 each ballot is going to be -- you know,
2 have some variation as to how -- sorry.
3 I'm not sure if you can hear me -- how
4 it was completed. But outside of that,
5 I don't see anything other than oral
6 argument and legal argument.

7 THE COURT: Okay. Now, are
8 you anticipating that you're going to
9 be handing me ballots to look at?

10 MR. HENRY: There might be a
11 sampling of ballots. I believe that's
12 attached in the stipulation. There's
13 some reference ballots that should give
14 a clear, firm indication of what the
15 majority are going to look like. I
16 don't anticipate, certainly, handing
17 you 2000 ballots, Your Honor.

18 THE COURT: That's reassuring.
19 Okay. And have you all looked at the
20 sample ballots that you're going to
21 hand up? Well, let me, Miss VanderKam,
22 what's your thought? Do you have
23 sample ballots here for me to look at?

24 MS. VANDERKAM: So during the
25 course of the teleconference yesterday

1 and thereafter, we all had a discussion
2 that it might make sense to provide
3 sample -- a sampling of the ballots at
4 issue to you and that is included in
5 the stipulation. There are --

6 THE COURT: The actual sample
7 ballots are in the --

8 MS. VANDERKAM: There are
9 about a dozen samples in there, some of
10 which have no dates, some of which have
11 no printed names, for example.

12 THE COURT: Okay.

13 MS. VANDERKAM: And so there
14 is simply just a sampling for you to
15 review. If counsel for Petitioner does
16 -- let me back up. The stipulation has
17 specific numbers in each category for
18 what number of ballots are at issue per
19 category. I'm sorry, Your Honor.

20 THE COURT: That's all right.

21 MS. VANDERKAM: And it was my
22 thought that we were stipulating that
23 everyone agrees that, for example,
24 there are 1,196 ballot envelopes that
25 do not have dates or have partial

1 dates. I don't know think anyone
2 anticipated bringing 1,196 envelopes
3 over to you this afternoon. Certainly,
4 if Petitioner is requesting that, then
5 we'll make those envelopes available,
6 but my thought was in terms of the
7 stipulation we all stipulate that's the
8 number and we've provided to you a
9 sampling of those that are
10 representative of those 1,196 ballot
11 envelopes; and therefore, I wouldn't
12 think that we would have to bring them
13 over. So...

14 THE COURT: All right.

15 Mr. McDonald -- is it Mr. McDonald or
16 Mr. Gordon who is going to be answering
17 my questions or -- which one? Mr.
18 Gordon?

19 MR. GORDON: I suppose it
20 depends on the question. No, it'll be
21 me, Your Honor.

22 THE COURT: All right. Well,
23 you can look at your colleague and ask
24 him for some guidance.

25 So, Mr. Gordon, do you have

1 evidence that you're going to put in
2 besides what I've just heard?

3 MR. GORDON: No, Your Honor,
4 not beyond what's in the stipulated
5 facts and the attachments therein.

6 THE COURT: All right. And,
7 Mr. Hoover?

8 MR. HOOVER: Agreed. I
9 believe the stipulated facts and the
10 attachments cover the evidence, Your
11 Honor.

12 THE COURT: All right. Then
13 it seems to me -- I mean, I would -- I
14 wouldn't be opposed to moving the
15 hearing sooner, but it occurs to me we
16 received a phone call from -- my office
17 received a phone call or text message
18 or something, my secretary -- my legal
19 assistant received communications from
20 a reporter saying, What's the dial-in
21 number for the hearing? And we don't
22 have a dial-in number for the hearing.
23 And so I'm thinking that it would be
24 inappropriate for me to begin a hearing
25 earlier than has been scheduled.

1 You know, frankly, I wouldn't
2 mind doing it because I have the stuff
3 here. I'm going to be looking at this.
4 But it sounds that your stipulation is
5 going to be pretty significant and, if
6 anything, maybe there'll be some more
7 ballots that you're going to want to
8 introduce.

9 MR. HENRY: No, Your Honor. I
10 believe the sample that's been produced
11 is pretty fair and accurate of the
12 entirety for each --

13 THE COURT: Then it seems to
14 me that what you're telling me is your
15 stipulation is the whole record. Am I
16 correct?

17 MR. HENRY: Other than
18 argument, yes, Your Honor.

19 THE COURT: Short of me asking
20 questions, perhaps, to supplement the
21 record. I may have some questions that
22 I need to ask you. But then I can just
23 -- I can read the stipulated record and
24 we can come back for the hearing. Does
25 that sound correct?

1 MS. VANDERKAM: I think that
2 that is absolutely correct to the
3 extent you have a question that
4 requires the testimony of the Director
5 at the Board of Elections, Mr. Thomas
6 Freitag. He will be available at
7 two o'clock in case you do need
8 testimony as to an issue that is not
9 covered by the stipulation.

10 THE COURT: I would ask that
11 you have him available, if not here.
12 It wouldn't be hard for him to be here,
13 I wouldn't think.

14 MS. VANDERKAM: He is planning
15 on it, Your Honor.

16 THE COURT: Oh, he is planning
17 on it?

18 MS. VANDERKAM: Yes.

19 THE COURT: Okay. Well,
20 that's great then. Can anybody here
21 think of anyone else that they want?

22 MR. GORDON: No, Your Honor.

23 MR. HOOVER: No, Your Honor.

24 THE COURT: Okay. Just out of
25 curiosity -- I probably shouldn't ask

1 this, but I'm going to. I can't help
2 myself. Would you have been planning
3 to make that stipulation if I hadn't
4 issued the Order for you to meet and
5 put together a stipulation? Would that
6 have happened before you walked into
7 the courtroom today?

8 MR. GORDON: It --

9 THE COURT: Go ahead.

10 MR. GORDON: Like my grandma
11 used to say about chicken soup, it
12 didn't hurt.

13 THE COURT: Okay.

14 MR. GORDON: All I can tell
15 you, Your Honor, is I've been involved
16 in two of these cases. In Montgomery
17 County there was a stipulation reached,
18 a very detailed stipulation that we
19 actually used as the starting point for
20 this stipulation.

21 In the Philadelphia County
22 case, it was faster moving. We didn't
23 have time to reach a stipulation. So I
24 think there may have been an effort,
25 but your Order certainly helped.

1 THE COURT: Well, and I issued
2 the Order. I was a little concerned
3 when I did it because I wasn't going to
4 be around to give guidance or
5 direction. And so, then, there was --
6 subsequently my office received an
7 email saying that there's going to be a
8 phone conference and what the call-in
9 number was, and that gave me the
10 opportunity then to send a letter for
11 more clarification. I want to make
12 that part of the record as well. I had
13 hoped that that would give guidance.
14 It looks to me like my intent, and I do
15 not want to distract from your hard
16 work, but it looks like it worked. You
17 know, we simplified issues which I
18 think are important.

19 I will say that when I read
20 the petition, I thought the petition
21 was very straightforward and I thought
22 it called out for an opportunity for
23 the parties to meet and stipulate. So
24 -- and here we go. I will -- maybe
25 I'll do it this afternoon. I think I

1 have a copy of the emails. I know they
2 were given to me. I will make sure I
3 have a copy of the email that I'm
4 referring to and we'll put that into
5 the record as well.

6 Then I'm sorry to have -- I
7 don't want to waste your time, but
8 unless you can think of something else
9 we need to do administratively, it
10 looks to me like we're set and ready to
11 go. I was also allowing enough time if
12 you were having a problem with the
13 stipulation or anybody got cranky with
14 the other person, I would talk to you
15 all in the courtroom and then redirect
16 you. But it doesn't sound like you
17 needed any direction at all, unless
18 someone wants to call out for
19 something.

20 All right. Then it seems
21 pretty easy. We'll come back, then, at
22 two o'clock. I will have read the
23 stipulation, studied the stipulation.
24 I may have some questions, and then we
25 could actually do oral argument.

1 Are you intending to submit
2 memos at some point beyond anything
3 that's already been submitted?

4 MS. VANDERKAM: Your Honor, a
5 brief in opposition was submitted by
6 the Bucks Board of Elections last
7 evening as well.

8 THE COURT: So it's already in
9 the record or it's already -- issued
10 have a copy. So you have that.

11 And, Petitioner, are you going
12 to be submitting anything beyond what's
13 already in? You're welcome to do that.
14 I don't want to delay this, but I want
15 to -- it's my intent to get a decision
16 out very quickly on this, so any -- and
17 I have no problem with receiving
18 submissions, but I'm telling you
19 they're going to have to be done
20 quickly. So are you intending to
21 submit more?

22 MR. HENRY: I do not, Your
23 Honor.

24 THE COURT: All right. So
25 you'll -- and I believe your authority

1 is in your petition.

2 MR. HENRY: That is correct.

3 THE COURT: I can't remember,
4 but I don't think your petition has an
5 accompanying memo, but the petition
6 cites the law. So you'll rely on that
7 alone?

8 MR. HENRY: Yes, Your Honor.

9 THE COURT: I did -- I believe
10 I was told that the Democratic National
11 Committee did file a memo, I guess. Is
12 that correct?

13 MR. GORDON: Yes, Your Honor,
14 along with our Motion to Intervene we
15 filed an answer to the petition, but
16 that was just -- not a detailed answer.
17 And then last night we filed an
18 opposition brief similar to what the
19 County did.

20 THE COURT: Okay. And,
21 Mr. Hoover, will you be filing any or
22 have you filed something already?

23 MR. HOOVER: No, Your Honor.
24 In my answer I included legal analysis
25 to the factual pleadings. I wasn't

1 sure locally if there was a vehicle for
2 a brief or a pleading like this. So
3 instead of that I beefed up my answer
4 to a point where it includes a legal
5 analysis for each of the issues.

6 THE COURT: So, again, I'm not
7 going to prevent anyone if they want to
8 submit something, but I'm going to give
9 you like a very short period of time.
10 But I'm not going to require it. If
11 you took it, you've already got memos
12 of the file.

13 MR. HOOVER: I'm satisfied
14 with my response, Your Honor. Also,
15 after reviewing the Board of Elections'
16 response and the Democratic National
17 Committee response that it would be a
18 lot of redundancy if I added it on top
19 of my response. I think my response is
20 sufficient -- would be sufficient.

21 THE COURT: Okay. Well, then
22 that sounds pretty good. Then I will
23 be doing a lot of reading between now
24 and two o'clock, but I'll see you at
25 two o'clock and we'll complete the

1 record at that point. All right?

2 MS. VANDERKAM: I am loathe to
3 raise this issue, Your Honor, but I
4 feel that I must. Your Order directed
5 Petitioners to provide notice of the
6 Order to all interested parties that a
7 hearing was going to occur today at
8 2:00 p.m.

9 THE COURT: I did.

10 MS. VANDERKAM: In my view,
11 all interested parties includes the
12 2000 or so voters of those ballots that
13 they're seeking to have you invalidate
14 today. So I have not seen any sort of
15 affidavit of service that indicates
16 that service has been made.

17 THE COURT: Well, one of the
18 things I said in the -- in my notice to
19 you was that the -- I believe in my
20 Order it said that the stipulation --
21 and, of course, I haven't read the
22 stipulation yet -- touched on that and
23 said that should deal with what notice
24 was provided.

25 Is there anything in the

1 stipulation that discusses notice to
2 people?

3 MS. VANDERKAM: Not to voters,
4 Your Honor.

5 THE COURT: Okay. And I don't
6 know whether notice to the individual
7 voters is required under the statute.
8 The statute says notice goes to -- the
9 statute, and I think in my Order I took
10 language right from the statute. And I
11 think that the statute does require a
12 certification be filed before any order
13 is issued.

14 See, I actually did know a
15 little bit of the law. I try to set
16 the bar very low for you; very, very
17 low.

18 But if I'm not mistaken, I
19 think the statute speaks to the notice
20 and says that before any ruling can be
21 made, a certification of notice has to
22 be filed.

23 Does anyone agree with that or
24 disagree or? Does anyone know what I'm
25 talking about? I see blank faces.

1 MS. VANDERKAM: (Nods
2 affirmatively).

3 THE COURT: All right. Here's
4 what I'm going to do. I'm going to
5 direct you between now and when we come
6 back to look and see to what extent you
7 contend that notice needs to be
8 incorporated into the record and
9 whether or not it -- you know, whether
10 or not we have sufficient information
11 in the record and what's required if it
12 hasn't been.

13 And let me see if I can give
14 you some help in that regard. I'm not
15 sure I have it. I am not sure I have a
16 copy of that section of the law, though
17 I might. Okay. Yes. It's under --
18 here we go. If you look at 25P.S.
19 3157(a) it says specifically: "Upon
20 the payment to the prothonotary of a
21 fee for filing such appeal, a judge of
22 the court shall fix a time and place
23 for hearing the matter in dispute
24 within three days thereafter, of which
25 due notice shall be served, with a copy

1 of such appeal, by the appellant upon a
2 member of the county board whose action
3 is complained of and upon every
4 attorney, watcher or candidate who
5 opposed the contention of the appellant
6 before the county board, and upon any
7 other person that the judge shall
8 direct, at least two days before the
9 matter shall be reviewed by the court.
10 Proof of such notice or the waiver
11 thereof must be filed therein before
12 any appeal is sustained."

13 Now, I take that to mean that
14 those specific entities, and I believe
15 in my Order, I believe I -- one of my
16 orders picked up that language
17 specifically. It was my intent to do
18 that. And, let me see, give me a
19 moment.

20 All right. My first Order
21 when I was assigned this case on the
22 day I was assigned it, somebody
23 scheduled this conference because I
24 figured, all right, between now and
25 then I'll figure out what we have to

1 do. Then I did some reading and the
2 next day I did a more comprehensive
3 Order specifically scheduling the
4 hearing, which I think has a time -- it
5 wasn't that you're supposed to have a
6 hearing in three days, but you were
7 supposed to schedule it within three
8 days. So I quickly issued the next day
9 when I realized that, issued my Order
10 of November 13th, wherein I scheduled
11 the -- rescheduled the conference to
12 take place today at 10:00 a.m. and that
13 the Order for a hearing, that the
14 hearing would take place at 2:00 p.m.
15 in this courtroom.

16 Then on that same day, I
17 issued an Order for a pretrial
18 conference and stipulation of facts.
19 And in that Order -- by the way, in
20 each of the Orders, it says, "Counsel
21 for Petitioner shall provide notice of
22 this Order to all interested parties."
23 I redefined that under my Order of
24 November 13th where I ordered you to
25 attend a pretrial conference, the

1 purpose of which was to prepare a
2 stipulation of facts, and in that I
3 specifically ordered: Petitioners'
4 counsel shall serve upon the Board of
5 Election, every attorney, watcher or
6 candidate who opposed the contention of
7 the Appellant before the County Board a
8 copy of their petition along with the
9 scheduling orders issued by this Court,
10 along with an invitation to meet in
11 person at a location in Doylestown,
12 et cetera. And that was for scheduling
13 the -- your conference, which took
14 place yesterday, and then until my
15 Order I further spelled out what was
16 supposed to happen at your pretrial
17 meeting. Not at this conference, but
18 at the pretrial meeting which took
19 place yesterday, described for you what
20 you were supposed to do.

21 Superficially it appears like
22 you did that, but as far as the notice,
23 I do believe that the record does
24 require a certification to be created.
25 I ordered, I thought to myself when I

1 made the order that your stipulation
2 would include that information in it.
3 Again, I haven't seen your stipulation.
4 But that is an issue that I think that
5 the parties need to deal with. And
6 when you come see me this afternoon,
7 you can tell me if there's a problem
8 concerning that. All right. Unless
9 somebody wants to address it right now
10 for some reason.

11 MR. HENRY: I would just like
12 to say we did file a Certificate of
13 Service on the docket that indicated
14 that we believe we complied with your
15 Order as far as notification to all the
16 parties who, obviously --

17 THE COURT: All right.

18 MR. HENRY: -- participated in
19 the conference.

20 THE COURT: All right. Well,
21 someone in the courtroom will -- who
22 works for me will go on the docket and
23 see what we can pull out and look at
24 it. You're welcome to, if you have a
25 copy of it with you, to put it -- you

1 know, make reference to it and show
2 this to me this afternoon, and I will
3 make a point of looking for it.

4 If anybody here feels that
5 that's not sufficient, you can tell me
6 what remedy you would like. My first
7 reaction, Miss VanderKam, is that all
8 the people whose ballots are being
9 challenged by the mere -- by the mere
10 fact that their ballot is being
11 challenged wouldn't receive notice
12 under that statute unless I had ordered
13 it. I was not requested to do that,
14 and I think that would be a pretty big
15 task for 2000 people to be contacted,
16 but -- and the other problem is we also
17 have the requirements. We've got to
18 get this resolved quickly. So I don't
19 know that that procedure -- I don't
20 know what to say, but that was not
21 presented to me in any meaningful way
22 for me to do anything about it up until
23 this moment. And, of course, I don't
24 know who at the hearing was there, took
25 part in the hearing, opposed the

1 hearing, whatever else. You put into
2 the record the decision of the Board,
3 and that decision makes reference to
4 the hearing or whatever. But it isn't
5 -- the document itself doesn't say the
6 following people were present or took
7 part in or -- so the language of the
8 statute might well include people that
9 I don't know about. But I don't know
10 about them; you folks would know about
11 them.

12 Just out of curiosity, who was
13 at the hearing which is being appealed?
14 Were any of the lawyers in this room at
15 that hearing?

16 MS. VANDERKAM: Yes.

17 THE COURT: And that would be
18 you? You're saying yes.

19 MS. VANDERKAM: Myself,
20 Mr. Hoover. There were no --

21 THE COURT: You know,
22 Mr. Hoover, you were shy there. You
23 were there as well?

24 MR. HOOVER: I was letting
25 Miss VanderKam speak first. But, yes,

1 I was there as well.

2 THE COURT: Okay. Thank you.
3 And, counsel, I'm assuming you were
4 not, correct?

5 MR. GORDON: That is correct,
6 Your Honor, we were not there.

7 THE COURT: Counsel, I'm
8 assuming you were not, then?

9 MR. HENRY: I was not, Your
10 Honor.

11 THE COURT: So is there a
12 record made of anyone who opposed that
13 -- opposed these -- the decision or
14 whatever else?

15 MS. VANDERKAM: No, Your
16 Honor. It's not -- under the Election
17 Code, it's not a hearing, per se. It's
18 part of the canvassing meeting which
19 stretched several days. So the Board
20 met during that several-day canvas
21 meeting to make these sufficiency
22 determinations under the Election Code.
23 Authorized representatives have been
24 present throughout the canvassing,
25 beginning with the pre-canvass at

1 7 a.m. on Election Day and then from
2 day to day to day to day as the
3 canvassing is ongoing.

4 So on the day where these
5 sufficiency determinations were being
6 made, there were authorized
7 representatives there for several
8 candidates, none of which were the --
9 was the candidate that's -- that were
10 any of the candidates that are
11 Petitioners in this action. They were
12 not present at that moment. There were
13 other authorized representatives there
14 for other candidates.

15 THE COURT: Right. Okay.
16 Because it's interesting Garrity for PA
17 and Heidelbaugh for Attorney General,
18 their opponents by name are not here as
19 responding to this. I'm not suggesting
20 that they're not being -- their
21 interests aren't being represented
22 because their interests are being, I
23 think, represented by the parties that
24 have recently intervened.

25 I will also note when you say

1 someone's interests were being
2 represented, am I correct in that in
3 this issue we have no idea on any
4 individual ballot who the person voted
5 for?

6 MS. VANDERKAM: That's
7 correct.

8 THE COURT: So the real irony
9 is the parties are taking a position
10 here, and if they're successful, it may
11 or may not help them in the overall
12 vote. Am I correct in that as well?
13 Does everyone agree with that?

14 MR. HENRY: Yes, Your Honor.

15 THE COURT: I just find that
16 somewhat ironic and interesting. I'm
17 not being judgmental about that in any
18 way. I'm just saying it's one of the
19 ironies of what this hearing is about.
20 Okay. We don't know how they -- what
21 these -- who voted how.

22 I will ask you another
23 question, which we should probably make
24 a record of. I think it would be good
25 to have someone here to make some sort

1 of record about the process of what you
2 just described in terms of how it's
3 done. It doesn't have to be long, but
4 just generally explain that process.

5 For one reason, I mean the
6 statute, because it -- I read to you
7 the language from that statute. It
8 makes it sound like there were these
9 identifiable people who were there
10 taking a position on some sort of
11 record even though there was no formal
12 record made. And, in fact, that's not
13 the process that's generally followed
14 anywhere. I'm pretty much aware of
15 that fact. So we have to put together
16 reality and then the black-letter law.
17 So I think it might make sense to put
18 that in.

19 But I do have a question. If
20 I ordered it, could you go back and
21 find my ballot?

22 MS. VANDERKAM: Yes.

23 THE COURT: My specific
24 ballot?

25 MS. VANDERKAM: Yes.

1 THE COURT: You could go back
2 and find my specific ballot and saw how
3 I voted?

4 MS. VANDERKAM: I want to be
5 specific with the words, Your Honor.
6 We could find -- if you submitted a
7 mail-in or absentee ballot --

8 THE COURT: Right.

9 MS. VANDERKAM: We could find
10 the envelope, the outer envelope that
11 your -- it -- that had within it the
12 privacy envelope that had within it
13 your ballot. So we can't find your
14 ballot, sir. We could find the outer
15 envelope that you mailed that you put
16 into the mail service.

17 THE COURT: Well, but the
18 ballots that are being challenged today
19 have been segregated so that -- they're
20 provisional so that you could get those
21 actual -- you can find the actual
22 ballot; am I correct?

23 MS. VANDERKAM: No.

24 THE COURT: So then how --
25 well, maybe we'll make a record on this

1 because one of the things I -- then
2 we'll make a record at the time of the
3 hearing on that because I'm going to
4 want some explanation.

5 If I said yes or no to some
6 part or whatever else, we have to make
7 a record on that point.

8 MS. VANDERKAM: I'm happy to
9 explain now if you wish.

10 THE COURT: Well, we can do
11 that. Would it make more sense to do
12 it during the hearing so that's
13 evidence that comes in in terms of what
14 the hearing's about?

15 MS. VANDERKAM: I think it
16 would make sense for it to come in at
17 two o'clock. I'm just saying if you
18 are curious of the answer --

19 THE COURT: Sure.

20 MS. VANDERKAM: -- in this
21 moment before two o'clock, I could
22 provide that information.

23 THE COURT: Why don't you
24 explain that to me, then.

25 MS. VANDERKAM: So the

1 categories that are before you for
2 consideration to be invalidated, those
3 categories -- let's just take one of
4 them. There's 1,196 outer envelopes
5 that either lacked a date or had a
6 partial date on the outer envelope.
7 All 1,196 of those envelopes were
8 canvassed, which means -- canvassing is
9 opening of the envelope, taking the
10 secrecy envelope out of it, putting
11 those all in a pile and then the staff
12 opens those secrecy envelopes.

13 Those were done in specific
14 subgroups, and then they were uploaded
15 into the State's numbers in the
16 specific subgroup. So if you were to
17 order, Your Honor, that none of those
18 ballots should be canvassed, the Board
19 has the ability to pull those numbers
20 out of the count specifically with that
21 category, and that's the case with all
22 of the categories.

23 So I cannot tell you that
24 Suzie Smith, who signed her ballot --
25 her outer envelope, who printed her

1 name, who printed her address, who did
2 everything accurately, except for she
3 didn't include a date, I can't say to
4 you: I can find Suzy Smith's ballot.
5 But I can pull the entire group of
6 ballots out if the Court ordered that
7 to be done.

8 As a practical matter, the
9 Board made this decision to canvas
10 these ballots on the 7th. There was no
11 application for an immediate stay. The
12 Board is under tremendous pressure to
13 canvass, canvass all of the ballots
14 and, you know, certify results to the
15 State, and so we continued to do that
16 upon receipt. And so they are into the
17 system, but they have the ability to be
18 pulled back out if you were to find
19 that one of these categories should be
20 pulled back out.

21 THE COURT: Well, one of the
22 categories is -- and spoiler alert, I'm
23 going to tell you the thing that I'm
24 looking at, and maybe when I see this
25 I'll say it's not an issue. But you

1 refer to a category as either there was
2 no date or a partial date. The statute
3 in the Code talks about you sign and
4 date the declaration. You have thrown
5 out ballots for not being signed; am I
6 correct?

7 MS. VANDERKAM: The Board
8 decided to not tabulate those.

9 THE COURT: They were not
10 accepted. Thank you for your -- and
11 that's proper, I mean your
12 clarification. The fact that you have
13 a partial date, to me, is a giant
14 distinction from no date. And I'm
15 planning on listening to people discuss
16 that with me, but a partial date to me
17 is a date, could be anyway. I'm
18 assuming -- depends on what it is. No
19 date is no date.

20 So a person who doesn't put a
21 date somewhere on the ballot, that's
22 one category, and then there might be
23 another category where you can't read
24 my writing. Okay. The person dated
25 it, it's illegible as could their

1 signature be illegible. Someone could
2 write it. But date versus, you know, a
3 partial date -- and, again, until I
4 understood what a partial date was, and
5 a partial date could be, you know, you
6 don't add the year to it but you've got
7 the date and month, that's one thing.
8 If someone wants to argue that's
9 insufficient, okay, I'll listen to it.
10 But it's a date. So I'm concerned
11 about that category for that reason.

12 MS. VANDERKAM: I'm happy to
13 address that concern now or later, Your
14 Honor.

15 THE COURT: If you want to
16 address it now, you can.

17 MS. VANDERKAM: Of course. So
18 I absolutely agree with you that the
19 statute says what you say that it says.

20 THE COURT: Say it again. I
21 did read something good.

22 MS. VANDERKAM: The statute
23 also says that you should fill your
24 ballot out in blue or black ink. But
25 the Pennsylvania Supreme Court had

1 held, I think, back in the '50s, and
2 you'll see this in our brief, that a
3 voter's decision to use red ink doesn't
4 invalidate that ballot.

5 Compliance with the technical
6 requirements of the Code need to be
7 reviewed in the sense of whether or not
8 the voter could be perpetrating fraud,
9 and there is no allegation, and you
10 will see in the stipulation between all
11 of the parties that there are no
12 allegations that these ballots --

13 THE COURT: Okay. Let me stop
14 you.

15 MS. VANDERKAM: -- are --

16 THE COURT: Let me stop you.
17 I know that's what the argument is
18 going to be. But the short answer is I
19 don't have the ability to segregate and
20 you don't have the ability to segregate
21 that category into two subgroups, if I
22 understand. So it's -- so then is my
23 decision all or nothing?

24 I mean, that I think is --
25 because the Pennsylvania Supreme Court

1 specifically stated within the last
2 year that the sufficiency of a ballot,
3 and, again, I'm blowing my cover here.
4 But they specifically -- and when I
5 said blowing my cover, you can see I
6 did a little reading -- specifically
7 stated that the sufficiency of a ballot
8 -- and I think it's during the
9 canvassing process. What they look for
10 is a signature and a date, and they put
11 the -- and the date is next to it in
12 the decision. And I'll -- while I'll
13 wait until this afternoon, but you can
14 make your argument then, but I'm going
15 to tell you -- let me just see. Give
16 me a moment.

17 In Boockvar, the October 23rd
18 decision -- by the way, I didn't just
19 say 2020, did I? So I gave you a
20 date -- some of the language says:
21 Thus in determining whether the
22 declaration is, quote, "sufficient,"
23 unquote, for mail-in or absentee ballot
24 at canvassing, the county board is
25 required to ascertain whether the

1 declaration on the return envelope has
2 been filled out, comma, dated and
3 signed. Now, that's one piece. And
4 then the opinion of November 3rd, 2020
5 general election, at 2020 Pa. LEXIS
6 5560, pages 35 through 36, the
7 Pennsylvania Supreme Court said: The
8 requirements of a ballot declaration
9 are set forth in Section 3146.69(a),
10 absentee ballots, and
11 Section 3150.16(a), small A, mail-in
12 ballots. Both sections require that
13 the elector fill out, date and sign the
14 declaration. And I'm going to skip the
15 citation.

16 Then it goes on to say: Thus,
17 in determining whether the declaration
18 is, quote, "sufficient," unquote, for a
19 mail-in or absentee ballot at
20 canvassing, the county board is
21 required to ascertain whether the
22 declaration on the return envelope has
23 been filled out, dated and signed.
24 This is the extent of the Board's
25 obligation in this regard. In

1 assessing the declaration's
2 sufficiency, there is nothing in this
3 language which allows or compels a
4 county board to compare signatures.
5 Accordingly, we would decline to read a
6 signature comparison requirement into
7 the plain and unambiguous language of
8 the Election Code as intervenors urge
9 us to do, inasmuch as the General
10 Assembly has chosen not to include such
11 a requirement at canvassing.

12 So I'm -- and I'm not being
13 dismissive when I say this. I am aware
14 of the overlying principles and,
15 certainly, a very big principle is that
16 the law should not be construed to
17 disenfranchise a voter. However,
18 mandatory -- I think the Supreme Court
19 has now said in two -- Pennsylvania
20 Supreme Court has now said in two
21 decisions: Mandatory language must be
22 followed, "shall" be followed, quotes
23 around shall. And I have to deal with
24 that issue. You have to deal with that
25 issue, and that's what I plan to have

1 you focus on.

2 And now what I have learned --
3 and, by the way, I think that this
4 conference -- there's no reason why
5 this conference -- everything you've
6 said here is part of the overall
7 record. I'm also going to say to you,
8 counsel, when you speak, if you want to
9 pull something back, you can, and tell
10 me now. Otherwise, I am going to
11 assume that what I'm about to say is
12 correct.

13 When you tell me something in
14 the courtroom and you say, well, this
15 is such and such and this is our
16 position, your comment on behalf of
17 your clients -- and the reason why I
18 also ask you: Well, who are you
19 representing? Your comments are made
20 on behalf of your client in their
21 judicial admissions. And that's why I
22 said to Petitioner: You have four
23 Petitioners. Every time Mr. Henry
24 speaks, he speaks for four Petitioners,
25 and whatever he says he speaks for all

1 of them. I mean, that's my
2 understanding, but I'm holding to
3 judicial admission.

4 So I take it that these
5 ballots now are the issue of partial or
6 full is they're lumped together, and
7 that's the situation we have for better
8 or for worse, but -- and that's
9 correct? Everyone agree with that?

10 MS. VANDERKAM: Yes.

11 THE COURT: No one disputes
12 that, I think. Okay.

13 Well, that's a fact that I
14 think you ought to be thinking about
15 over lunch. I mean, you can say, well,
16 don't worry about it, Judge, just --
17 they all have to be treated exactly the
18 same. There's that language, then, and
19 I welcome your input on now that
20 language is not mandatory, how you
21 separate it. Because you know that the
22 Pennsylvania Supreme Court made a very
23 specific -- by the way, the one
24 decision I cited was done under the
25 authority of the King's Bench. They

1 took that up to give direct guidance.
2 You know, was the Supreme Court justice
3 just rambling on with words when they
4 put *signature* and *date* together in the
5 sentence and they really just meant to
6 say *signature*. What am I to read on
7 this? The statute also says *signature*
8 and *date*. It doesn't say a lot of the
9 other stuff, but it does say *signature*
10 and *date*. And the naked -- and the
11 argument over the naked ballot, the
12 Supreme Court specifically says certain
13 things are compelled.

14 You know, I find that to be
15 something that I have to wrestle with
16 at the end of the day here, and I now
17 have this other piece to wrestle with,
18 which I don't know what to do with that
19 information yet. But since I'm not the
20 smartest person in the room, since all
21 of you are much smarter than I am in
22 terms of Election Law, I'm sure you
23 will be able to guide me. All right.

24 Those who have never met me
25 before are probably going, Who is this

1 nut? But you can talk to the people
2 who have met me before.

3 I don't think -- unless
4 someone else wants to say something on
5 this point, counsel, Petitioner, you're
6 quiet over there.

7 MR. HENRY: I don't. You
8 know, if I could -- I mean, I'm not
9 saying that we will, but to the extent,
10 you know, I speak with my client and if
11 they want to try to provide some
12 additional case cite or argument or --

13 THE COURT: No, I'm not asking
14 you that. I'm just saying if anybody
15 else wants to churn (sic) in on
16 anything I just said at the moment.
17 We're going to have an opportunity this
18 afternoon. Does anybody need anything
19 before we come back this afternoon?

20 MS. VANDERKAM: I would just
21 say, Your Honor, on the date issue,
22 because I can't help myself, I think
23 one way to look at the cases that were
24 before the Pennsylvania Supreme Court
25 recently is that they weren't

1 considering the date issue specifically
2 --

3 THE COURT: They weren't.

4 MS. VANDERKAM: That was --

5 THE COURT: They absolutely
6 were not.

7 MS. VANDERKAM: The only issue
8 they were discussing that was before
9 them was whether or not the boards had
10 to do some --

11 THE COURT: Right.

12 MS. VANDERKAM: -- sort of
13 signature analysis.

14 THE COURT: I agree.

15 MS. VANDERKAM: So there's
16 citation to the statute in that opinion
17 I don't think needs to be as commanding
18 to you in your decision here.

19 THE COURT: I'm assuming
20 that's what your arguments's going to
21 be.

22 MS. VANDERKAM: Thank you.

23 THE COURT: I'm assuming and
24 I'm assuming you are aware of those
25 cases. I'm just telling you: Okay,

1 look at those cases. I'm looking at
2 those cases, and, as I say, I think it
3 is an argument or a thought that it can
4 create two different things that I'll
5 carry further for you. In your
6 decision -- it was a decision, right?
7 I mean, what you printed was a -- in
8 the Board's determination --

9 MS. VANDERKAM: The Election
10 Code contemplates that the Board may
11 render a writing to memorialize the
12 decision they made --

13 THE COURT: Right.

14 MS. VANDERKAM: -- in
15 determination. And so it was in that
16 light that their written decision was
17 prepared.

18 THE COURT: Correct. So I
19 don't know, whatever you want me to
20 call it. But in that you -- when I say
21 you, your client. And it may have been
22 you. I'm not sure that they say who
23 the author is of this, but it might
24 have been you.

25 It says and explains this

1 piece of it because of the date and the
2 time when they were sent, you were
3 satisfied that you had information, the
4 totality of the information shows that
5 they would have been signed at the time
6 that it was appropriate. I don't
7 disagree with that logic, and we'll let
8 you talk more on it.

9 I just don't know that I'm --
10 if it was a partial date, the person
11 would have dated it; it just would have
12 been arguably -- if I say to you: I'll
13 see you next Thursday. Some people are
14 not sure, and I'm never sure whether
15 you mean literally in two days from now
16 or do you mean the next Thursday or the
17 following Thursday, not the one that's
18 coming up. I never know what that
19 means. So you need -- but, on the
20 other hand, if we were planning on
21 getting together the following
22 Thursday, you'd probably take that
23 statement. You'd understand what it
24 meant because of the full totality of
25 the circumstances, the information you

1 already have at your fingertips, that
2 abbreviated versions of: I'll see you
3 next Thursday would give you a date
4 that you would know about. Similarly,
5 if I reference something in the past
6 and I use the numbers November 17th,
7 and then suppose I said 11/17 and then
8 it said -- I'm sorry, make it --
9 suppose it said 11/11 and I put in
10 after it '17, didn't put 2017, I just
11 put '17, you might assume that means
12 2017. I could have also meant
13 Armistice Day 1917. Depending upon the
14 context of what I said you would know
15 what that partial date meant.

16 So I see that as something
17 worth discussing when we come back, but
18 I would also say it leaves me with a
19 quandary in terms of -- you know, let's
20 suppose I already concluded the date
21 was necessary but a partial date would
22 satisfy. I don't know what I'm
23 supposed to do now. And do you want to
24 -- and does your client really want to
25 throw out those ballots without even

1 knowing what they are because of that
2 ministerial mistake?

3 MR. HENRY: Not to sound
4 heartless, Your Honor, but since they
5 sent me here to do that, I would assume
6 that that's what they would like me to
7 accomplish.

8 THE COURT: Okay. Well, I am
9 going to find as a fact that is what
10 you want to accomplish. I'm not saying
11 that's wrong, right or indifferent.
12 I'm saying that that's a -- that's the
13 issue that confronts me.

14 We're going to take a recess
15 now. You'll have plenty of time to
16 think about this. You'll have plenty
17 of time to come back and tell me
18 exactly what I should do. And I invite
19 you to focus the language on those
20 cases. You know the case I'm talking
21 about, and we'll be able to discuss all
22 of this when we come back.

23 * * *

24 (A recess was taken.)

25 * * *

1 THE COURT: Now, I said this
2 this morning, but I'm going to say it
3 again for people who are out there and
4 see me do something here. I am going
5 to take my mask off, and the parties
6 have all agreed that that did not upset
7 them. If there is someone in the
8 audience that is concerned because I've
9 taken my mask off, I would tell you to
10 move further away from me. I think I
11 am far enough away from everyone in the
12 courtroom. And I realize we now have
13 one or two other people in close
14 proximity.

15 If you are on this side of the
16 bar of the Court and it troubles you to
17 have me take my mask off, please tell
18 me. I'm not pushing that on anyone,
19 but I think out of courtesy to the
20 litigants, they should be able to see
21 my face. And so after I check with
22 them, it's been my practice since we've
23 all been wearing masks to on some
24 occasions take my mask off with the
25 understanding that anyone has the right

1 to object to that and I won't do it if
2 they have an objection. I don't see an
3 objection, so I'm going to take my mask
4 off.

5 I am going to tell counsel
6 word got back to me that at this
7 morning's conference our stenographer
8 did have trouble hearing some of you
9 from time to time. I can't emphasize
10 enough how important it is for you to
11 get your voice on the sound system. I
12 don't know how stenographers do what
13 they do, anyway. But you may not
14 appreciate the distance you are from
15 the stenographer and we've got plastic
16 partitions between some of you and her.
17 So it is difficult, and she can't see
18 your face, and looking at someone's
19 face when they're talking helps you
20 understand what they're saying,
21 including lip reading to some extent.
22 Everybody lip reads, whether they know
23 it or not, to some extent. So I will
24 tell you it's very important to get
25 your voice into a microphone.

1 you have other evidence that you wish
2 to put into the record beyond the
3 stipulation of facts at this time?

4 MR. HENRY: There may be one
5 or two other cases that I think are
6 relevant, but other than oral argument,
7 no, Your Honor.

8 THE COURT: Okay. So the
9 factual record is made, as far as
10 you're concerned, on behalf of -- and I
11 think the way you put it, you represent
12 -- you have authority to represent all
13 four of the Petitioners, but you are
14 here principally on behalf of the first
15 Petitioner, Donald J. Trump For
16 President, Inc.; am I correct?

17 MR. HENRY: That's correct,
18 Your Honor.

19 THE COURT: Okay. Thank you.
20 Then I'll go to Respondent. You said
21 you were going to supplement the
22 record, or we talked about you
23 supplementing the record, correct?

24 MS. VANDERKAM: We did, Your
25 Honor.

1 THE COURT: All right. So the
2 record is clear at this point, I think
3 we said it before, but the stipulation
4 of the parties -- by the way, now that
5 I have read the stipulation and
6 reviewed it, I do want to commend you.
7 I think counsel did an excellent job
8 and I have to -- I didn't hear any
9 shouting or screaming, there was no
10 motions, I haven't heard anybody say
11 complaints about each other. I think
12 your stipulation is excellent in terms
13 of really focusing on facts, probably
14 wanting to get more things in.

15 I mean, each of you may have
16 wanted a couple more things in. But I
17 think it's really excellent, and it
18 helps me out a lot in terms of
19 understanding these things. So I
20 commend you for a job well done. And,
21 also, that makes this whole case a lot
22 simpler. And with that, I will let
23 Respondent begin to present their
24 evidence.

25 MS. VANDERKAM: Thank you,

1 Your Honor. We would call Mr. Thomas
2 Freitag, Director of Bucks County Board
3 of Elections.

4 THE COURT: All right. Sir,
5 I'm going to have you come up here, and
6 you're going to be behind a plastic
7 shield. So I'm going to direct that
8 you're going to have to remove your
9 mask when you testify in there so your
10 face can be seen. And I may move my
11 seat so I can actually see you better.

12 THE CLERK: Raise your right
13 hand.

14 * * *

15 THOMAS FREITAG, after having
16 first been duly sworn, was examined and
17 testified as follows:

18 * * *

19 THE WITNESS: I do swear.

20 THE CLERK: State your name
21 and spell your first and last name.

22 THE WITNESS: Thomas Freitag,
23 T-H-O-M-A-S F-R-E-I-T-A-G.

24 THE COURT: Thank you. Have a
25 seat.

1 THE WITNESS: Thank you.

2 THE COURT: Now, Mr. Hoover,
3 if you can't see him and you need to
4 move, I understand. I'm not sure where
5 you're going to move to, but...

6 MR. HOOVER: I can see the
7 witness, Your Honor. Thank you.

8 THE COURT: Thank you. You
9 may continue.

10 MS. VANDERKAM: Thank you.

11 DIRECT EXAMINATION

12 BY MS. VANDERKAM:

13 Q. Mr. Freitag, can you inform the Court as
14 to your employment and how long you have been
15 with the Bucks County Board of Elections?

16 A. I'm the Director of the Bucks County
17 Board of Elections. I have been with the
18 department for six years.

19 Q. And, sir, during a conference that we
20 held earlier this morning there was an
21 indication by this Court that they would
22 appreciate some information regarding the
23 process involved with these particular
24 declarations and ballots. I'm going to ask you
25 some questions in that regard.

1 A. Okay.

2 Q. Can you detail for us the life cycle of
3 a ballot? I'm sorry. An absentee or mail-in
4 ballot. Where does the life cycle of such a
5 ballot begin?

6 A. Oh, it would start with an application.
7 The voter would apply for either an absentee or
8 a mail-in ballot either by a paper application
9 or online.

10 Q. And what information would they have to
11 provide to the Board in that application?

12 A. The application would have their name,
13 their registered address, their date of birth.
14 It would have their signature. If it was an
15 absentee, it would have -- require a reason. It
16 would also have their driver's license number or
17 the last four digits of their Social Security
18 number.

19 Q. And if they requested in that
20 application to be sent a ballot to a different
21 address, would that information be on that
22 application?

23 A. Yes, it would have to be an alternate
24 address they can have it sent to.

25 Q. And that is acceptable?

1 A. That's correct.

2 Q. And, then, once the application is
3 filed, what does your staff do at the Board of
4 Elections with the application?

5 A. We review the application to make sure
6 that the voter is, in fact, the registered
7 voter, and we have all their necessary
8 information. We would then process the
9 application accordingly, either approve or deny
10 it. If it were to be approved, then it would go
11 to -- the next step would be to get everything
12 ready to send the ballot to the voter; either if
13 the voter was there in person, we could issue it
14 right there, or we'd have it sent to our mail
15 house, which we send the files daily for them to
16 send ballots to those people. And we send them
17 the information where they want the ballots sent
18 to and everything.

19 Q. And the envelope that is sent to the
20 voter, which I'll call the outer envelope, is
21 there any instructions to the voter on that
22 outer envelope?

23 A. Yes.

24 Q. And what are those instructions to the
25 voter?

1 A. It says to: Put your ballot inside the
2 secrecy envelope and place it in there and then
3 also to sign the voter's declaration in their
4 own handwriting.

5 Q. And those instructions, were they placed
6 on the envelope pursuant to the Secretary of
7 State's directive?

8 A. Yes. They were templates sent to us by
9 the Department of State.

10 Q. Okay. And these absentee and mail-in
11 envelopes, particularly the mail-in envelopes,
12 are these a new process under Act 77?

13 A. Yes.

14 Q. And Act 77 just being passed late last
15 year in 2019?

16 A. Yes.

17 Q. Okay. Now, when the ballots began to be
18 canvassed by the Board of Elections, can you
19 describe the process that your staff was
20 undergoing with review to the declarations on
21 the envelope?

22 A. So as ballots came --

23 THE COURT: Let me ask you
24 this, if I could. When she said: When
25 you begin canvass, does that mean --

1 that means when you start processing
2 the ballots; is that correct?

3 THE WITNESS: Well, canvassing
4 --

5 THE COURT: What does that
6 mean?

7 THE WITNESS: Canvassing would
8 be the actual count of the ballot. Are
9 you referring to the count or when the
10 ballots come back to the office?

11 BY MS. VANDERKAM:

12 Q. When the ballots come back to the
13 office, were your -- was your staff instructed
14 to review declarations?

15 A. Yes. They were instructed to review
16 each declaration as they came in to make sure
17 they were complete.

18 Q. And can you describe the process by
19 which certain declarations were set aside?

20 A. So in speaking with the Board of
21 Elections, there was a determination to set
22 aside all -- all ballots that had any
23 deficiencies and they would be determined at a
24 later date to -- for them to vote on. And we
25 set aside anything -- things that were missing a

1 signature, missing a date, missing part of their
2 address, or basically any -- any kind of
3 deficiency on their declaration we set aside.

4 THE COURT: Was that process
5 done as they arrived?

6 THE WITNESS: Yes, Your Honor.

7 THE COURT: So then as they
8 arrived, if you saw something, I will
9 say, obvious on its face, it was set
10 aside by whoever had that job at that
11 moment, at that time?

12 THE WITNESS: That's correct.

13 THE COURT: And during this
14 period of time you were receiving about
15 how many ballots?

16 THE WITNESS: Well, we
17 received back in total about 165,000
18 ballots.

19 THE COURT: 165,000?

20 THE WITNESS: Yes.

21 THE COURT: So you had a total
22 of between write-in and mail-in a total
23 of approximately 165,000 ballots?

24 THE WITNESS: That's correct.

25 THE COURT: Okay. Thank you.

1 And then -- and as they were coming in,
2 not on the day of the election or the
3 day afterwards, you were all -- you
4 were -- I'm not suggesting there is
5 anything wrong by doing that -- you got
6 first look at those ballots and you
7 were able to identify some of them on
8 their face had a problem and you were
9 able to put those aside for -- to
10 review later; is that right?

11 THE WITNESS: That's correct.

12 THE COURT: Thank you.

13 BY MS. VANDERKAM:

14 Q. As you are receiving ballots into the
15 office, were you also sorting those ballots into
16 precincts?

17 A. That's correct.

18 Q. With regard to the declarations that had
19 issues, I'll say, did the Board create
20 spreadsheets indicating -- listing of each of
21 those particular categories where there was a
22 problem?

23 A. We did.

24 Q. Okay. And you're familiar with Exhibits
25 C, D, E and F attached to our joint stipulation

1 of those spreadsheet listings in those
2 particular categories?

3 A. Yes, I am.

4 Q. Exhibit C being the exhibit that details
5 any declarations that either do not have dates
6 or have partial dates?

7 A. Yes.

8 Q. And then Exhibit D, any declarations
9 that had either no printed name or no printed
10 address or both?

11 A. Yes, I'm familiar with those.

12 Q. And Exhibit E, all those declarations
13 that had a partial address? And Exhibit F all
14 declarations that had a mismatched address, that
15 being the address that was printed on the
16 envelope was different than the address on the
17 label?

18 A. Yes, I'm familiar with those.

19 Q. And just for the Court, each absentee
20 and mail-in ballot has a label on it, correct?

21 A. Yes, either printed directly onto the
22 envelope or labeled onto the envelope.

23 Q. And can you let us know what information
24 and what the purpose is of that label?

25 A. It has their voter ID number, their

1 precinct number, whether it's a mail-in or an
2 absentee ballot. It also has their name and
3 their registered address. Some of it is simply
4 for purposes of being able to sort the ballots,
5 and we have to have the precinct number on there
6 so we know what precinct the ballot belongs to
7 and the voter's information, their name, and
8 everything like that and to determine it's
9 actually a ballot that we sent --

10 THE COURT: I'm not sure your
11 voice is coming up over the sound
12 system.

13 THE WITNESS: Can you hear me?
14 I'm sorry.

15 THE COURT: That's a lot
16 better. Go ahead.

17 THE WITNESS: Okay. So -- and
18 then there's also a barcode printed on
19 there that corresponds to what's called
20 the correspondence ID, which is part of
21 the State's Sure System, which is a
22 statewide uniform registry of electors.
23 It's the voter registration database,
24 and the barcode is scanned when it is
25 received to update the voter's record

1 that their ballot was returned.

2 BY MS. VANDERKAM:

3 Q. And we have also attached as Exhibit G
4 to the joint stipulation several exemplars of
5 declarations with those labels on them; is that
6 correct?

7 A. That's correct.

8 THE COURT: Counsel, do you
9 have the sample ballot? Did you attach
10 a sample ballot, per se, that you were
11 just describing?

12 MS. VANDERKAM: The sample
13 outer envelope, Your Honor?

14 THE COURT: Yes.

15 MS. VANDERKAM: A blank one?

16 THE COURT: Yes, like that.

17 MS. VANDERKAM: I can hand one
18 up. There is also one attached to the
19 decision of the Board.

20 THE COURT: Yes, there was.
21 But if you will hand that up, that will
22 be fine. So I can look at it right
23 now, if you don't mind.

24 All right. I'm going to have
25 this marked as Court Exhibit 3.

1 * * *

2 (Court Exhibit 3 was admitted
3 into evidence.)

4 * * *

5 THE COURT: Thanks. Thank you
6 go ahead now, counsel. Sorry to
7 interrupt you.

8 MS. VANDERKAM: That's okay.

9 BY MS. VANDERKAM:

10 Q. So, Mr. Freitag, if I can just draw your
11 attention to Exhibit G, which are copies of
12 actual declarations. Do you have that in front
13 of you?

14 A. Yes, I do.

15 MS. VANDERKAM: And for
16 counsel, I did number these pages on my
17 copy, but they may not be numbered on
18 yours.

19 BY MS. VANDERKAM:

20 Q. The first two declarations on the first
21 page, Mr. Freitag, are these declarations that
22 are signed by the voters, they have the voter's
23 name and address printed but lack a date?

24 A. Yes.

25 Q. And so they are part of the 1,196

1 declarations that lacked a date or lacked -- or
2 only had a partial date, correct?

3 A. That's correct.

4 THE COURT: And the two you
5 selected, one is for Ashley and the
6 other one is for Douglas, correct?

7 THE WITNESS: That's correct.

8 THE COURT: Okay.

9 BY MS. VANDERKAM:

10 Q. And then on Page 2, just another
11 exemplar from Miss Ruggero -- Ruggieri,
12 R-U-G-G-I-E-R-I, and David Derr with the same
13 particular issue with regards to the date,
14 correct?

15 A. That's correct.

16 Q. And the next pages -- actually, the back
17 side of those outer envelopes indicating that --
18 there is a postmark there that both of them were
19 received -- you know, postmarked, and these were
20 also received by the Board by November 3rd at
21 8:00 p.m., correct?

22 A. Correct.

23 Q. All of the ballots, all of the ballot
24 envelopes at issue today are ballots that were
25 timely received, correct?

1 A. Correct.

2 Q. Okay. And so were all of these -- well,
3 actually, I'll just keep leaping through this
4 stack, if I may. On Page 4, are these two
5 declarations that had partial dates?

6 A. Yes.

7 Q. Okay. And then on Page 5 another
8 partial date?

9 A. That's correct.

10 Q. The page that follows indicates the
11 postmark on that, Mr. Bigler's vote there?

12 A. Correct.

13 MS. VANDERKAM: B-I-G-L-E-R.

14 BY MS. VANDERKAM:

15 Q. On Page 7, are these voters' envelopes
16 where they did not print their name?

17 A. Yes.

18 Q. So they signed, they dated, they printed
19 their address, but they did not print their
20 name?

21 A. That's correct.

22 Q. And, of course, on both of these
23 exemplars, the voter's name is on the envelope?

24 A. Yes, they are.

25 Q. Okay. On Page 8 you have signatures,

1 dates, the printed name but no printed address,
2 correct?

3 A. Correct.

4 Q. And, again, the voter's address is
5 printed on the envelope about an inch below the
6 lines that are empty?

7 A. Yes, it is.

8 Q. On Page 9, is this an exemplar of a
9 voter that just drew a line down to their name
10 and address?

11 A. Yes.

12 Q. And that one was set aside and is part
13 of this 1,196 ballots, correct?

14 A. Correct.

15 THE COURT: Now, this is --
16 which one are you referring to that
17 time?

18 THE WITNESS: This is
19 Christine McCleary.

20 THE COURT: Christine. Okay.

21 MR. GORDON: Just for
22 clarification -- I'm sorry, Mr. Gordon
23 on behalf of the DNC. I believe this
24 one on Page 9 was not part of the
25 1,196. I think it's part of a

1 different category.

2 MS. VANDERKAM: Yes, I
3 misspoke. So this is part of the
4 category: No printed name, no printed
5 address, which numbered 644. Thank you
6 for the assistance.

7 BY MS. VANDERKAM:

8 Q. On Page 10 you have Mr. Gary Foster and
9 Gary Cosner, C-O-S-N-E-R?

10 A. Yes.

11 Q. What is the deficiency with these two
12 declarations?

13 A. They are partial addresses. Mr. Foster
14 put his street address but did not put his city
15 and ZIP Code. Mr. Cosner just put his city and
16 ZIP Code but did not put his street address.

17 Q. Okay. And then Pages 11, 12, and 13,
18 those six ballots, which categories did these
19 serve as exemplars of?

20 A. These were mismatched addresses. The
21 voter's registered address is what is printed
22 beneath the barcode. The address that they put
23 was the address the ballot was mailed to. These
24 appear to be, on Page 11, college students, the
25 address is State College, PA on both.

1 Q. Did the Board direct, specifically with
2 the category of mismatched addresses, did the
3 Board direct the staff to do any research with
4 regard to these?

5 A. Yes, they did.

6 Q. Can you explain that to the Court?

7 A. We looked on the voter's record and
8 their application and compared what address the
9 ballot was mailed to versus the address that the
10 voter supplied on their declaration, and we made
11 the -- we let the Board know if it was an
12 address that they had it mailed to or if it was
13 just a different address altogether.

14 Q. And did the Board make a determination
15 once that research was done?

16 A. Yes.

17 Q. And based upon that research did the
18 Board elect to accept 182 of these mismatched
19 addresses and reject 64 of those ballots?

20 A. Yes, they did.

21 Q. The 182 that were accepted, was that due
22 to the fact that the voter had provided to Board
23 of Elections a different mailing address to have
24 that ballot sent to?

25 A. Yes, that was the reason.

1 Q. And it looks to me --

2 THE COURT: And the 64 that
3 were rejected, why were they rejected?

4 THE WITNESS: So it was the
5 Board made the decision to reject them
6 based on that it wasn't the address
7 either that they were registered at or
8 the address the ballot was mailed to.

9 THE COURT: Can I conclude
10 from that information that that --
11 there was something wrong there?

12 MS. VANDERKAM: I'm sorry,
13 Your Honor?

14 THE COURT: I don't want to
15 raise issues that aren't raised. I'm
16 not sure I completely -- those were
17 rejected because when someone -- if I
18 had put -- if I had sent my ballot back
19 in and I had been staying somewhere
20 else because of Covid, so I put that
21 address in there, could I have had my
22 ballot rejected because I put that
23 address down there?

24 MS. VANDERKAM: I think that
25 is precisely the issue of these

1 mismatched addresses. So the Board
2 felt comfortable with accepting 182 of
3 them because those voters had indicated
4 to the Board that they had a different
5 mailing address for purposes of --
6 excuse me --

7 THE COURT: How did they --
8 well, how did they indicate that to the
9 Board?

10 THE WITNESS: Well, we just
11 gave the -- we didn't give any
12 recommendation on whether they should
13 be counted or not. The Board had asked
14 us to do -- just do the research on the
15 addresses. And the Board, made up of
16 the Commissioners, was the ones who
17 made that determination.

18 THE COURT: Okay. I'm just
19 trying to figure out on the ones that
20 were rejected why they were rejected.
21 But, all right. It's beyond the scope
22 of the appeal. I just don't know why
23 -- I mean, no one has filed an appeal
24 saying they shouldn't have been
25 rejected, but -- that's fine. Sorry.

1 I'm asking too much. I should keep my
2 mouth shut. Go ahead, next question.

3 MS. VANDERKAM: Why don't I
4 just ask one question to kind of close
5 the loop on that.

6 THE COURT: That would be
7 fine.

8 BY MS. VANDERKAM:

9 Q. Mr. Freitag, to the ones that were
10 accepted, did the voters, when they applied for
11 their mail-in or absentee ballot, did they
12 inform the Board to mail their ballot to a
13 separate address?

14 A. Yes.

15 Q. And was that the basis for them being
16 accepted?

17 A. Yes.

18 THE COURT: Got it. Thank
19 you.

20 BY MS. VANDERKAM:

21 Q. So, Mr. Freitag, once these categories
22 were set aside, did the Board convene during its
23 canvass process to consider whether or not these
24 declarations were sufficient or insufficient?

25 A. Yes, they did.

1 Q. And that occurred on November 7th,
2 correct?

3 A. Correct.

4 Q. Okay. And during -- when that occurred,
5 were there authorized representatives present
6 for those determinations?

7 A. Yes, there were.

8 Q. And were authorized representatives
9 given the opportunity to present argument in
10 support of their position?

11 A. Yes, they were.

12 Q. And ultimately the Board elected to
13 reject any ballots that did not have a
14 signature; is that correct?

15 A. That's correct.

16 Q. And they were forced --

17 THE COURT: Can I stop you for
18 a second. I want to go back to what
19 you just said. You said an authorized
20 representative, and in the stipulation
21 of facts at paragraph 18, specifically
22 there are people named, authorized
23 representatives; first one is Joseph
24 Cullen, the second one is Tom Panzer,
25 et cetera.

1 Those authorized
2 representatives, is that another word
3 for these people with Watcher's
4 Certificate?

5 THE WITNESS: So they're
6 different but very similar. Act 77
7 that was then amended by Act 12 gave
8 the ability for -- during the canvass
9 -- pre-canvass and canvass that
10 candidates and parties could have
11 authorized representatives. They don't
12 have all of the same stipulations that
13 watchers have.

14 Watchers have to be a
15 registered voter, they have to live
16 within the county, et cetera; while an
17 authorized representative just needs to
18 be authorized by the candidate or
19 party. And each candidate can have one
20 authorized representative present, as
21 well as the party can have one
22 authorized representative present.

23 THE COURT: And in this case
24 are there situations where an
25 authorized representative was an

1 authorized representative for more than
2 one candidate, do you know? Or if you
3 don't know, you don't.

4 THE WITNESS: We issued
5 certificates to anyone and it named the
6 candidate or party that they were
7 authorized to represent. So they could
8 only be for one at a time.

9 THE COURT: Okay. And I don't
10 know whether you know this. I'll ask
11 counsel. You identified specific
12 people who, coincidentally, I know
13 personally almost all of them. And I
14 say that because years ago I was
15 involved in politics and so a couple of
16 them have been involved in politics for
17 years, and so I just happen to know
18 them. And I myself was a Watcher from
19 time to time. I never was in the Board
20 of Elections. So I do understand the
21 process and what they do.

22 How did the -- for the
23 stipulation, how did you come up with
24 these names to identify them in here?
25 If you can tell me that, I'd appreciate

1 it, as opposed to other people.
2 Because I'm sure on this particular
3 election, lots of people had Watcher
4 Certificates. And, by the way, if I
5 had a Watcher Certificate, could I have
6 been there?

7 THE WITNESS: You need to be
8 authorized by the candidate. So only
9 -- it would depend if more than one
10 person was there for that candidate
11 that you were watching for.

12 THE COURT: Well, I guess what
13 I'm trying to say is being there on
14 November 7th, was it -- I'm trying to
15 figure out the difficulty or lack of
16 difficulty to get there and observe,
17 being an observer or a watcher or
18 whatever else. It's been -- it was my
19 experience and my recollection that
20 they have tons of Watchers'
21 Certificates that are given out on
22 Election Day for all the polls and
23 stuff and people are there.

24 I'm just trying to get a sense
25 of, for the people that were able to be

1 present for this canvassing that are
2 referred to in Paragraph 18, you know,
3 what happens to be -- to get approved
4 to do that? And are there -- are there
5 more people approved than actually show
6 up? I guess I'm trying to figure out
7 -- Miss VanderKam, you're shaking your
8 head yes.

9 MS. VANDERKAM: If I may.

10 THE COURT: Please. And we'll
11 see if all counsel agree on this or
12 have any reason to dispute it.

13 MS. VANDERKAM: Candidly,
14 because Act 77 and Act 12 are so new,
15 it's different than in years past. So
16 the process goes like this. The
17 authorized representatives that wish to
18 be so authorized on behalf of the
19 candidate have to submit paperwork -- a
20 piece of paper to the Board with the
21 candidate or campaign committee's
22 signature saying this person's
23 authorized to be a watcher for me at
24 the canvass or pre-canvass.

25 THE COURT: At the canvass.

1 So it's a specific thing. It's
2 different than the other Watcher's
3 Certificates.

4 MS. VANDERKAM: It is. It is
5 distinct under Act 77. And so those
6 authorized -- what we did here in Bucks
7 County is that we had someone stationed
8 at the entryway of the pre-canvass and
9 canvass room that was signing
10 authorized representatives in and out
11 so we could monitor that it was just
12 one per candidate and one per committee
13 at a time. So they would have to
14 display their certificate and sign in
15 and then sign out when they left.

16 That canvass and pre-canvass
17 process was open to all authorized
18 representatives throughout it
19 occurring, and that began on 7 a.m. on
20 11/3 and it was a rolling, rolling
21 meeting from day to day. And so we
22 would see authorized representatives
23 appear throughout that process.

24 Now, when we met on
25 November 7th, we specifically reached

1 out to the political committees and the
2 people that had really been kind of
3 coordinating for their political
4 parties and gave them notice that we
5 were going to make the sufficiency
6 determinations on the 7th, did they
7 want to be there. They said: Yes. We
8 said: We'll give you an opportunity to
9 speak.

10 So everyone was aware that
11 this was occurring. The people that
12 are indicated on the joint stipulation
13 were the ones that chose to appear on
14 that day.

15 THE COURT: Okay. So they
16 happened to be the ones that were there
17 when these decisions were made on
18 November 7th, 2020; is that correct?

19 MS. VANDERKAM: Correct.

20 THE COURT: Does anyone
21 dispute that fact or care to challenge
22 it or have me put somebody under oath
23 to confirm it? You agree on
24 Petitioners' behalf; is that correct?
25 You're shaking your head, counsel?

1 MR. HENRY: To the best of my
2 understanding, that is correct.

3 THE COURT: Okay. And --

4 MR. GORDON: No dispute, Your
5 Honor.

6 THE COURT: Mr. Hoover?

7 MR. HOOVER: I just noticed
8 now I'm looking at the Petition. There
9 is one error in one individual who was
10 there. Other than that --

11 THE COURT: Is that someone --
12 one individual was not there?

13 MR. HOOVER: There was someone
14 who was not there that's listed, and
15 then there is someone who was there
16 that's not listed. Although, I cannot
17 recall that specific watcher's name.

18 THE COURT: Okay.

19 MR. HOOVER: I don't think it
20 changes anything for our purposes
21 today. I just wanted to make sure that
22 was clear.

23 THE COURT: All right. Thank
24 you. You were one of the people that
25 was there, right?

1 MR. HOOVER: I was.

2 THE COURT: All right. And is
3 the vice-president and -- I don't think
4 he's called the vice-president,
5 whatever, of the Bucks County
6 Republican Party was there?

7 MS. VANDERKAM: Correct.

8 THE COURT: And the former
9 controller was there, who's also a
10 Republican, correct?

11 MS. VANDERKAM: Correct.

12 THE COURT: We've got
13 Mr. Hoover, who was there, who happens
14 to be in the courtroom right now. And
15 do you want to identify Ronnie -- I
16 always mispronounce her name. She is
17 politically active for the Democratic
18 Party?

19 MR. HOOVER: If I may
20 interject, Your Honor, she was not
21 present at that --

22 THE COURT: She was not
23 present. Okay. So that stipulation is
24 wrong. I will just draw a pen through
25 that. Anybody object if I put a pen

1 through that? But there was somebody
2 else there, I gather?

3 MR. HOOVER: Yes.

4 THE COURT: Okay. And Chris
5 Serpico, who is someone who's run for
6 office as a Democrat and has been
7 active in the Democratic Party for
8 quite some time. All the people --
9 it's interesting that Ronny is the one
10 person I don't really know, but all the
11 other people I know, and I would say I
12 respect and don't think of them as
13 being shy and unable to speak up. So
14 it is sort of interesting to me in
15 terms of who all was there.

16 Let me ask you something else,
17 though. On that -- on that event at
18 that moment -- so both, both sides,
19 I'll say, for lack of a better -- both
20 the Republicans and the Democrats have
21 local politically active people at the
22 event on November 7th when the vote was
23 taken; is that correct?

24 THE WITNESS: That's correct.

25 THE COURT: All right. And in

1 that process the discussion had to do
2 with the different categories, correct?

3 THE WITNESS: Correct.

4 THE COURT: Did anyone ever
5 suggest, discuss or argue whether the
6 categories were sufficient? Whether or
7 not the categories should be, you know,
8 sub-categorized?

9 THE WITNESS: To the best of
10 my knowledge, no.

11 THE COURT: Okay. All right.
12 Anything else?

13 BY MS. VANDERKAM:

14 Q. And so, Mr. Freitag, the Board made the
15 decision to accept some of these categories and
16 reject other categories, correct?

17 A. That's correct.

18 Q. For example, they rejected the entire
19 category of so-called naked ballots where the
20 voters did not put their ballot in the secrecy
21 envelope?

22 A. Correct.

23 Q. And they also reviewed secrecy envelopes
24 that had stray marks on those envelopes; is that
25 correct?

1 A. That's correct.

2 Q. And were those ones examined one by one?

3 A. Yes.

4 Q. And the ones that were rejected had some
5 indication of the voter's identity on the
6 secrecy envelope, correct?

7 A. Correct. They had either written their
8 name or signed it.

9 Q. And the ones that were accepted had no
10 indication of voter's identity, their political
11 affiliation or their candidate preference,
12 correct?

13 A. Correct.

14 THE COURT: And that was 13,
15 correct?

16 THE WITNESS: Let me see.

17 THE COURT: You've got --

18 THE WITNESS: I believe it was
19 seven.

20 MS. VANDERKAM: Seven accepted
21 and 21 rejected.

22 THE COURT: Oh, I'm sorry, I
23 see. All right. And the other
24 category, I guess you said, the ones
25 that had -- I'm looking at the

1 stipulation and following you with that
2 and I interrupted your pace. It was
3 708 ballots that were not contained in
4 the secrecy envelope that were
5 rejected; is that correct?

6 THE WITNESS: That's correct.

7 THE COURT: You can go ahead,
8 counsel.

9 BY MS. VANDERKAM:

10 Q. Once the Board made their determinations
11 as to these declarations, did you and your staff
12 commence to canvass those, those ballots?

13 A. Yes.

14 Q. And by canvass, I mean opening the
15 envelopes, taking the secrecy envelopes out and
16 then processing the ballots within the secrecy
17 envelopes?

18 A. Yes. They were separated from the
19 declaration envelopes and the ballots separated
20 from the secrecy envelopes and scanned and
21 tabulated.

22 Q. And at any point were -- was your office
23 served with any petition for an injunction to
24 stop that process?

25 A. No.

1 Q. Okay. And all of these categories, were
2 they canvassed in a segregated manner?

3 A. Yes. Each category was canvassed
4 separately on what's called a target card. Each
5 of them were scanned in their own numbered
6 target card so that they would all be still
7 segregated but still also counted.

8 THE COURT: So if I struck one
9 of these categories, you could pull
10 back out of the count --

11 THE WITNESS: That's correct.

12 THE COURT: -- that category?

13 THE WITNESS: Yes. We'd be
14 able to pull one individual category or
15 all depending on Your Honor's --

16 THE COURT: Right. But you
17 can't go into -- you couldn't go into
18 one of the categories. And if I said,
19 well, half of them seem right and half
20 of them don't, you can't do that, it's
21 all or nothing?

22 THE WITNESS: That's correct.

23 THE COURT: Okay.

24 BY MS. VANDERKAM:

25 Q. And what was the reason for them being

1 canvassed immediately? Is the Board under any
2 obligation by the statute to finish canvassing?

3 A. Yes. We're required to certify -- final
4 certification has to be done by this coming
5 Monday, but there's also a five-day period that
6 we have to do a precertification prior to that,
7 which today is the deadline.

8 Q. And so these ballots needed to be
9 canvassed in order for the Board to comply with
10 the statutory authority that requires them to do
11 a certification?

12 A. That's correct.

13 Q. Mr. Freitag, I skipped over one category
14 that the Board considered. I apologize. That
15 category was ballots that were fully enclosed
16 within their privacy envelopes, but there were
17 arguably -- those envelopes were unsealed. With
18 regard to that category, was the privacy of the
19 ballots jeopardized in any manner?

20 A. No.

21 Q. With regard to that category, was there
22 any view of the ballots?

23 A. No, not to my knowledge.

24 Q. And was there any way to determine by
25 the Board whether or not it had been sealed at

1 one point and became unsealed?

2 A. No.

3 THE COURT: Did the Board of
4 Elections provide that envelope, the
5 envelope that we're talking about?

6 THE WITNESS: Yes. The
7 secrecy envelope was provided by the
8 Board of Elections.

9 THE COURT: And on those
10 envelopes, the matter of sealing them,
11 were they envelopes that you lick or
12 are they envelopes that you pull a tab
13 -- you know, a tab off of and then
14 they're already pre-sticky, or was
15 there a combination of both?

16 THE WITNESS: No, no. They
17 would need to be either moistened by
18 licking or water or glue.

19 THE COURT: Okay. So the
20 person sealing them would have taken
21 what was provided to them and -- I
22 don't know if everybody still licks
23 those envelopes or people don't do that
24 any more. But they were the type that
25 you would have to moisten and then rely

1 on what you folks had given them as far
2 as the quality of the seal?

3 THE WITNESS: Correct.

4 THE COURT: I mean, you could
5 have added more -- if someone had put
6 Scotch Tape across it, would that have
7 been a mark that would have been a
8 voter problem?

9 THE WITNESS: No.

10 THE COURT: All right.

11 BY MS. VANDERKAM:

12 Q. Did the commissioners, who are the Board
13 of Elections discuss at the meeting whether or
14 not voters may have had concerns about licking
15 envelopes given the current pandemic?

16 A. Yes, they did.

17 Q. And was that a factor -- did that appear
18 to be a factor in their decision?

19 A. It appeared to be, yes.

20 Q. And these, these ballots that were
21 enclosed within unsealed privacy envelopes, were
22 they enclosed within an outer envelope?

23 A. Yes.

24 Q. Mr. Freitag, I just want to ask some
25 particular questions about a few categories.

1 First the category with regard to dates.

2 When did the Board commence mailing
3 ballots out to voters?

4 A. The first ballots started going out on
5 October 7th.

6 Q. And with regard to all of the 1,196
7 ballots on Exhibit C, were those ballots timely
8 received by the Board?

9 A. Yes, they were.

10 Q. And is there any possibility that the
11 voter could have returned a ballot outside of
12 that time frame?

13 A. With these, no.

14 Q. So are we left with the inescapable
15 conclusion that these votes were completed by
16 voters within that time frame?

17 A. Yes.

18 Q. Okay. And I provided to you earlier the
19 directions on the envelope. Are there any
20 directions on the envelope that specifically
21 require the voter to date it?

22 A. Nothing specifically telling them
23 besides just having a line for date.

24 Q. The instructions are limited to signing
25 the declaration and putting your ballot inside

1 the secrecy envelope, correct?

2 A. Correct.

3 Q. And it goes further on to say: You must
4 place your ballot in the secrecy envelope to
5 ensure that it will be counted?

6 A. Correct.

7 Q. The ballots in this category of 1,196,
8 did they have a signature by the voter?

9 A. Correct. Yes.

10 Q. Do they have a printed name and printed
11 address?

12 A. The -- for the partial date, yes, they
13 did.

14 Q. And did the Board receive guidance from
15 the Secretary of State with regard to the
16 examination of declarations?

17 A. Yes.

18 MS. VANDERKAM: Your Honor,
19 that's attached to the joint
20 stipulation, I believe, at Exhibit A.

21 BY MS. VANDERKAM:

22 Q. And, Mr. Freitag, does the Secretary of
23 State and the Department of State indicate to
24 the Board what they should do when a voter's
25 declaration was returned blank, completely

1 blank?

2 A. Yes.

3 Q. And what did they indicate?

4 A. That it should be set aside.

5 Q. And is that the only category that it

6 was -- that the Board was told to set aside?

7 A. I believe it was -- or unsigned.

8 Q. For unsigned declarations?

9 A. Correct.

10 Q. For unsigned declarations the Department

11 of State informed boards of election around the

12 Commonwealth that they should set those aside,

13 but only those?

14 A. Correct.

15 Q. And not count those?

16 A. Correct.

17 Q. Okay. With regard to the category of

18 print -- no printed name and/or no printed

19 address, do each of these envelopes have a label

20 on the envelope that has the individual's name

21 and printed address?

22 A. Yes.

23 Q. And in the case of all of these they

24 also have signatures, correct?

25 A. Correct.

1 Q. So if we were required -- if we required
2 the voters to print their name, for example, on
3 these, their name would then be on the outer
4 envelope three times?

5 A. Correct.

6 THE COURT: Counsel, just to
7 -- I don't know if this is going to go
8 assist you or gets in your way. I just
9 wanted a little bit of background
10 information, which I think you've
11 covered most of what I wanted. You're
12 welcome -- you're making a very good
13 record.

14 You have already got a lot of
15 this stipulated, and it's already
16 stipulated as fact. While he's here,
17 if you want to nail it down even
18 farther, that's fine. But I just want
19 you to know I'm not going to -- the
20 mere fact that this witness did not
21 testify to something, the stipulation
22 of facts does not affect the
23 stipulation of facts. And if anybody
24 here thinks it should, speak up now.
25 But the stipulation of facts are facts

1 that do not need to be proven to the
2 extent that this witness has touched on
3 them and expanded on it to provide me
4 with clarity and not just whatever. I
5 appreciate that he's here, but anything
6 else you want to the cover, you can. I
7 just want to be clear, you don't have
8 to -- you've already got golden
9 suspenders on. You don't have to do
10 anything more than that.

11 MS. VANDERKAM: Your Honor,
12 your comment and direction is
13 well-timed, Your Honor. Actually, that
14 was my last issue that I wanted to
15 present that I felt wasn't necessarily
16 nailed down in the stipulation.

17 THE COURT: I'm going to go
18 around the room and let other
19 counsel -- does counsel for the
20 Democratic Party have any questions for
21 this witness?

22 MR. GORDON: No, Your Honor.

23 THE COURT: Mr. Hoover, do you
24 have any questions?

25 MR. HOOVER: I actually might,

1 Your Honor, with some direction from
2 the Court, if you would humor me for a
3 moment.

4 From earlier in this witness's
5 testimony, Your Honor brought up the
6 distinction with the mismatched
7 addresses between the 64 that were
8 decided by the Board of Elections not
9 to count and the 182 that were decided
10 to count. That decision was actually
11 made yesterday by the Board of
12 Elections. Because from November 7th,
13 when this meeting originally took
14 place, it did not have that information
15 that they ask for research on with
16 regards to whether or not --

17 THE COURT: Are you asking a
18 question or are you telling me
19 something?

20 MR. HOOVER: I'm asking Your
21 Honor for direction if you're going to
22 permit any inquiry into that area?
23 Because on the petition, those 247
24 ballots with the mismatched address
25 were challenged. So I believe that

1 issue is before the Court even though
2 the Board's final decision on those
3 ballots wasn't made until yesterday. I
4 think in judicial -- in interests of
5 judicial economy with regard to that --
6 those 64 ballots --

7 THE COURT: That makes sense.
8 Please -- and I don't know whether you
9 have had a chance to talk to other
10 people, and whether counsel for the
11 Petitioner has any issue with respect
12 to that. So --

13 MR. HOOVER: I have not
14 because Your Honor just brought it up.

15 THE COURT: Okay. Well, why
16 don't you make your record and let's
17 see where we go.

18 EXAMINATION

19 BY MR. HOOVER:

20 Q. Mr. Freitag, with regard to the 64
21 ballots that were rejected by the Board for
22 mismatched addresses, all of those addresses
23 that were placed on the declaration forms by
24 those 64 voters, those could have been temporary
25 addresses for those voters, correct?

1 A. They could be, correct.

2 Q. And the reason why they were rejected
3 was because the voter just did not request the
4 ballot to be mailed to that address on the
5 declaration form, correct?

6 A. I can't speak for the Board for why they
7 chose to reject them. But that was just the
8 research we did and supplied to them.

9 Q. And when a voter applies for a mail-in
10 ballot, do they have to give their address for
11 which they're requesting to cast a ballot?

12 A. Yes.

13 Q. And can that be challenged by any party
14 prior to the date of the election?

15 A. Challenges can be done up to the Friday
16 before the election on absentees and mail-ins.

17 Q. And that challenge would be specifically
18 the addresses that it can be -- whether or not
19 that voter is a qualified elector at that
20 address? That could be one of the challenges,
21 correct?

22 A. Correct.

23 Q. And, to your knowledge, no challenges
24 were filed to those 64 ballots that were
25 rejected for mismatched addresses, correct?

1 A. Correct.

2 THE COURT: Was it 64 or 54?

3 MR. HOOVER: I believe 64.

4 MS. VANDERKAM: (Nods
5 affirmatively).

6 THE COURT: Thank you.

7 BY MR. HOOVER:

8 Q. And to your knowledge, sir, if a voter
9 moves prior to an election, are they permitted
10 to cast one last ballot at that polling place?

11 A. Yes, they are.

12 MR. HOOVER: Those are all the
13 questions I have, Your Honor, on that
14 issue. Thank you.

15 THE COURT: All right, counsel
16 for Petitioner, do you have questions?

17 MR. HENRY: Excuse me. Just a
18 handful.

19 CROSS-EXAMINATION

20 BY MR. HENRY:

21 Q. To your knowledge, does the Secretary's
22 guidance override the Election Code?

23 A. No, not to my knowledge.

24 Q. Did the Board prepare -- and I'm going
25 to call it the fill-in instructions on the

1 absentee or mail-in ballot; that is, the blanks
2 that required the signature, the date, the
3 address?

4 A. The blank fill-ins, they were done by
5 the Department of State. We added the extra
6 guidance of: You must place your ballot in the
7 secrecy envelope marked official election ballot
8 to ensure that it will be counted.

9 Q. And that was added this year; is that
10 correct?

11 A. That's correct.

12 Q. Do you recall what it was in the past?

13 A. I don't believe the envelopes in the
14 past had any check boxes.

15 Q. Did they include any instructions?

16 A. Yes.

17 Q. Do you recall what those instructions
18 said?

19 A. I don't know them verbatim, but the
20 instructions did have them to complete the
21 declaration and put the ballot in the secrecy
22 envelope.

23 Q. Okay. Do you recall why the
24 discrepancies were initially flagged?

25 A. We -- basically we were instructed to

1 flag anything with any missing information.

2 Q. Who gave that instruction?

3 A. The Commissioners as the Board of
4 Elections.

5 MR. HENRY: Okay. I have no
6 further questions.

7 THE COURT: All right. Did
8 those questions raise anything that
9 anyone else needs to further clarify?

10 MS. VANDERKAM: No, Your
11 Honor.

12 THE COURT: You may step down.
13 Thank you.

14 THE WITNESS: Thank you.

15 THE COURT: Is there any
16 further evidence to be presented by the
17 Respondent?

18 MS. VANDERKAM: No.

19 THE COURT: No?

20 MS. VANDERKAM: No.

21 THE COURT: From the National
22 Democratic Committee.

23 MR. GORDON: No, Your Honor.

24 THE COURT: From the State and
25 local Democratic Committee?

1 MR. HOOVER: No, Your Honor.

2 THE COURT: All right. So
3 then the record is closed.

4 Did counsel want to provide me
5 with some closing argument at this
6 point? If so, I'm going to have the
7 Respondent go last, but I'm going to
8 give you each an opportunity, small
9 opportunity to respond to one another.
10 And I'm going to -- Mr. Hoover, I'm
11 going to -- it occurs to me that I --
12 with all deference to you, if you don't
13 object if I go first with the
14 Democratic National Committee and then
15 go to you, and then I'll go to --
16 there's a reason why I'm doing that in
17 that order. It's not out of disrespect
18 for you. But unless you have any
19 objection to that, I am going to follow
20 that order.

21 MR. HOOVER: I do not, Your
22 Honor.

23 THE COURT: Okay. I'll tell
24 you the reason why I'm following that
25 order is because, in theory, I've got

1 the Republican National Committee here,
2 I've got the Democratic National
3 Committee. So I sort of see them in
4 equal planes. So I'm going to have
5 them go first. You are the only local,
6 and I'm going to have you come in
7 second. It wasn't because you're Matt
8 Hoover and I'm picking on you. I don't
9 want you to feel that way, even though
10 I just did.

11 Counsel, you might want to use
12 the podium for this. Before you begin,
13 and you can still stay there, I just
14 want to check something else out with
15 the parties. Looking at the
16 stipulation, and I just want to make
17 sure I understand. And, Petitioner,
18 maybe I'll direct this to you. I'm
19 looking at the stipulation. If I
20 understand that for purposes of my
21 final decision, if I look at the
22 stipulation, the specific ballots that
23 you're challenging are all contained in
24 Paragraph 24?

25 MR. HENRY: That is correct,

1 Your Honor, with the exception that
2 there's been a reduction in Category 4.

3 THE COURT: I'm sorry. The
4 exception, was that in Category 4?

5 MR. HENRY: Yes, Your Honor.

6 THE COURT: And so in
7 Category 4 -- maybe you folks can help
8 me. Let's do this together. You have
9 rejected some of those. So that number
10 would be reduced?

11 MS. VANDERKAM: 182.

12 THE COURT: I'm sorry?

13 MS. VANDERKAM: 182.

14 THE COURT: So I'm going to
15 write on the stipulation, it's actually
16 -- then Category 4 is now 182 that you
17 did not, I'll say, reject -- or
18 canvass, I guess, is the word I'm
19 supposed to say. You didn't canvass
20 it. The other ones you did reject; is
21 that correct?

22 MS. VANDERKAM: It's 182 that
23 we did canvass that I believe
24 Petitioner is objecting to.

25 THE COURT: As opposed to 246?

1 MS. VANDERKAM: Correct.

2 THE COURT: All right. That's
3 what I tried to say, but I said it
4 differently. Do you agreed, counsel,
5 that that is the right number?

6 MR. HENRY: I do, but I
7 actually would like to add something
8 that might make this a little bit more
9 expedient.

10 THE COURT: Go ahead.

11 MR. HENRY: As far as those
12 Category 4, if it is the Board's
13 representation that those voters were
14 otherwise qualified, we would withdraw
15 that challenge of a mismatch address
16 because to the Code they did provide an
17 address.

18 THE COURT: Okay.

19 MR. HENRY: And then I also
20 would withdraw --

21 THE COURT: So you're going to
22 withdraw Category 4 altogether?

23 MR. HENRY: That's correct.
24 And also Category 6. So far as those
25 markings which were represented by the

1 Board do not include the identifying
2 information, that challenge we would
3 withdraw.

4 THE COURT: Okay. So you're
5 now going to withdraw Category 6?

6 MR. HENRY: That's correct.

7 THE COURT: So now we have
8 Category 1, 2, 3, 5 that remain. And
9 it seems like these numbers, the
10 ballots don't overlap? Is that what --
11 I understand? I meant to ask the
12 witness that.

13 So somehow when there was, I
14 will call it a deficiency -- I just
15 assumed there would be overlapping
16 deficiencies, but that's not what we
17 have here. We have distinct ballots.
18 The 1,196 ballots in Category 1 are
19 totally different than all the ballots,
20 the 644 in Category 2, if I understand
21 correctly?

22 People are shaking their head,
23 I'm going to assume that's a fact for
24 the record.

25 Okay. And then there's also

1 another category we haven't discussed,
2 but that's subject to a separate
3 lawsuit; am I correct? The 627 ballots
4 received after 8:00 p.m.? Am I
5 correct?

6 MR. HENRY: That's correct,
7 Your Honor.

8 THE COURT: And you're
9 challenging them, but you agree that
10 that's been resolved by that case?

11 MR. HENRY: Correct, Your
12 Honor.

13 THE COURT: Okay. So do you
14 count that as withdrawing the challenge
15 from my decision? I don't need to
16 touch on that in my final decision; is
17 that correct?

18 MR. HENRY: That's correct.

19 THE COURT: Okay. Just to
20 make sure. So then I'm only going to
21 focus for the record, then, on
22 Categories 1, 2, 3 and 5.

23 MR. HENRY: So just to be
24 clear, we do not withdraw the
25 challenge. We do not believe the

1 challenge is ripe before you.

2 THE COURT: For the other one,
3 the 627?

4 MR. HENRY: That's correct,
5 Your Honor.

6 THE COURT: Fine. Thank you.
7 All right. Counsel, you may proceed.

8 MR. GORDON: Thank you, Your
9 Honor. And while I appreciate
10 Petitioners' withdrawal of challenges
11 to certain categories here, the fact
12 remains that Petitioners' here before
13 this Court seeking to disenfranchise
14 more than 2,000 Bucks County voters.
15 These are voters who made the effort to
16 submit their ballots during the midst
17 of a pandemic.

18 These ballots were timely
19 received by the Board of Elections.
20 They were all signed; the outer
21 envelopes were all signed. There's no
22 indication of any fraud, impropriety,
23 any undue influence, no indication that
24 any of these ballots were submitted by
25 somebody other than who signed the

1 outer envelope. And, in fact, the
2 voters -- and we've heard today about
3 the instructions on the outer envelope.

4 The voters at issue here
5 followed the instructions on the outer
6 envelope. They signed that outer
7 envelope, they enclosed those ballots
8 within the secrecy envelope, they
9 placed the secrecy envelope within the
10 outer envelope and timely remitted
11 those to the Board of Elections.
12 Nevertheless, Petitioner seeks to
13 invalidate each of these more than
14 2,000 ballots and disenfranchise the
15 voters who cast them.

16 For none of these ballots is
17 there a deficiency where the
18 legislature has said in the Election
19 Code that is the type of irregularity
20 or deficiency that mandates exclusion
21 or invalidation of the ballot.

22 THE COURT: Would you mind if
23 I interrupt you or would you --

24 MR. GORDON: Please.

25 THE COURT: If you said to me,

1 could you just let me speak for five
2 minutes and then interrupt you, I'll do
3 that, or I'm going to interrupt you
4 right now. I don't care either way.

5 MR. GORDON: Whatever is your
6 preference, Your Honor. If you want to
7 interrupt me, I will be interrupted.

8 THE COURT: Well, let's talk
9 about that. You said nowhere in the --
10 I forget your exact language -- nowhere
11 in the Election Code or wherever else
12 do they say there's a deficiency or
13 whatever it was. Give me an example of
14 where the Election Code says something
15 to the contrary.

16 MR. GORDON: Certainly, Your
17 Honor. Section 3146.8.

18 THE COURT: Okay.

19 MR. GORDON: There are at
20 least two provisions or subsections
21 within that section that talk about and
22 direct that ballots with certain
23 deficiencies be set aside and not
24 counted.

25 On (g)3 it says if there's a

1 -- I'm sorry. I misspoke. Under
2 Subsection D.

3 THE COURT: 31468
4 Subsection D?

5 MR. GORDON: Correct.

6 THE COURT: Okay.

7 MR. GORDON: And this deals
8 with the situation where if there's
9 proof that an absentee or mail-in
10 elector has returned his ballot in
11 accordance with the provisions of this
12 act but has died prior to the opening
13 of the polls, the statute instructs the
14 ballot of such deceased elector shall
15 be rejected by the canvassers. And, of
16 course, that's not at issue here.

17 We have stipulated that there
18 are no ballots that have been cast by
19 individuals who passed away before
20 Election Day.

21 THE COURT: Correct.

22 MR. GORDON: 31.468 sub 4, sub
23 2 deals with ballots that arrive in
24 envelopes with identifying marks on the
25 outside of the inner or privacy

1 envelope. And there the statute says
2 if any of the envelopes -- and I'm
3 skipping ahead -- contained any text,
4 mark or symbol which reveals the
5 identity of the elector, the elector's
6 political affiliation or the elector's
7 candidate preference, the envelopes and
8 the ballots contained therein shall be
9 set aside and declared void.

10 What Petitioner would have
11 this Court do is read into other
12 sections of the Election Code,
13 specifically 3146.6 sub A, that
14 language: Shall be set aside and
15 declared void, even though that
16 language appears nowhere in that
17 section. So the legislature, the
18 General Assembly clearly evidenced that
19 they knew how to and they did use
20 language about the consequence of
21 noncompliance and specifically use
22 language about shall be set aside and
23 declared void where they so intended.
24 And the absence of that language in
25 Section 3146.6 is critical here.

1 And Your Honor during this --
2 the conference this morning referenced
3 the Pennsylvania Democratic Party case,
4 the recent decision from the
5 Pennsylvania Supreme Court. And this
6 language that I just pointed the Court
7 to 3146.8 sub 4 sub 2 was specifically
8 discussed by the Court in that
9 decision. The Court noted in dealing
10 with the naked envelope or the lack of
11 a privacy envelope situation that there
12 was no express sanction in the code for
13 a failure to enclose the ballot within
14 a privacy envelope.

15 But the court said the statute
16 dealing with privacy envelopes has to
17 be read together with this statute,
18 which says if there's a stray marking
19 on the outside that identifies the
20 elector or the elector's affiliation,
21 et cetera, the ballot shall be set
22 aside and declared void.

23 THE COURT: And once they did
24 that they concluded that, indeed, if
25 there was no envelope, even though the

1 statute didn't say it, it had to be, it
2 had to be set aside, right?

3 MR. GORDON: That is correct.
4 Reading those two statutes together
5 also construing and looking to the
6 constitutional prerogative for a secret
7 ballot and the importance of secrecy
8 and confidentiality of the ballot, the
9 Court said it's beyond dispute what the
10 legislature intended here.

11 THE COURT: Beyond cavil, I
12 think. I don't have it affirmatively,
13 but I think they said beyond cavil.

14 MR. GORDON: They did. Yes,
15 they did. They said it's very clear
16 what the legislative intent was reading
17 those statutes together, considering
18 the Constitution, considering the
19 importance, the compelling interest in
20 ballot secrecy that's at stake.

21 THE COURT: Do they also -- I
22 believe they also said -- and to me I
23 thought it was the defining -- they
24 talk about directory versus mandatory.
25 Is that right?

1 MR. GORDON: They did, Your
2 Honor.

3 THE COURT: In fact, in both
4 of the Pennsylvania Supreme Court cases
5 they talk about the overriding policy
6 that a voting statute should not -- you
7 know, that the rules and the
8 requirements -- this is my language,
9 not theirs. Their language is much
10 more eloquent. But you don't -- we're
11 not going to knock somebody's vote out
12 because of some hyper-technicality.
13 That's abundantly clear. You shouldn't
14 do that unless there is a mandatory
15 provision of the code, right?

16 MR. GORDON: Yes. That is
17 exactly right. The Court said, and
18 this is echoing what the Supreme Court
19 has said multiple times before, that
20 ballots containing minor irregularities
21 should only be stricken for compelling
22 reasons.

23 THE COURT: Right. And the
24 minor should be something that didn't
25 have mandatory language in it. Because

1 didn't they say that once you have the
2 mandatory language, it's clear then
3 that it is something that is mandatory
4 and needs to be followed? Isn't that
5 exactly what they said?

6 MR. GORDON: What they said,
7 and again, if we're still talking about
8 the same case here --

9 THE COURT: Please.

10 MR. GORDON: -- the
11 Pennsylvania Democratic Party case. My
12 understanding of what they said is they
13 did do the analysis that Your Honor
14 suggests, the analysis of mandatory
15 versus directory. And they said that
16 the distinction between the two turns
17 on the consequence of noncompliance.
18 So if the consequence of noncompliance
19 is mandated by statute, as it is in
20 3146.842, that's clearly mandatory
21 language.

22 THE COURT: Well, hold it,
23 hold it. I want to make sure that
24 we're both on the same page there.

25 MR. GORDON: Sure.

1 THE COURT: The one statute,
2 and I don't have them all in front of
3 me. So I'm sorry to do it this way.
4 But the one that you said earlier if
5 someone dies, there's a provision that
6 tells you the vote gets tossed?

7 MR. GORDON: Correct.

8 THE COURT: In the one with
9 the naked ballot, the mandatory
10 requirement does not include a
11 provision that says the vote gets
12 tossed?

13 MR. GORDON: That's correct.
14 And that's why --

15 THE COURT: But they said
16 because there is a -- you shall put the
17 ballot in the envelope, then the
18 envelope has to get stuck -- then the
19 envelope, the naked -- you can't use a
20 naked ballot. You have to have the
21 secrecy envelope because of the word
22 *shall*. That's the way I read it. I
23 think this is what the language said.
24 I have something right here. It says
25 here: Thus, in determining -- now,

1 they use it in terms of the
2 requirements for a ballot declaration
3 are set forth in 3146.6(a), (absentee
4 ballots), and Section 3150.16(a)
5 (mail-in -- that's mail hyphen in,
6 ballots), in parens, period. Both
7 sections require that the elector,
8 quote, "fill out, date and sign the
9 declaration." And then they cite edict
10 and they give the citation for it.

11 Then they say: Thus in
12 determining whether the declaration is,
13 quote, "sufficient," unquote, for a
14 mail-in or absentee ballot at
15 canvassing, the County Board is
16 required to ascertain whether the
17 declaration on the return envelope has
18 been filled out, dated and signed.

19 I'm sorry. I just pulled the
20 wrong case. This was the case on
21 whether or not the Commonwealth had to
22 -- after they concluded that they
23 weren't properly signed, whether or not
24 they had to do a comparison, and they
25 said, no, we don't have to compare the

1 language. I apologize. That was the
2 language from the other case as opposed
3 to the one -- but your case -- but your
4 case and the other case, the one you're
5 talking about now -- I probably don't
6 have -- let me just see.

7 Fortunately, I have people who
8 work with me that regularly keep me
9 organized. When I make explosions of
10 paper, they're able to sort through
11 them and get the right one back in
12 front of me.

13 I think you know what I'm
14 referring to, I think.

15 MR. GORDON: I do, Your Honor.

16 THE COURT: And so -- hang on.
17 I may have found it right here. This
18 is the one. I believe this is where it
19 says: Accordingly, we hold that the
20 secrecy provision language in
21 Section 3150.16(a) is mandatory, and
22 the mail-in elector's failure to comply
23 with such a requisite by enclosing the
24 ballot in the secrecy envelope renders
25 the ballot invalid.

1 That's the language, right?

2 MR. GORDON: That's correct,
3 Your Honor.

4 THE COURT: And they find that
5 their holding in the appeal of Pierce
6 leads to the inescapable conclusion
7 that a mail-in ballot that is not
8 enclosed in the statutorily-mandated
9 secrecy envelope must be disqualified.
10 But the requirement to disqualify is
11 not in the statute.

12 MR. GORDON: It's not in the
13 statute, Your Honor.

14 THE COURT: But, on the other
15 hand, in the example you gave me with
16 the dead voter -- I should be very
17 careful here -- I'm thinking of a Monty
18 Python joke. Sorry.

19 But in the case of someone who
20 has filled out their ballot and then
21 passes before the vote is taken -- or
22 before the Election Day, the statute
23 specifically deals with that and says
24 that vote is disqualified.

25 MR. GORDON: The ballot shall

1 be rejected. Just as the statute that
2 talks about a stray, an identifying
3 mark on the privacy envelope. And I
4 think that's really the more relevant
5 --

6 THE COURT: Okay.

7 MR. GORDON: -- standing here
8 for our discussion.

9 THE COURT: All right.

10 MR. GORDON: That does say
11 that the ballot -- the envelope and the
12 ballot inside shall be set aside and
13 declared void.

14 The Pennsylvania Supreme Court
15 in its analysis in the Pennsylvania
16 Democratic Party case, it's very clear
17 that the word *shall* is not the end of
18 the inquiry. It's just the beginning
19 of the inquiry for the Court.

20 The Court has three pages of
21 analysis about whether the shall
22 directive regarding secrecy envelopes
23 is mandatory or discretionary. And the
24 Court does not say because it says
25 shall, it is mandatory. The Court

1 instead looks at that the language,
2 then looks at the statute that we were
3 just discussing about how ballots that
4 arrive with identifying marks must be
5 set aside and declared void and
6 considers the Constitutional issue of
7 ballot secrecy. And the Court says in
8 light of all that, it's clear that the
9 legislative intent here was to make it
10 so that the ballot secrecy is
11 protected. And that is the compelling
12 interest that the Court identifies in
13 that case. And they say: A failure to
14 enclose the envelope -- excuse me --
15 the ballot inside the privacy envelope
16 undermines that compelling interest.

17 So, here, to disqualify and
18 disenfranchise these Bucks County
19 voters, Petitioner needs to establish
20 either that there's an express
21 consequence in the Election Code.
22 They've not done that. Or that there
23 is a compelling interest that would be
24 undermined if these ballots were
25 counted. And Petitioner has not

1 identified any such compelling
2 interest. Indeed, Petitioner has
3 admitted --

4 THE COURT: Well, let me stop
5 you for a second. Because, by the way,
6 much of what you're saying, I
7 completely agree with what you're
8 saying. The idea of throwing out these
9 ballots because of the date is not
10 something that I think -- or maybe it's
11 a -- I would not be able to defend
12 other than it's the law, the logic or
13 the fairness of throwing out the
14 ballot. Let's be clear.

15 And I'm -- it's my job right
16 now to apply the law as I read it with
17 ice water in my veins, and I do feel
18 I'm very capable of applying the law
19 with ice water in my veins. And the
20 consequences are secondary when it's a
21 pure question of law.

22 I don't think there's any
23 discretion here for me. I think this
24 is an issue -- well, there may be other
25 issues. But in the interpretation of

1 the law, it's strictly an
2 interpretation of the law. And I have
3 to tell you, as I read those two -- you
4 understand my thought process, I think,
5 at this point because I've talked about
6 the language. I talked about it this
7 morning during our conference. And I'm
8 focusing on exactly this point you're
9 talking about. And you're saying that
10 the Court went on and they said the
11 decision is not just based on the word
12 *shall* alone. I think you're right
13 there, but, boy, that word *shall* sure
14 made a big point. As I was looking at
15 it I was wordsmithing some of the
16 language of the Court, pulling out this
17 phrase or that phrase, and then looking
18 and going like, boy, I can't reconcile.
19 I mean, they gave me -- it seems to me
20 they gave me a formula and with that
21 formula, it looks to me like if a --
22 they're saying the date is a mandatory
23 provision.

24 Let me add another piece to
25 that. Is there any legal document that

1 you know of that you sign that doesn't
2 require a date on it? I mean, who --
3 what do you -- what do you sign
4 anywhere, any time that doesn't have a
5 date on it?

6 Now, you have facts in the
7 record which make it abundantly clear
8 that these ballots were, in fact,
9 signed in the time provision in which
10 they had to be signed, that the vote
11 was taken in secret because of the
12 declaration, you know, that the act of
13 signing the ballot and so on were all
14 done within that time period. And, so,
15 the piece that I look at -- and I go
16 like -- and in the Board of Elections
17 -- and I call it a decision. I don't
18 know what you want to call it. But
19 they say, you know, we know that the
20 vote was signed in this period of time.
21 I agree. I find as a fact right now
22 that these votes were all signed.

23 Furthermore, based on upon
24 your stipulation of facts, I find as a
25 fact there is no evidence that there is

1 anything wrong about these ballots,
2 other than some of them have no date on
3 them.

4 Now, where I would -- now, the
5 fact that those ballots that have no
6 date on them, to me, I'm having trouble
7 seeing why they shouldn't be knocked
8 out for the reasons in those two cases
9 and because of the logic that I'm
10 saying, applying the same rationale.
11 And I'm saying to the Supreme Court,
12 look, if it's your position that in
13 your language, your own language that
14 I'm misreading it or something is
15 wrong, tell me. But when I read it, I
16 have a hard time getting around that
17 language.

18 I will say, however, I don't
19 agree with the idea -- if my language
20 and my interpretation is correct --
21 let's assume it is for a moment. Let's
22 assume once I got one thing right. I
23 then would say that if someone puts a
24 half a date in, like some of the ones
25 you just showed me, you got October,

1 they didn't fill in the day, you know,
2 the day that they did it and they got
3 the year in or if they didn't have the
4 year on it, I'd be -- if you said to
5 me: Oh, that's a date. I'd go like,
6 yeah, it's a date; complies. It's a
7 date.

8 I mean, I guess what would be
9 a bigger problem, but it's not in front
10 of me, would be if the date said
11 January 2nd, 1827. You'd go like, oh,
12 ah, that's so obviously -- you know,
13 and it's in perfectly clear script,
14 what is this person trying to tell me?
15 You know, I might throw that one out
16 saying: I think this person's like
17 thumbing their nose at me and they're
18 saying I didn't do this on the proper
19 date, and maybe that's what they're
20 trying to tell me. So maybe you throw
21 that one out. But on the other ones,
22 if it was illegible but a date was
23 given of some kind, you know, I think
24 maybe what I'd do is I'd turn around
25 and say, okay, you're objecting to

1 this, Mr. Objector, you say this is not
2 valid. Why?

3 And they say, well, because --
4 obviously, because of the date it was
5 obviously done at a different time.
6 I'd say, no. The totality of the
7 evidence shows it was done, and a date
8 was given. You might like more of the
9 information.

10 Now, having said that now that
11 I, of course, find an issue that other
12 people didn't find, and I have law
13 clerks that have probably said to me
14 keep your voice shut. Why do you do
15 this?

16 But I, but I don't have the --
17 I have no remedy, I don't think, based
18 on the record. And the record is
19 closed, folks. The record is closed.
20 Because to disenfranchise people who
21 did date it but it was incomplete, to
22 me I don't think is valid under my
23 logic. I think you would have had --
24 to have been other evidence to show
25 that there was something invalid.

1 So I have a bucket of 1,000 --
2 more than 1,000 votes that I'm
3 suffering through because of that
4 dilemma. And you're welcome to tell me
5 more -- you're telling me if I go back
6 to the law and really study it and go
7 back to your brief, I'll be able to see
8 your wisdom that the whole issue of the
9 date doesn't really count despite what
10 the Supreme Court says, despite what
11 I'm focused on.

12 MR. GORDON: If I may, several
13 points, Your Honor.

14 THE COURT: Yes.

15 MR. GORDON: So I think Your
16 Honor's discussion of the partial date
17 given versus the absence of any date
18 helps illustrate the point that there
19 is no compelling reason for these
20 ballot envelopes to have a date on
21 them.

22 THE COURT: Okay. Now, let me
23 say this. Let's suppose you and I --
24 and I agree with you on that. I
25 totally agree with you on, but that has

1 nothing to do with the legal analysis.
2 Because the legal analysis, did the
3 General Assembly think it had some
4 compelling reason?

5 It's not for me to override or
6 rewrite the law. It's not for me to --
7 and the Supreme Court specifically said
8 it's not for them, it's not for me to
9 overwrite -- override their compelling
10 -- it just seems to me that the
11 language in the statute -- and let's go
12 back where the language says under
13 3150.16. It says: The elector shall
14 then fill out, *shall* then fill out,
15 date and sign the declaration printed
16 on such envelope.

17 Now, you agree that they have
18 to sign it, right?

19 MR. GORDON: Yes, Your Honor.

20 THE COURT: And you agree that
21 it should be tossed out if it's not
22 signed, right?

23 MR. GORDON: I believe that
24 the Board made the decision to
25 invalidate ballots that were not signed

1 and --

2 THE COURT: And it wouldn't
3 shock you if I threw it out because it
4 wasn't signed? But they already threw
5 them out because it wasn't signed,
6 right?

7 MR. GORDON: That's correct.

8 THE COURT: So the only -- so
9 following that provision on the, the
10 one on signing, well, why is it that
11 the signing becomes so important? Why
12 should they be thrown out?

13 MR. GORDON: I think the
14 distinction here is that the signature
15 does serve a compelling purpose. The
16 signature is the voter's -- there is a
17 declaration above the signature and the
18 voter by signing it is affirming the
19 contents of the declaration. And that
20 is a compelling purpose.

21 But if I may go back, Your
22 Honor.

23 THE COURT: Please.

24 MR. GORDON: This notion that
25 because it says *shall*, it's mandatory

1 and it requires invalidation and
2 disenfranchisement, that -- I don't see
3 the support for that in the
4 Pennsylvania Supreme Court decisions
5 that we're talking about.

6 Those decisions do talk about
7 a statutory language. As Miss
8 VanderKam indicated this morning, it's
9 dicta, and that issue was not before
10 them. The issue is not just about what
11 the statute says about shall sign and
12 date, the issue for Your Honor is what
13 is the consequence of not dating the
14 ballot envelope? Is the consequence
15 invalidation and disenfranchisement?
16 And that's why what the Pennsylvania
17 Supreme Court did in the Pennsylvania
18 Democratic Party case is so relevant
19 here.

20 Again, the Court did not stop
21 the analysis with looking at 3146.6
22 noting that it said shall and then
23 saying because it says shall, it's
24 mandatory and the lack of a privacy
25 envelope means invalidation. That is

1 not what the Court did at all.

2 Again, the Court looked at
3 other statutes to determine the
4 legislative intent and the legislative
5 intent of preserving the secrecy and
6 the confidentiality of the ballot. And
7 they said because -- again, beyond --
8 because that intent was beyond cavil
9 that it was the compelling reason for
10 the requirement in 3146.6 for a privacy
11 envelope. And they said that
12 compelling reason in ballot secrecy
13 would be undermined if the ballots were
14 not enclosed in those envelopes. And,
15 for that reason, they concluded that
16 the language in 3146.6 with respect to
17 privacy envelopes was mandatory, not
18 because it said *shall*. That was just
19 the beginning of the inquiry, not the
20 end of the inquiry.

21 Your Honor asked whether I was
22 aware of anything -- any signature that
23 was effective without a date --

24 THE COURT: That's a quote I
25 said. But it's good enough. I mean, I

1 don't mind you giving me that because
2 I'm sure there are lots of situations
3 where a signature could be given that
4 would be valid without a date. There
5 are, absolutely. I'm just saying as a
6 matter of course, is there any legal
7 document that you know of that doesn't
8 have a place for a signature? But go
9 ahead.

10 MR. GORDON: Well, I think
11 there -- you're certainly right that
12 most legal documents have a place for a
13 date. Again, the question is if the
14 date is not inputted, does that render
15 that signature invalid?

16 And I certainly don't want to
17 represent that I am familiar with the
18 whole array of different situations in
19 which that might arise. But I think
20 there are situations in which a
21 document that is signed but not dated
22 -- contracts, for example, where that
23 contract is still valid because it was
24 signed even if not dated.

25 THE COURT: I agree with you.

1 MR. GORDON: So, again, the
2 question is: Is there a compelling
3 reason that would be undermined if
4 these ballots were counted? And
5 Petitioner --

6 THE COURT: Now, let me just
7 say this. If there it was the
8 legislature's decision that was
9 compelling, it would be up to them --
10 and it's not for me to say is it
11 compelling.

12 Isn't the better question:
13 Did the legislature consider it a
14 compelling issue? Or was that just a
15 -- was that language just sort of
16 surplus?

17 I mean, do you think the
18 legislature did not think the date was
19 compelling or you didn't think about
20 it? You think, they just like, you
21 know --

22 MR. GORDON: Well, I think if
23 we -- a couple things. One, again, and
24 not to beat a dead horse here, but the
25 Pennsylvania Supreme Court only

1 concluded that the legislature believed
2 that privacy envelope was compelling
3 after reviewing other sections of the
4 Code and the Pennsylvania Charter
5 regarding secrecy of envelopes. So
6 they did not conclude from the use of
7 the word *shall* that there was a
8 compelling interest.

9 Secondly, if we accept the
10 notion, and I do not, but if we do
11 accept the notion that any time the
12 legislature says shall, that means it's
13 a compelling interest, we would also
14 have to include that everything at
15 3146.6 --

16 THE COURT: Well, I knew when
17 I said that anytime the legislature
18 said shall, it's a mandatory as opposed
19 to -- not discretionary --

20 MR. GORDON: Directory?

21 THE COURT: Directory. Yes.
22 Meaning whether the language of the
23 statute is directing you to do
24 something as opposed to compelling you
25 to do something. And I, I don't know

1 that the language of the decision --
2 it's your position that even though a
3 statute says shall, it doesn't
4 necessarily mean you have to do it?
5 Isn't that what I have to find?

6 MR. GORDON: No, Your Honor.
7 And you can look back to the
8 Pennsylvania Democratic Party decision.
9 The position is that if it says shall,
10 it says that this is something that
11 you're supposed to do. I agree with
12 that.

13 The question here is the
14 consequence for noncompliance, and that
15 is what determines whether or not
16 something is mandatory or directory.
17 If shall was the beginning and end of
18 the inquiry, the Pennsylvania
19 Democratic Party decision would be
20 three pages shorter.

21 They -- the Supreme Court
22 would have said: It says shall enclose
23 in an envelope; they didn't enclose it
24 in an envelope, ballots get tossed.
25 Again, that's only the beginning of the

1 analysis for the Pennsylvania Supreme
2 Court.

3 Three pages later they finally
4 come to the conclusion that after
5 examining other sources to determine
6 the legislative intent and determine
7 whether the legislature believed this
8 to serve a compelling interest, only
9 then did they say this language is
10 mandatory or this is a mandatory
11 directive and the ballots must be
12 tossed.

13 And, again, importantly, that
14 was after looking at 3146.842, which
15 talked about if there is identifying
16 information on the ballot, the ballot
17 must be set aside and not counted.

18 Petitioners have identified
19 nothing in the Election Code and,
20 frankly, nothing else in support of the
21 notion that the legislative intent here
22 was that this was such a compelling
23 interest that a failure to provide a
24 date must lead to invalidation and
25 disenfranchisement.

1 Particularly, whereas here, as
2 Your Honor noted, the date is
3 immaterial because we know that these
4 ballots were completed and signed
5 between October 7th and November 3rd
6 and they timely arrive at the Board of
7 Elections.

8 You can imagine the scenario
9 in which the date might matter. Maybe
10 if the ballot had arrived after
11 November 3rd, during that three-day
12 period without a postmark. Then the
13 Board of Elections might look to the
14 date on the envelope to help determine
15 when the envelope was completed and the
16 voter signed the envelope. That's not
17 the issue here.

18 So the question has to be:
19 What is the compelling weighty interest
20 here? There is none, Your Honor. So
21 where we are is in the zone of what the
22 Pennsylvania Supreme Court has
23 previously called minor irregularities,
24 and the Court in the Bickhart case
25 said: Ballots containing mere minor

1 irregularities should only be stricken
2 for a compelling reason. That's what
3 we have here, minor irregularities and
4 no compelling reason.

5 The Court there also said that
6 they were refusing to read into the
7 statute an all-out prohibition where
8 one is not required, particularly given
9 the Commonwealth's longstanding policy
10 to protect the elective franchise.

11 The other case that is
12 relevant here -- or one other case that
13 is relevant here is the Wieskerger
14 appeal. That was the one that dealt
15 with the color of the ink. And this
16 one is particularly salient, Your
17 Honor, because 2d 3146.6 and the
18 analogous provision for mail-in ballots
19 also says that the elector shall in
20 secret proceed to mark the ballot only
21 in black led pencil, indelible pencil
22 or blue, black or blue-black ink in
23 fountain pen or ballpoint pen?

24 And the question there is: Is
25 that setting out a sufficiently

1 compelling interest that a failure to
2 mark the ballot in one of those
3 specific types of writing instruments
4 should lead to invalidation and
5 disenfranchisement? And the Court in
6 the Wieskerger appeal looked at that
7 issue and said: No. The power to
8 throw out a ballot for minor
9 irregularities should be sparingly used
10 and only for very compelling reasons.
11 And they found no very compelling
12 reason that a ballot marked in red or
13 green ink should be -- should be thrown
14 out and invalidated.

15 THE COURT: I'll have to go
16 back and look, but I thought that case,
17 also, they had language in it that they
18 said was directory and not mandatory,
19 but I could be wrong. And I thought
20 that was pivotal on that case. I
21 thought on that one -- I'm thinking off
22 the top of my head now, and I could
23 easily be wrong.

24 I thought that on that one
25 they said that the underlying language

1 requiring the blue versus green versus
2 red, whatever, was directory and not
3 mandatory.

4 MR. GORDON: And I agree with
5 Your Honor. The statute at issue was a
6 different statute than the statute
7 here. But I illustrate that because
8 both deal with these kind of minor
9 irregularities.

10 THE COURT: Believe me, I'm
11 focused on this directory versus
12 mandatory because we've got what I
13 would consider to be mandatory language
14 here. We don't have directory --
15 directitory (sic) language. That's a
16 weird verb, you know. So it's the
17 mandatory aspect of it that has me --
18 both in the Supreme Court's decision,
19 even though, arguably, it's dicta
20 because they included some other
21 things. But the problem is as soon as
22 they say you have to sign, they then
23 add the words sign and date. And they
24 don't say -- I mean, it's -- their
25 language in both the statute and in the

1 Supreme Court's decision, to me, is
2 mandatory; and, to me, I'm looking for
3 a basis to get a way around mandatory
4 language. And you're arguing to me to
5 go back and look at the Supreme Court's
6 decision and see and that I should then
7 be convinced that mandatory language
8 standing alone isn't a sufficient
9 analysis.

10 Can you think of a case where
11 they have said what you're saying, that
12 the mandatory language itself is not a
13 sufficient analysis, where they have
14 actually said even though it's
15 mandatory, you don't have to do it?

16 MR. GORDON: Well, two points,
17 Your Honor --

18 THE COURT: On anything. I'm
19 just thinking off the top of my head.
20 This is the first time I ever really
21 had to focus on this. I can't remember
22 a case off the top of my head where
23 there was mandatory language and the
24 Court said, I know it's mandatory, but,
25 you know, it's the legislature. Come

1 on, we don't listen to them anyway.
2 Sorry. Go ahead.

3 MR. GORDON: With respect,
4 Your Honor, I think that the issue is
5 not whether --

6 THE COURT: You've said this.
7 You're saying it's not the fact that
8 the mandatory language doesn't control,
9 right?

10 MR. GORDON: It's not
11 mandatory -- I don't -- I think using
12 the word *mandatory* to describe the
13 language is not what the Pennsylvania
14 Supreme Court does.

15 If the statute says shall,
16 that does not mean that it is mandatory
17 language. That's exactly what the
18 Supreme Court does in the Pennsylvania
19 Democratic Party case. They say, and
20 this is on Page 24 of the analysis,
21 they say the difference between a
22 mandatory and directory provision is
23 the consequence for noncompliance.

24 THE COURT: I know. I read
25 that. That, again, makes me more

1 nervous, but go ahead. And it goes on
2 to say --

3 MR. GORDON: Well, and the
4 point is, again --

5 THE COURT: Then it goes on to
6 say: If it's mandatory, the
7 consequence...

8 MR. GORDON: Right. But the
9 point is --

10 THE COURT: And we agree with
11 mandatory language here, right?

12 MR. GORDON: No.

13 THE COURT: We don't agree?

14 MR. GORDON: I think that's
15 the point of disagreement is that just
16 because it says shall, does not -- that
17 does not mean that it's mandatory under
18 the law as the Pennsylvania Supreme
19 Court has defined the distinction
20 between mandatory and directory.

21 THE COURT: Okay.

22 MR. GORDON: I think that's,
23 that's, maybe, the difference that we
24 have here.

25 THE COURT: No, I appreciate

1 that you -- all right -- you know, you
2 weren't coming here thinking that I
3 would be counting how many fairies were
4 on the head of a pin and then ask you
5 to count them with me. But I took it
6 the -- I took the word to be very
7 important in -- and maybe I -- maybe I
8 put too much emphasis on that word. I
9 don't know.

10 MR. GORDON: Well, again, I
11 think that the word shall is the
12 beginning of the inquiry, but not the
13 end of the inquiry here. And that's
14 what the Supreme Court did in the
15 Pennsylvania Democratic Party case.
16 They have language that said shall, but
17 then they went on and compared the
18 statute, other statutes, looked at the
19 Constitution, tried to determine what
20 was the legislative intent here.

21 Was there a compelling or
22 weighty interest that the legislature
23 was trying to further through this
24 *shall* language? And there they said,
25 yes, there is. And if we allow naked

1 ballots, it would undermine that
2 compelling reason.

3 So Petitioner here has the
4 burden to show not only that the
5 language says shall, but also that the
6 legislative intent of that language was
7 to further a compelling interest and
8 that allowing ballots without dates
9 written on the outer envelopes would
10 undermine that interest.

11 Petitioner has utterly failed
12 to identify either a compelling
13 interest or the fact that allowing
14 undated ballots would undermine that
15 interest, and that's the distinction
16 between mandatory and directory. Not
17 just the word *shall*, but the
18 legislative intent whether it has --
19 whether there's a compelling interest
20 or not.

21 The Bickhart case dealt with
22 language -- and it was a different
23 issue there, admittedly, Your Honor.
24 But there the language said that
25 somebody could write in the name of a

1 person who is not already printed on
2 the ballot for that office.

3 And, of course, the natural
4 reading of that statute is that if
5 somebody's name is already printed on
6 the ballot, you don't get to write them
7 in.

8 What happened? A number of
9 people wrote in the names of people who
10 were identified on the ballot. The
11 Court considered that, and the Court
12 said: We are not going to disqualify
13 those ballots despite what appeared to
14 be mandatory language about what you
15 can and cannot do there.

16 THE COURT: On that case -- on
17 that case you're saying they turned --
18 they said -- what you've just said
19 would contradict -- well, it would
20 really undercut my suggestion that the
21 Supreme Court is telling me that I have
22 to be very specific with *shall*. And I
23 don't remember in that case -- I'm
24 trying to remember. In that case that
25 you just cited, I don't remember it

1 turning quite like that on that
2 provision.

3 I remember them saying what if
4 I write it in? It was not inconsistent
5 with the requirement. That's how I
6 remember that case. But I would have
7 to go back and look at it.

8 MR. GORDON: And that's not my
9 understanding of the case, Your Honor.
10 My understanding is they said it
11 technically would be inconsistent with
12 the statute, but there's no, there's
13 nothing indicating that allowing that
14 would, you know, undermine a compelling
15 interest in preventing fraud or in
16 ballot secrecy.

17 And what the Court said
18 specifically there is: We refuse to
19 read an all-out prohibition into that
20 section where one is not explicitly
21 required, particularly given this
22 Commonwealth's longstanding policy to
23 protect the elective franchise. That
24 is what is at issue here is Petitioner
25 is asking this Court to read an all-out

1 prohibition or of the language that you
2 see elsewhere in the Code set aside and
3 not counted into Section 3146.6(a);
4 i.e., they're asking you to import into
5 that section the consequence for not
6 dating the ballot when that consequence
7 is not spelled out in that section or
8 in any other section of the Election
9 Code.

10 We talked mostly about the
11 ballots without dates, Your Honor. If
12 Your Honor would like to hear argument
13 on the others, much of it is similar.
14 There are, of course, some other --

15 THE COURT: I think all the
16 other ones fall under the category of
17 -- your other argument is that with
18 respect to all the other issues, there
19 is no language saying that they're
20 compelling, that to make that the
21 remedy would be rather Draconian, and
22 against the overriding principle that
23 you don't throw out ballots for some
24 minor irregularity.

25 MR. GORDON: That argument

1 applies, I think, with equal force to
2 each of these categories, Your Honor --

3 THE COURT: Okay. But I --

4 MR. GORDON: The distinction
5 between those ballots that lack a name
6 or an address, if there is a
7 distinction, is that the statute, of
8 course, doesn't say shall fill out name
9 or address.

10 THE COURT: Right.

11 MR. GORDON: The unsealed
12 privacy envelopes, I understand that
13 Petitioner is still challenging those.
14 And I think a couple points are worth
15 making with respect to those.

16 THE COURT: Sure.

17 MR. GORDON: First, as you
18 heard in the testimony today, there is
19 no -- the Board could not determine
20 whether the elector had, in fact,
21 sealed the privacy envelope and it had
22 become unsealed during transit or with
23 the passage of time, or the elector
24 never sealed the privacy envelope in
25 the first place.

1 And Your Honor's question
2 about what type of envelopes these
3 were, whether they were ones you lick
4 or moisten or pull off, I think, was
5 important because I think we've all had
6 the experience of thinking we licked an
7 envelope enough, only to see it later
8 unseal itself.

9 So, as a factual matter -- and
10 Petitioner has the burden here. This
11 is an abuse of discretion standard of
12 review. As a factual matter,
13 Petitioner cannot establish that the
14 electors at issue did not seal those
15 envelopes.

16 And then as a statutory
17 matter --

18 THE COURT: Well, let me just
19 say this. Whether he could or not,
20 there's been no evidence offered on
21 that point, and the record is bare --
22 I'm not saying this is not a shot at
23 the Petitioner or counsel for the
24 Petitioner at all or is some weakness
25 in his -- in what he has done on behalf

1 of his client. That's not at all the
2 case. But the record is bare of any
3 evidence that the envelopes weren't
4 sealed; they weren't, you know, sealed
5 by the elector. They came -- they
6 weren't sealed when they were received,
7 but whether or not the person had
8 licked it or done something to seal it,
9 there's no evidence one way or the
10 other on that in the record as far as
11 I'm concerned.

12 MR. GORDON: I think that's
13 right. I mean, I --

14 THE COURT: I think that goes
15 right to the language of the statute.
16 Because the statute says he has to fold
17 it, put it in the envelope, seal the
18 envelope and, you know -- securely seal
19 the envelope, it says.

20 MR. GORDON: Well, what it
21 says, and this may be important, I
22 think the factual question resolves the
23 issue. But just to be clear, what the
24 statute says is: Fold the ballot,
25 enclose and securely seal the same in

1 the envelope. It actually doesn't say
2 that the envelope has to be sealed. It
3 says that the ballot has to be sealed
4 in the envelope. And it goes on to
5 then --

6 THE COURT: You read that to
7 say -- you read that to say one could
8 interpret that language to mean the
9 securely sealed means it's securely
10 sealed within the outer envelope?

11 MR. GORDON: Well, it goes --
12 there's another piece of the statute
13 that talks about the outer envelope and
14 it uses different --

15 THE COURT: No. But I'm
16 saying your argument here is one could
17 read that statute to mean that the
18 securely sealing means that the secrecy
19 ballot is securely sealed within the
20 other envelope?

21 MR. GORDON: No, Your Honor.
22 I think what the statute says is
23 enclose and securely seal the same in
24 the envelope on which is printed,
25 stamped or endorsed official election

1 ballot. So it has to be securely --
2 this says that it has to be securely
3 sealed in the inner privacy envelope,
4 but it doesn't say the inner privacy
5 envelope has to be sealed.

6 The same statute later goes on
7 to say that this envelope shall then be
8 placed in the second one, the outer
9 envelope, such envelope shall then be
10 securely sealed. So it does say that
11 the outer envelope has to be securely
12 sealed, but it doesn't say the inner
13 envelope.

14 You can imagine that what it
15 means to securely say seal the same in
16 the envelope. That's not entirely
17 clear what that means. And so we
18 interpret that using the principles
19 from the Pennsylvania Supreme Court
20 about the goal being to enfranchise,
21 not to disenfranchise.

22 So somebody might reasonably
23 think that that language means that
24 they put the privacy envelope -- excuse
25 me -- put their ballot in the privacy

1 envelope and then just fold the flap in
2 and not actually, you know, lick the
3 envelope and seal it down.

4 So as a statutory matter and
5 as a factual matter, Petitioners have
6 not shown that those ballots should be
7 discarded and invalidated.

8 With respect to the name and
9 the address, the arguments applicable
10 to date apply, but with even more force
11 because there is nothing in the statute
12 saying you shall put in your name and
13 your address.

14 But, again, just circling back
15 to the date, Your Honor --

16 THE COURT: You can. I'm
17 laughing at myself. I promise you, I'm
18 laughing at myself when I think how
19 frustrating it must be to argue in
20 front of me, but go ahead.

21 MR. GORDON: It's not
22 frustrating all, Your Honor. It's a
23 pleasure, and I thank you for allowing
24 me to appear in your --

25 THE COURT: That's not true.

1 He doesn't think that at all, but go
2 ahead.

3 MR. GORDON: I have the bible
4 right here, if you want --

5 THE COURT: Don't touch that.
6 Don't touch that. Go ahead.

7 MR. GORDON: Just, again, Your
8 Honor, the statute says shall sign and
9 date. We don't dispute that. The
10 question is what is the consequence for
11 not dating? And that answer cannot
12 come just from looking at the words
13 shall sign and date.

14 Following what the
15 Pennsylvania Supreme Court has done,
16 it's a broader inquiry into the
17 legislative intent and whether that
18 language *shall date* serves a compelling
19 interest that would be undermined by
20 allowing ballots that were not dated.
21 No such interest has been identified;
22 certainly no interest at all, let alone
23 a compelling interest. And for that
24 reason, Your Honor, those ballots
25 should be allowed along with the

1 others.

2 THE COURT: Thank you.

3 MR. GORDON: Thank you.

4 THE COURT: All right. Now,
5 yes, I was just going to say I so
6 apologize to you. We're going to take
7 a break for the stenographer.

8 * * *

9 (A brief recess was taken.)

10 * * *

11 THE COURT: Mr. Hoover.

12 MR. HOOVER: Your Honor, is
13 there any preference for the
14 categories? Would you like to address
15 them in any order?

16 THE COURT: No. And you
17 really don't -- I'm not -- I don't want
18 to be rude because you spent your time,
19 your clients' -- you know, you want to
20 get your word in, but don't have to
21 repeat everything that I've just been
22 told. And I recognize that an awful
23 lot of what you are prepared to say and
24 discuss has already been said. But I
25 am going to say to you, you don't have

1 to go through the whole thing again.
2 But, please, any order you want to go.

3 MR. HOOVER: All right, Your
4 Honor, I will address some of the
5 categories very briefly then.

6 Category 2 and 3, I agree with
7 Mr. Gordon. There's no statutory
8 provision that says these don't have to
9 be on the declaration on the front of
10 the mail-in ballot. So for the reasons
11 that Mr. Gordon said, I would adopt his
12 arguments in that regard. And absent a
13 statutory provision that says it has to
14 be there consistent with the cases that
15 we discussed in the Election Code that
16 there was -- there is not a basis to
17 strike down those votes for the fact
18 that they're not there.

19 For the unsealed secrecy --
20 the unsealed secrecy envelopes,
21 Category 5, again, I agree with
22 Mr. Gordon's arguments in that regard.
23 There's no evidence of record for any
24 of those as to the condition which they
25 left the voter. And that's the statute

1 -- that's what the statute, the statute
2 looks at.

3 Whether it was sealed at the
4 time it was placed in the declaration
5 -- in the outer envelope and mailed
6 back. The condition it was when
7 received by the Board of Elections
8 isn't dispositive of the other, and
9 there's no evidence that would suggest
10 all of those were unsealed at the time
11 they were placed in the envelope. Even
12 if they were, Your Honor, I would
13 suggest that because the secrecy of
14 those votes is not at issue because
15 they were all within the secrecy
16 envelope; then the secrecy is preserved
17 as well and there's not a basis to
18 invalidate those votes.

19 As to the date issue, Your
20 Honor --

21 THE COURT: By the way, I
22 don't think your voice is coming over
23 the sound system.

24 MR. HOOVER: Is it?

25 THE COURT: Now it is.

1 MR. HOOVER: I'll take a step
2 closer.

3 THE COURT: Okay. Or you can
4 pull the mic over --

5 MR. HOOVER: It's a habit this
6 past year of staying -- stepping away
7 from things instead of stepping toward
8 things, but...

9 THE COURT: Okay.

10 MR. HOOVER: For the date,
11 date issue, if I could draw your
12 attention again to the Pennsylvania
13 Democratic Party versus Boockvar case,
14 and specific -- and I think -- and
15 because it's a recent case, I'm not
16 sure if the page numbers or the ones
17 I'm looking at are the same as yours,
18 but I have it at 380. Towards the end
19 of the provision there has to -- of the
20 provision that deals with the secrecy
21 ballots that we were just discussing.

22 When looking at the issue of
23 the secrecy ballots and determining
24 whether or not that language was
25 mandatory for purposes of the Election

1 Code. And looking at it through the
2 case law that we already discussed
3 through the lens that when possible
4 that the statute should try to be
5 interpreted in a way that doesn't
6 disenfranchise the voter.

7 So the Court in looking
8 through the appeal of Pierce case,
9 which was also a case in which it was
10 determined that it was enough of an
11 issue to invalid a vote. And that was
12 a third party bringing absentee ballots
13 to the Board of Elections under the old
14 law.

15 So what the Supreme Court said
16 in the Boockvar case was that even
17 absent an express sanction. So the
18 condition that Mr. Gordon was talking
19 about where the Election Code doesn't
20 say what happens when this provision's
21 not followed. Even absent an express
22 sanction where legislative intent is
23 clear and supported by a weighty
24 interest, like fraud prevention, it
25 would be unreasonable for (sic) render

1 such a concrete provision ineffective
2 for want of deterrent or enforcement
3 mechanism.

4 What we learn from that
5 decision is that violations of the
6 mandatory statutory provisions that
7 pertain to integral aspects of the
8 election process should not be
9 invalidated sub silentio for want of a
10 detailed enumeration of consequences.

11 So, one of the points Your
12 Honor made is -- or the question that
13 Your Honor said was how can I use --
14 looking at the weighty governmental
15 interest. How can I use that to get
16 around the word *shall*?

17 And my position, and the way I
18 look at the case, Your Honor, is that
19 point of inquiry isn't something to
20 look at to get around the word shall.
21 It's something that the Supreme Court
22 says you have to look at in addition to
23 the word shall.

24 It says that when the
25 legislative intent is clear and

1 supported by a weighty interest, like
2 fraud prevention, that's when we can
3 think about invalidating a vote -- a
4 vote. It says that when there's a
5 mandatory statutory provision that
6 pertains to integral aspects of the
7 election process. It adds something on
8 top of the *shall* that has to be
9 considered. So instead of there being
10 a test and the test being the word
11 *shall*, the test is it says shall, and
12 also that there is a weighty interest
13 that is in play. That is the reason
14 why the legislature put it there.

15 And I think when we look at
16 legislative intent, what they mean by
17 it, it's not that the legislature
18 intended it to be there, of course the
19 legislature intended it to be there.
20 It was voted on. I mean, it was -- you
21 know, it says name, it says signature
22 and date. That's what it says in the
23 statute. The question is would the
24 legislature intend the remedy to be the
25 person's vote doesn't count?

1 And specific to election law
2 cases in itself, Your Honor, I think
3 that that connect between that there's
4 a violation of a statute and the vote
5 doesn't count. It's a bigger hurdle
6 than just because it says shall. And I
7 think that's what the Supreme Court
8 articulated specifically in that, in
9 that case.

10 And with that, I agree with
11 the rest of Mr. Gordon's points on that
12 issue.

13 THE COURT: Thank you.

14 MR. HOOVER: I would ask and,
15 in addition, I believe that the
16 solicitor's office has it. The
17 Philadelphia Court of Common Pleas
18 issued an opinion that upheld date --
19 I'm sorry. That when there was a date
20 that was not on the ballot, the
21 Philadelphia Court of Common Pleas said
22 that the ballot still should be
23 counted.

24 I don't have that specific
25 order in my possession. I believe that

1 the solicitor's office does. I would
2 just ask that they provide that to the
3 Court for your consideration. But
4 because I've looked at it -- I don't
5 happen to have a physical copy in my
6 hands, but I believe that analysis maps
7 out exactly the analysis this Court can
8 follow to still be compliant with the
9 Boockvar case and also uphold these
10 thousand-plus votes of Bucks County
11 voters that when they filled out the
12 ballot and they returned it, they did
13 everything they could to have it
14 counted.

15 The final issue I would ask
16 the Court's indulgence to talk about is
17 the issue with the mismatched
18 addresses. As I created a little bit
19 of a record, there were 64 ballots that
20 were not counted by the Board of
21 Elections because of a mismatched
22 address.

23 That appeal brought the
24 mismatched addresses before the Court.
25 And that decisions was made yesterday,

1 so technically any party would have
2 until tomorrow to appeal that decision.

3 I don't know if it's putting a
4 square peg in a round a hole to bring
5 that before the Court right now, but
6 any decision you render on it, I would
7 actually specifically say that is not
8 before the Court so I am not estopped
9 from bringing that later if my clients
10 so choose.

11 THE COURT: The 64 what?

12 MR. HOOVER: The 64 votes. I
13 want to make sure that issue is
14 protected. If Your Honor believes it
15 is before you based on the Petitioner,
16 I am happy to address that with you
17 right now. But if --

18 THE COURT: Well, I don't
19 think it is because I think -- if that
20 could have been discarded, I think
21 counsel for Petitioner said, no, we're
22 not challenging that. They're reducing
23 the number of the challenges. They're
24 not -- they've removed 64 from their
25 count and said, no, okay. I think

1 that's right, and so I think you're
2 fine.

3 MR. HOOVER: Okay.

4 THE COURT: All right. Thank
5 you.

6 MR. HOOVER: That's all I
7 have, then. Thank you.

8 THE COURT: Okay.

9 Miss VanderKam, did anyone
10 leave anything for you?

11 MS. VANDERKAM: Not much, Your
12 Honor, but I do want to hammer a few
13 points home, if you will indulge me.

14 THE COURT: Please.

15 MS. VANDERKAM: Your Honor, I
16 do not think you need to have ice cold
17 water in your veins to agree with the
18 way the Board of Elections handled this
19 matter. I don't think -- I think you
20 absolutely have discretion.

21 I understand that you're
22 troubled by the fact that the statute
23 says shall, but I'm here to reaffirm
24 what Mr. Gordon and Mr. Hoover stated
25 to you in their arguments that shall

1 does not necessarily equal mandatory.
2 And you can see that directly in the
3 Pennsylvania Democratic v. Boockvar
4 case, as Mr. Gordon stated. If it was
5 as simple as the statute saying you
6 shall -- the statute does say that you
7 shall place the ballot in the secrecy
8 envelope. But that wasn't the end of
9 the inquiry.

10 The only reason why the
11 Supreme Court stated that we're going
12 to toss those ballots is because the
13 legislature specifically stated in a
14 different section of the Election Code
15 that that was the consequence.

16 There is no corresponding
17 section in the Election Code for the
18 issue of a failure to provide a date on
19 the declaration. You won't find it
20 because it's not there.

21 And so I think what you're
22 left with is a directory statute that
23 says fill out, sign and date. But
24 there is no consequence in the statute
25 that says that a board has to throw

1 those out or a court has to throw those
2 out.

3 In fact, the legislature
4 delegated to each of the county boards
5 the discretion to determine whether or
6 not these declarations were sufficient.
7 That's specifically in 3146.8. That
8 discretion is delegated to the Board.
9 They acted upon that discretion, and
10 this Court has the ability to determine
11 whether or not in the failure to
12 include a date or any of these other
13 categories rises to the level of
14 something that should be strictly
15 enforced.

16 And what you'll find in
17 Supreme Court case law is that the only
18 Election Code provision that should be
19 strictly enforced is the one that is in
20 place to prevent fraud. And you have a
21 stipulation from all parties that fraud
22 is not an issue here. And so I think
23 what you are left with is absolutely
24 the ability and the discretion to say
25 that the failure to add a date --

1 THE COURT: Are you suggesting
2 that it would be up to -- my discretion
3 is to make this decision as opposed to
4 following the law?

5 MS. VANDERKAM: What I'm
6 suggesting to you, sir, is that the law
7 doesn't say that these types of ballot
8 -- envelope ballots should be thrown
9 out. The legislature clearly knows how
10 to write that type of statute because
11 they have in 3146.6(a) --

12 THE COURT: So that it would
13 not be in my discretion to throw them
14 out? You're not suggesting that, I
15 don't think. I think you're suggesting
16 that -- I don't mean to step on what
17 you're saying. But, to me, this is not
18 a discretionary decision for me. For
19 me, this is not for a discretion. For
20 me, I'm to apply the law.

21 And the challenge, I think, by
22 the Petitioner is not that anyone
23 abused their discretion, it's that they
24 did not follow the law. That's the way
25 I look at it and that's the way I've

1 been looking at it all along, is this
2 is purely a legal decision, not a
3 discretionary situation.

4 When I said I have ice water
5 in my veins, I was saying to you I
6 certainly have the fortitude to throw
7 out the ballots if I find that it's
8 legally necessary. And the reason for
9 the ice water was this is not about
10 what's nice or what's good or what's
11 bad, it's a matter of following the
12 law. And I think, on the other hand,
13 what you're saying is the law has more
14 heart than I'm suggesting it might
15 because of my interpretation of the
16 statute.

17 MS. VANDERKAM: You're right
18 on, Your Honor. And I want to give you
19 as much support for that as possible.
20 And so what I would say is the
21 legislature clearly knows how to
22 indicate when ballots should be thrown
23 out. They did that in 34 -- 3140 --
24 sorry -- 3146.6. They said: If it is
25 in an envelope that has markings on it

1 that reveal a voter's identity, you
2 have to throw that out.

3 They know how to write that
4 statute. They did not write such a
5 statute for failure to date a
6 declaration, even though they, clearly,
7 could have. And so that's why when
8 Mr. Gordon's talking about the
9 Pennsylvania Democratic Party Boockvar
10 decision in those three pages where the
11 Supreme Court really struggled with
12 whether or not this is mandatory or
13 directory language. They have to say
14 that it's mandatory only because there
15 is that section in the Election Code
16 that says you have to throw these out.
17 But that section is not anywhere else
18 in the Election Code with regards to
19 date. And so, therefore, because the
20 Code doesn't specifically tell all of
21 the county boards you have to throw
22 these out, then what you're left with
23 is each county has to make sufficiency
24 determinations. And that authority was
25 given to those boards in the statute.

1 And so they have exercised
2 that discretion by rendering this
3 decision, and I -- and I don't see how
4 -- well, I think that's a good place
5 for a period on that remark.

6 What I also want to bring to
7 your attention is there are several
8 cases where the Pennsylvania Supreme
9 Court has examined the word *shall* in
10 the Election Code, and they have -- for
11 example, the red pen case.

12 THE COURT: Right.

13 MS. VANDERKAM: That language
14 said: You shall mark in red -- in blue
15 or black ink. And the Court looked at
16 that and it determined -- and let me
17 just pull the language, sir -- that
18 that was not a sufficient reason to
19 throw out a voter's ballot who the --
20 considered to be a minor irregularity.
21 And throwing out the ballot should be a
22 -- that power should be exercised very
23 sparingly and with the idea in mind
24 that voters should not be
25 disenfranchised except for compelling

1 reasons, such as fraud. And you don't
2 have that on this record.

3 So I think you absolutely can
4 lean on what the Pennsylvania Supreme
5 Court has done in other cases when
6 faced with the word *shall*. And they
7 still look to whether or not these
8 minor irregularities, technicalities,
9 in honoring those technicalities should
10 trump the intent of the voter and the
11 ability for that voter to cast these
12 votes.

13 THE COURT: Okay. By the way,
14 when the transcript gets written
15 whether or not it should trump the
16 ability of the voter to cast votes, I
17 think that's spelled like small t as
18 opposed to a capital T.

19 MS. VANDERKAM: Your Honor, I
20 will hand up to you -- that was very
21 funny. I will hand up to you two
22 orders that were issued by the
23 Philadelphia Court of Common Pleas --

24 THE COURT: Has counsel had a
25 chance to see them? I mean, there are

1 other cases, so it's preferable for me
2 to see them, but I want to make sure
3 that he gets a copy of them as well.

4 MS. VANDERKAM: Yes, I do have
5 other copies that I can provide to him.
6 I will hand these up, and I will also
7 say that the Court had to deal with the
8 same language that you're toiling with
9 in making those decisions and found
10 that the word *shall* was directory, not
11 mandatory, did not require these votes
12 to be cast aside.

13 THE COURT: Those are orders
14 or the opinion?

15 MS. VANDERKAM: Only orders
16 were issued, Your Honor.

17 THE COURT: Okay. Ill accept
18 it for what it's worth. I mean, I
19 don't know to -- obviously, I have to
20 read it to see what it -- but if it's
21 another court of common pleas, you
22 know, handling the same issue, it would
23 certainly be reasonable for me to
24 review their logic or their argument,
25 and so I'm going to accept it for that

1 reason.

2 MS. VANDERKAM: If you will
3 indulge me one more -- two more
4 minutes.

5 THE COURT: Yes.

6 MS. VANDERKAM: I want you to
7 think -- I know you don't take this
8 decision lightly, but I do think it is
9 helpful to understand the life cycle of
10 a ballot. If you're Suzie Smith in
11 Levittown and you've applied for a
12 mail-in ballot, you filled out all the
13 paperwork that you needed to do to do
14 that. You received it. You filled it
15 out and you followed the instructions
16 on the envelope that say sign it,
17 enclose it in your privacy envelope;
18 you return it on time. You printed
19 your name, you printed your address,
20 you signed it. Your name is on the
21 envelope twice. And we are going to
22 say that, sorry, we're going to throw
23 it out because it doesn't have a date.

24 I don't think that that's what
25 the Election Code has in mind. I do

1 not think that the Election Code should
2 be a game of gotcha, where we're
3 looking for reasons to disenfranchise
4 voters. That's all.

5 THE COURT: Thank you.

6 Counsel, I'm sorry we don't
7 have time.

8 MR. HENRY: Fair enough.

9 THE COURT: Come on up here.
10 I can't help but note that you have a
11 whole swarm of attorneys, at least that
12 have entered their appearance, on your
13 side and then, I guess, you had the
14 very shortest straw and they forced you
15 to come be in front of me, so...

16 MR. HENRY: Yeah, it's funny
17 how that worked out.

18 THE COURT: Yes.

19 MR. HENRY: So with the
20 Court's indulgence, I actually prefer
21 to read the statement I prepared.

22 THE COURT: That's fine. Let
23 me just warn you when you do read,
24 people oftentimes read faster and speak
25 less clearly than when they're not. So

1 the stenographer wants to record what
2 you say, and because you're reading it,
3 I'll hold off interrupting you -- I'll
4 try to hold off interrupting you. But
5 if you'd like to go ahead and read, I
6 just ask that you do so as clearly as
7 you can into microphone.

8 MR. GORDON: Counsel, I
9 apologize. I'm sorry to interrupt. Is
10 there a way to maybe draw the blind
11 over there.

12 * * *

13 (A brief discussion was held
14 off the record.)

15 * * *

16 THE COURT: Thanks. Go ahead.

17 MR. HENRY: So I'd like to
18 read a blurb from a Philadelphia Common
19 Pleas Court case from 1964 In Re:
20 Canvass -- so I'd like to start by
21 reading a blurb from a Philadelphia
22 Common Pleas Court from 1964 titled:
23 In Re: Canvass of Absentee Ballots of
24 April 28, 1964. Absentee voting has
25 consistently been regarded by the

1 Pennsylvania Courts as extraordinary
2 procedure for which the safeguards of
3 the ordinary election process are
4 absent.

5 As such, it constitutes an
6 extension of the right to vote, that
7 is, a privilege to exercise the
8 franchise in a particular manner. In
9 extending the privilege of utilizing
10 the absentee ballot, the legislator
11 very properly provided safeguards to
12 ensure that the exercise of this
13 privilege of utilizing the exercise --
14 excuse me -- of utilizing the absentee
15 ballot -- the legislature very properly
16 provided safeguards to ensure that the
17 exercise of this privilege would not be
18 abused either directly or indirectly,
19 inadvertently or maliciously.

20 In quote, "There is little
21 room for argument that the provisions
22 of the law regarding absentee voting
23 have must be strictly construed and the
24 rights created thereunder not extended
25 beyond the plain and obvious intention

1 of the act.

2 "Accordingly, the statutory
3 requirements for the proper casting of
4 an absentee ballot are not mere
5 technicalities but are substantive in
6 nature and are mandatory; thus, the
7 court must give strict interpretation
8 of the letter of electoral act as well
9 its spirit."

10 The procedural requirements
11 set forth in the Act are, it must be
12 securely -- the ballot must be securely
13 sealed, filled out, dated and signed.
14 And this is clear and unequivocal
15 language, and it was reiterated by the
16 Pennsylvania Supreme Court less than a
17 month in Boockvar's King's petition.

18 The Supreme Court stated the
19 requirements for ballot declaration are
20 set forth in Sections 3146.6(a) for
21 absentee ballots, and
22 Section 3150.16(a) for mail-in ballots.
23 Both sections require that the elector
24 fill out, date and sign the
25 declaration.

1 Thus, in determining whether a
2 declaration is sufficient for mail-in
3 or absentee ballot in canvassing, the
4 county board is required to ascertain
5 whether the declaration on the return
6 envelope has been filled out, dated and
7 signed.

8 These requirements are not
9 discretionary but mandates, and a
10 mandate without a consequence is no
11 mandate at all. However, in order to
12 follow the rationale that the
13 Respondents are putting forth, the
14 Court must accept, despite the clear
15 mandate of the Code, that while sign
16 means sign but shall doesn't actually
17 mean shall, date doesn't actually mean
18 date, fill out doesn't actually mean
19 fill out and securely seal doesn't
20 actually mean securely seal.

21 The picking and choosing in
22 this interpretation is at odds with the
23 clear language of the Code -- excuse me
24 -- of the Code in its interpretation of
25 the courts in this Commonwealth. That

1 is, in order for the vote to be
2 counted, a voter should securely seal
3 the official election ballot and should
4 fill out date and sign the declaration.

5 I'm open for questions, Your
6 Honor.

7 THE COURT: Have you focused
8 on, in terms of before coming in here
9 -- maybe I shouldn't ask it that way.
10 Do you care to comment on my
11 questioning of counsel in terms of
12 mandatory versus directory language?
13 Do you care to comment on that
14 discussion at all?

15 MR. HENRY: No, Your Honor.

16 THE COURT: Okay. Fine.
17 Thank you. Thank you for your
18 presentation. I will say to you I
19 appreciate the manner in which this has
20 been conducted by you. Thank you.

21 Does anyone else have anything
22 else they would like to say? I think
23 that usually I give the Petitioner the
24 last word, but I would oftentimes say
25 if his comments touched on something

1 you weren't able to touch on, I would
2 give you an opportunity to speak up. I
3 don't see why that would be necessary
4 here, but... all right --

5 MR. GORDON: May I address one
6 point, Your Honor?

7 THE COURT: You may.

8 MR. GORDON: Petitioners'
9 comments are telling. Petitioner cites
10 to you and read extensively to you from
11 a case from this Court of Common Pleas
12 in 1964 which reflects, I submit, an
13 outdated view of absentee voting. But
14 even more telling than what Petitioner
15 said is what he said at the end, what
16 Petitioners' counsel said at the end.
17 He said that there is clear language
18 that must be followed about fill out,
19 sign and date, and then he said: In
20 order for the vote to be counted.

21 That is a critical point here,
22 Your Honor, because that language, in
23 order for the vote to be counted, is
24 nowhere in the statute. And that is
25 what Petitioner would have you read

1 into the statute that you have to fill
2 out, sign and date in order for the
3 vote to be counted. It's not there.
4 And because it's not there, Your Honor
5 should follow the law absolutely, but
6 what the law says according to the
7 Pennsylvania Supreme Court in the
8 Boockvar case, Pennsylvania Democratic
9 Party case: Is there a compelling
10 interest? Is there something that is
11 so essential to the integrity of the
12 Election Code that noncompliance
13 justifies disqualification of the
14 ballot?

15 Petitioner has not identified
16 any interest, let alone --

17 THE COURT: Counsel, you're
18 repeating yourself now. Thank you. I
19 appreciate it.

20 MR. GORDON: Thank you, Your
21 Honor.

22 THE COURT: I'll give you the
23 last word if you have anything else you
24 want to say behind him. You don't have
25 to, but if you'd like to.

1 MR. HENRY: I think it's a
2 legal argument and we've stated the
3 Code.

4 THE COURT: Okay. I
5 appreciate that. All right. Then I'm
6 going to accept the arguments made by
7 counsel. I appreciate the work that
8 you did to pull this together. I think
9 you did an extraordinarily good job
10 making a record that's clear, that will
11 expedite my getting the decision out
12 for you.

13 I appreciate the respectful
14 way you have treated each other and the
15 help you provided the Court. So I will
16 close the record, and my decision will
17 be coming out very soon. Thank you.

18 MR. GORDON: Thank you, Your
19 Honor.

20 MR. HENRY: Thank you, Your
21 Honor.

22 MR. HOOVER: Thank you, Your
23 Honor.

24 MS. VANDERKAM: Thank you.

25 THE COURT: Are there any time

1 issues that you want to bring to my
2 attention in terms of how quickly my
3 decision needs come out?

4 MS. VANDERKAM: Your Honor,
5 the County is required to do what's
6 called a first signing today. And so
7 we intend to do that. It requires us
8 to report all the numbers, and we
9 intend to put an asterisk next to this
10 issue.

11 THE COURT: Fine.

12 MS. VANDERKAM: If you were to
13 give us something sooner, that would be
14 great, but if that is not in the cards,
15 then we'll just proceed in that manner.

16 THE COURT: I think you need
17 to proceed in that manner. I don't
18 think it would be fair to the situation
19 to not proceed in that manner. So you
20 proceed in that manner, and I will --
21 but I will get my decision out very
22 quickly.

23 Thank you all.

24 MR. HENRY: Thank you, Your
25 Honor.

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MR. GORDON: Thank you, Your
Honor.

* * *

(The record was closed.)

* * *

C E R T I F I C A T E

1
2
3
4 I hereby certify that the
5 proceedings, evidence and rulings are contained
6 fully and accurately in the stenographic notes
7 taken by me in the above cause, and that this
8 document is a true and correct transcript of
9 same.

10
11
12 _____
13 Joanne I. Luongo, RPR

14 Dated: _____
15
16

17 The foregoing record of the
18 proceedings upon the hearing of the above cause
19 is hereby approved, certified and directed to be
20 filed.
21
22

23 _____
24 The Honorable Robert O. Baldi, Judge

25 Dated: _____

Exhibit E



County of Bucks

BOARD OF ELECTIONS and REGISTRATION COMMISSION
Administration Building, 55 East Court Street, Doylestown, PA 18901
Election - (215) 348-6154 - Registration - (215) 348-6169

Board of Elections

DIANE M. ELLIS-MARSEGLIA, LCSW
ROBERT J. HARVIE, JR.
GENE DIGIROLAMO

THOMAS A. FREITAG
Director
JOSEPH J. KHAN, ESQ.
Solicitor

**WRITTEN DECISION OF BOARD OF ELECTIONS DETERMINATIONS PURSUANT
TO 25 P.S. § 3146.8(g)(3)**

WHEREAS, pursuant to 25 P.S. § 3146.8(g), the Board of Elections convened its pre-canvass meeting on Tuesday, November 3, 2020 at 7 a.m. to pre-canvass the mail-in and absentee ballots received by the electors of Bucks County; and

WHEREAS, at the close of the polls on Tuesday, November 3, 2020 at 8 p.m. the Board continued to canvass the mail-in and absentee ballots; and

WHEREAS, on November 7, 2020, during the course of the canvass meeting of mail-in and absentee ballots, and in the presence of any and all interested Authorized Representatives who were provided an opportunity to present argument to the Board of Elections, the Board of Elections met to determine whether certain Declarations on the envelopes of certain ballots were “sufficient” pursuant to the authority granted to the Board in 25 P.S. § 3146.8(g)(3); and

WHEREAS, the Board of Elections is guided by the authority set forth by the Pennsylvania Supreme Court in *Appeal of James*, 105 A.2d 64, 65-67, wherein the Court held: “The power to throw out a ballot for **minor irregularities** . . . must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons. * * * ‘The purpose in holding elections is to register the actual expression of the electorate's will’ and that ‘computing judges’ should endeavor ‘to see what was the true result.’ There should be the same reluctance to throw out a single ballot as there is to throw out an entire district poll, for sometimes an election hinges on one vote.” *Appeal of James*, 105 A.2d 64, 66 (Pa. 1954)(emphasis added).

Further, the Board is guided by the Court’s holding that ‘[e]lection laws will be strictly enforced to prevent fraud, but ordinarily will be construed liberally in favor of the right to vote. All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor. Where the elective franchise is regulated by statute, the regulation should, when and where possible, be so construed as to insure (sic) rather than defeat the exercise of the right of suffrage. Technicalities should not be used to make the right of the voter insecure. No construction of a statute should be indulged that would disfranchise any voter if the law is reasonably susceptible of any other meaning.’ 29 C.J.S., Elections, § 7, p. 27, *citing Appeal of James*, 105 A.2d 64, 65-66 (Pa. 1954).

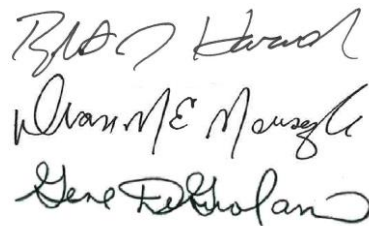
NOW, THEREFORE, in consideration of the foregoing and after review of Declarations on the ballot envelopes as presented on November 7, 2020, the Bucks County Board of Elections hereby finds as follows:

1. With regard to any Declarations on ballot envelopes that do not include the elector's signature, which currently number 110, the Board finds that failure to include a signature renders the ballot insufficient, and therefore those ballots shall not be canvassed.
2. With regard to any Declarations on ballot envelopes that either lack a date or have a partial date, which currently number 1,196, the Board takes note that no mail-in or absentee ballots were mailed out to electors earlier than October 7, 2020, and that all ballots at issue were received by the Board on or before November 3, 2020 at 8 p.m. In light of the certainty that all ballots at issue were completed between October 7, 2020 and November 3, 2020 at 8 p.m., the inclusion of the date on the Declaration is not necessary. The Board finds there is no compelling reason to throw out these ballots and disenfranchise these voters for minor irregularities. Therefore, any Declaration that either lacks a date or has a partial date is hereby deemed to be sufficient, and therefore those ballots shall be canvassed.
3. With regard to any Declarations on ballot envelopes where the elector failed to either print their name and/or print their address on the envelope, which currently number 644, the Board takes note that: a) the elector's name and address are already printed on the envelope on a label located approximately 1 inch below the Declaration; b) the elector still signed the Declaration; and c) the envelope contains a reminder to the elector to *only* sign the Declaration and place the ballot within the secrecy envelope. *See* attached ballot envelope at Exhibit "A." The Board hereby finds that an elector's failure to either print a name and/or address is a mere irregularity, and that this omission is not fatal to the elector's ballot. Therefore, the Board deems any Declarations that either lack a printed name and/or address as sufficient and directs that same shall be canvassed.
4. With regard to any Declarations on ballot envelopes where the elector only provided a partial address on the envelope, which currently number 86, the Board hereby deems these Declarations to be sufficient for the reasons afore-stated, and directs that those ballots shall be canvassed.
5. With regard to any Declarations on ballot envelopes where the elector's printed name does not match the name on the label located on the envelope, which currently number 13, the Board hereby finds that these Declarations are insufficient and directs that those ballots shall not be canvassed.
6. With regard to any Declarations on ballot envelopes where the elector's printed address does not match the address on the label located on the envelope, which currently number 246, the Board hereby directs the Board of Elections staff to research whether these electors

have mailing addresses different from their residential addresses in the SURE system, to further guide the Board in its decision.

7. With regard to two Declarations that are from the same household where the voters therein appear to have inadvertently signed one another's Declarations, the ballots therein shall not be canvassed; and with regard to a Declaration that is partially damaged but is still partially legible, the Board hereby deems same to be sufficient and directs that it shall be canvassed.
8. During the pre-canvass and canvass it was determined that 708 electors failed to place their ballots within a secrecy envelope, thereby rendering them what has been termed "naked." The Board hereby finds that these ballots shall not be canvassed.
9. During the pre-canvass and canvass it was determined that 69 electors enclosed their ballots within the secrecy envelope, but at the time of opening it was determined that the secrecy envelope did not appear to be sealed. Pursuant to the Pennsylvania Supreme Court's holding in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020), and the "conclusion that a mail-in ballot that is not enclosed in the statutorily-mandated secrecy envelope must be disqualified" the Board finds that since these ballots were enclosed within their privacy envelopes and the privacy of the ballots therein was maintained (and that the Board lacks any basis for determining whether these envelopes became unsealed through no fault of the elector) these ballots shall be canvassed.
10. During the pre-canvass and canvass it was determined that 28 secrecy envelopes had stray marks thereon. Upon review by this Board, 21 of these secrecy envelopes contained writings that revealed the elector's identity, and therefore shall not be canvassed, pursuant to Section 3146.8(g)(4)(ii). Seven (7) of these ballots reflected stray marks that did not identify the elector, their candidate preference or their political affiliation, and therefore the ballots therein shall be canvassed.
11. In accordance with the above directives, the Board directs that the ballots be canvassed forthwith.

Date: November 7, 2020


Ryan Howard
William M. Moseley
Gene F. Holman