

IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. ___ EAL 2020

IN RE: CANVASSING OPERATION

APPEAL OF: DONALD J. TRUMP for PRESIDENT, INC., Plaintiff

**EMERGENCY PETITION FOR ALLOWANCE OF APPEAL
BY DEFENDANT THE CITY OF PHILADELPHIA
BOARD OF ELECTIONS**

Emergency Petition for Allowance of Appeal from the Order of the Commonwealth Court entered November 5, 2020, at No. 1094 CD 2020, Reversing The Order Of The Honorable Judge Stella Tsai, In The Court Of Common Pleas Of Philadelphia County, Dated November 3, 2020, at November Term, 2020 No. 07003

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

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

November 5, 2020

TABLE OF CONTENTS

INTRODUCTION1

COUNTER-STATEMENT OF THE CASE3

 A. Procedural History4

 B. Factual History5

REASONS FOR GRANTING ALLOWANCE OF APPEAL.....10

 A. The Challenged Access Regulations Were Issued by the Board Pursuant to Its Broad Discretionary Authority Under the Election Code10

 B. As the Court of Common Pleas Correctly Held, the Board’s Access Regulations Comply With the Applicable Statutory Requirement13

 C. The Election Code Does Not Allow Candidates, Parties, or Their Representative to Make *Any* Time-of-Canvassing Challenges20

 D. Plaintiff Has No Access Rights Beyond What the Express Terms of the Election Code Provide22

 E. The Court of Common Pleas’ Decision Is Consistent With Decisional Authority24

CERTIFICATION OF COMPLIANCE WITH RULE 1115(f)29

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Baer v. Meyer</i> , 728 F.2d 471 (10th Cir. 1984).....	22
<i>Commonwealth v. \$23,320.00 U.S. Currency</i> , 733 A.2d 693 (Pa. Commw. Ct. 1999).....	11
<i>Cotz v. Mastroeni</i> , 476 F. Supp. 2d 332 (S.D.N.Y. 2007)	22
<i>Donald J. Trump for President, Inc. v. Boockvar</i> , No. 20-966, --- F. Supp. 3d ----, 2020 WL 5997680 (W.D. Pa. Oct. 10, 2020).....	14, 22
<i>Donald J. Trump for President, Inc. v. Boockvar</i> , No. 20-966 (W.D. Pa. filed Sept. 23, 2020)	13
<i>Election Integrity Project Cal. Inc. v. Lunn</i> , No. 56-2020-00540781 (Cal. Super. Ct. filed Sept. 15, 2020).....	25, 26
<i>Gentex Corp. v. W.C.A.B. (Morack)</i> , 23 A.3d 528 (Pa. 2011).....	11
<i>Gwynedd Dev. Grp., Inc. v. Dept. of Labor & Indus.</i> , 666 A.2d 365 (Pa. Commw. Ct. 1995).....	10, 11
<i>Harris v. Conradi</i> , 675 F.2d 1212 (11th Cir. 1982).....	22
<i>Kraus v. Cegavske</i> , No. 20 OC 00142 1B (Nev. Dist. Ct. filed Oct. 29, 2020)	23, 24, 25
<i>Kraus v. Cegavske</i> , No. 82018 (Nev. filed Nov. 3, 2020).....	25

<i>In re November 3, 2020 General Election,</i> No. 149 MM 2020, --- A.3d ----, 2020 WL 6252803 (Pa. Oct. 23, 2020)	20, 21
<i>Otter v. Cortés,</i> 980 A.2d 1283 (Pa. 2009)	10
<i>Pa. Democratic Party v. Boockvar,</i> No. 133 MM 2020, --- A.3d ----, 2020 WL 5554644 (Pa. Sept. 17, 2020)	22
<i>Republican Party of Pa. v. Cortés,</i> 218 F. Supp. 3d 396 (E.D. Pa. 2016).....	22
<i>Rogele, Inc. v. Workers’ Comp. Appeal Bd.,</i> 969 A.2d 634 (Pa. Commw. Ct. 2009)	18
<i>SEPTA v. City of Phila.,</i> 159 A.3d 443 (Pa. 2017)	18
<i>Turchi v. Phila. Bd. of License & Inspection Review,</i> 20 A.3d 586 (Pa. Commw. Ct. 2011)	18
STATUTES	
25 P.S. § 2602(a.1).....	13
25 P.S. § 2642.....	9
25 P.S. § 2642(f).....	9
25 P.S. § 2642(g)	9
25 P.S. § 2650.....	2
25 P.S. § 3146.8.....	2, 3, 21, 26
25 P.S. § 3146.8(g)(3).....	20
25 Pa. Stat. § 2602(q.1).....	13
25 Pa. Stat. § 2641	9
25 Pa. Stat. § 2650	12

25 Pa. Stat § 2687	12
25 Pa. Stat § 3050	12
25 Pa. Stat. § 3146.8(b).....	passim
25 Pa. Stat. § 3146.8(g)(1.1)	13, 15, 18, 21
25 Pa. Stat § 3146.8(g)(2)	13, 15, 18, 21
25 Pa. Stat. § 3146.8(g)(4)(ii)	17
Act of December 11, 1968, No. 375, § 8, § 1308(e), 1968 Pa. Laws. 1183, 1200	19, 20

RULES

Pa. R. App. P. 1114.....	1
--------------------------	---

OTHER AUTHORITIES

Pa. Dept. of State, Supplemental Results Dashboard, available at https://www.votespa.com/About-Elections/Pages/Counting-Dashboard.aspx/	8
---	---

INTRODUCTION

Petitioner-Defendant -- the Philadelphia County Board of Elections (the Board or the City) – asks this Court to accept emergency review to consider the Commonwealth Court’s decision of first-impression.

Specifically, on November 5, 2020, the Commonwealth Court reversed the trial court and ruled that the Board was required, contrary to their highly discretionary determination, to permit representatives of Plaintiff Donald J. Trump for President, Inc. (Plaintiff) to conduct closer inspection of the City’s ballot canvassing procedures at the Pennsylvania Convention Center. (The Commonwealth Court Order is attached as hereto as Exhibit A.)

We recognize that a petition for allowance of appeal is appropriate “only when there are special and important reasons therefor.” Pa. R. App. P. 1114. Here, because Commonwealth Court is wrong, and because it jeopardizes both the safety of the City Defendants’ canvass, plus the privacy of voters, immediate allowance of appeal is warranted.

Opinions Below

The Common Pleas Opinion and Order (Exhibit B) is attached hereto. The Commonwealth Court opinion is forthcoming.

Order In Question (Exhibit A)

AND NOW, November 5, 2020, upon review of arguments contained in briefs submitted by Donald J. Trump for President, Inc. (Appellant), the Philadelphia County Board of Elections, and the Pennsylvania Democratic Party, it is hereby ORDERED that the November 4, 2020 order of the Court of Common Pleas of Philadelphia County (trial court) denying Appellant's oral motion to allow closer observation of the canvassing of ballots is REVERSED. The matter is REMANDED to the trial court to enter an ORDER no later than 10:30 a.m. today, November 5, 2020, effective immediately, requiring that all candidates, watchers, or candidate representatives be permitted to be present for the canvassing process pursuant to 25 P.S. § 2650 and/or 25 P.S. § 3146.8 and be permitted to observe all aspects of the canvassing process within 6 feet, while adhering to all COVID-19 protocols, including, wearing masks and maintaining social distancing. Opinion to follow.

/s/ Christine Fizzano Cannon
Christine Fizzano Cannon, Judge

Controlling Question of Law

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

Answer below: No; Suggested Answer: Yes

COUNTER-STATEMENT OF THE CASE

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

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

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

A. Procedural History

At 7:45 a.m. on Election Day, November 3, 2020, Plaintiff first brought this action in the Election Court of the Court of Common Pleas of Philadelphia County, challenging the location of observers in Philadelphia's ballot processing facility. Plaintiff then withdrew the action without prejudice and waited until 9:40 P.M., to raise the issue again. Plaintiff did not allege that anything about the observers' location changed in the intervening 13 hours.

Plaintiff presented one witness in the renewed proceeding, a lawyer for the Trump campaign who was observing the ballot-counting process at the Philadelphia Convention Center. Election Court Judge Stella Tsai heard testimony and argument from the Board and the Pennsylvania Democratic Party. Based on this evidence and argument, Judge Tsai denied Plaintiff's Petition, holding that the Board had complied with requirements under 25 P.S. § 3146.8. For reasons Plaintiff has not explained, it then waited another 12 hours, until the afternoon of November 4, 2020, to appeal to Commonwealth Court. Later that night, Judge Christine Fizzano Cannon held a status conference.¹

¹ Commonwealth Court scheduled a telephonic status conference that began at 7:00 p.m. on November 4, 2020. During the conference, Plaintiff asked the Court to issue an order setting a deadline of 9:00 a.m., November 5, 2020, for the filing of Plaintiff's brief. Because Plaintiff did not file papers below, and because this appeal raises important legal issues that require extensive briefing, the Board's counsel requested a short amount of time to review Plaintiff's brief before filing a (footnote continued on next page)

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

On November 5, 2020, Commonwealth Court (per Judge Fizzano Cannon) reversed, requiring the City to allow Plaintiff to move within 6 feet of all of the City's canvassing operations.

B. Factual History

Philadelphia County's pre-canvass and canvassing operation is being conducted in Hall F at the Philadelphia convention center. Tr. at 20:22-21:2 (the transcript is attached to Plaintiff's Commonwealth Court Brief). This is a massive operation; since 7:00 a.m. on Election Day, the Board of Elections has been reviewing, opening and counting more than 350,000 mail-in and absentee ballots, as well as processing election returns from in-person polling sites. This endeavor

responsive brief. At approximately 9:12 p.m. on November 4, 2020, this Court issued an Order requiring the parties to file simultaneous briefs by no later than 8:00 a.m. the following morning. In light of this briefing schedule, any issues, arguments, or requests for relief that Plaintiff did not squarely raise and develop in the Court of Common Pleas should be deemed waived and forfeited.

requires a great deal of space, because of the physical volume of the ballots involved and the need to ensure social distancing protocols among the facility's hundreds of workers. Because of the need for staff to circulate unimpeded and the security and privacy concerns involved with handling ballots, the Board cannot permit outsiders to wander freely through this workspace. Accordingly, the Board has set up a location from which candidates and party representatives, potentially in large numbers, can view the room without impeding the operation.

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

Mr. Mercer admitted that, from his vantage point in the room where pre-canvassing and canvassing occurs, he was able to perceive the full sweep of the Board's operation at the Convention Center. This operation is taking place in a "very, very large hall" that is "divided width wise into four discrete sections for the four discrete processes." Tr. at. 21:25-22:1-5. Each process is conducted in a section, some of which contain roughly 35 tables. Tr. at 22:14, 24:1-25:1. Behind those sections are areas for the storage and sorting of ballots as well as processing

and receiving stations for the ballots. Tr. at 22:3-5. A waist-high crowd-control fence, with metal vertical pickets with spaces between each, separates the observers from the workers. Tr. at 25:5-10. Despite the scale of this operation, Mr. Mercer testified that he was able to walk back and forth across the width of the hall and watch the ballot envelopes going from beginning of the process all the way through the scanning of the ballots that are in the envelopes. Tr. at 21:7-12.

Mr. Mercer said the first section had three rows about fifteen tables deep. Tr. at 21:20-25. His vantage point, which he estimated to be between fifteen and eighteen feet from the first table, allowed him to observe the envelope review process. Tr. at 27:9-19. He could see these workers take ballot envelopes out of one tray, look at the back of the envelope where the declaration is located, and then either place them in a different tray or back in the initial tray. Tr. at 27:9-19. He stated that the workers were looking at the back of the ballot envelopes, but that he was not able to see what was written on the envelopes. Tr. at 27:9-19. Each subsequent table was approximately five to six feet behind the previous one, depth-wise. Tr. at 24:1-5. Each worker sat approximately six feet from any other worker, but could occasionally be shoulder to shoulder with a supervisor who may have been called over. Tr. at 25:23-26:11.

In the next section, Mr. Mercer was able to observe what he labeled as the “extraction stage”. Tr. at 28:12-21. He described watching a very quick process in

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

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

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

It is important to note that Plaintiff's complaints about distance come during a pandemic, during which hundreds of workers are operating in shifts, 24 hours a day, to complete the processing of over 350,000 ballots as efficiently and safely as possible. See Pa. Dept. of State, Supplemental Results Dashboard, available at <https://www.votespa.com/About-Elections/Pages/Counting-Dashboard.aspx/>

REASONS FOR GRANTING ALLOWANCE OF APPEAL

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

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

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

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

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

be substituted for administrative discretion.” *Id.* at 370.

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

As shown below, there is no basis for disturbing the Court of Common Pleas' determination that the Board's access regulations were a permissible exercise of discretion that (a) respect candidates and political parties' their statutory right to be in the room where canvassing occurs while (b) taking account of the imperatives of ballot security, operational efficiency, voter confidentiality and safety.

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

As shown by the plain language of the Election Code, the Board's access regulations comply with the Code's requirements. In arguing that the Board's access restrictions are "inconsistent with law," Plaintiff has relied on two different statutory provisions. The first states that "[w]atchers shall be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded." 25 Pa. Stat.

§ 3146.8(b). The term "watchers" refers to people that, under the Election Code, candidates and political parties can appoint to, among other things, observe certain activities at polling places on election day. *See* 25 Pa. Stat. §§ 2650, 2687, 3050.

The second statutory provision states that "[o]ne authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots

are pre-canvassed” and “canvassed.” 25 Pa. Stat. § 3146.8(g)(1.1), (2).²

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

² “Pre-canvassing” is defined in the Election Code as “the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots.” 25 Pa. Stat. § 2602(q.1). “Canvassing” is defined as “the gathering of ballots after the final pre-canvass meeting and the counting, computing and tallying of the votes reflected on the ballots.” *Id.* § 2602(a.1). The primary if not exclusive distinction between the two is that pre-canvassing, because it takes place before the polls are closed, includes the counting but not “the recording or publishing of the votes reflected on the ballots.” *Id.* § 2602(q.1); *see also id.* § 3146.8(g)(1.1) (“No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.”).

Indeed, in his recent decision dismissing all of Plaintiff’s claims in that case, United States District Judge J. Nicholas Ranjan agreed that “[t]he Election Code provisions pertaining to the ‘pre-canvass’ and ‘canvass’ do not make any separate reference to poll watchers, instead referring only to the ‘authorized representatives’ of parties and candidates.” *Donald J. Trump for President, Inc. v. Boockvar*, No. 20-966, --- F. Supp. 3d ----, 2020 WL 5997680, at *25 (W.D. Pa. Oct. 10, 2020). As Judge Ranjan explained, that wording of the pre-canvassing and canvassing provisions—and, in particular, the *exclusion* of watchers from the pre-canvassing and canvassing meetings—reflected the legislature’s concern to protect the pre-canvassing and canvassing process from the risk of interference and encroachment (even if unintentional) by proxies of the candidates and parties:

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

Id. at 73 (citation omitted). Put simply, to the extent Plaintiff now seeks to argue that the “watcher” provision in 25 Pa. Stat. § 3146.8(b) applies to the Board’s access regulations governing pre-canvass and canvass meetings, those arguments

are (a) contrary to its earlier admissions and (b) simply wrong—as Judge Ranjan explained.

In any event, the Board’s regulations plainly do not violate either § 3146.8(g)(1.1), (2) *or* § 3146.8(b). As noted, the former requires only that “authorized representative[s]” of the candidates and parties “be permitted to remain in the room in which” the pre-canvassing and canvassing of absentee and mail-in ballots takes place. It is undisputed that the Board’s access regulation permits exactly that. Moreover, this is not case in which—to use the hypothetical example Plaintiff invoked below—the access to the room is illusory because there is a blanket or other barrier obstructing the representatives’ lines of sight. As set forth in the Court of Common Pleas’ well-supported factual findings, representatives can see the entire set up of the canvassing room, and can perceive “in detail the various stages of the process,” from the sorting and examination of the ballot envelopes, to the extraction of the inner secrecy envelope from the outer envelope (“including the separation of so-called ‘naked ballots,’ which do not have inner secrecy envelopes”), to the extraction of the ballot from the inner secrecy envelope, to the scanning of the ballots themselves. (Opinion at 2-4; *see supra* § III.B .)

In short, the evidence makes clear that candidate and party representatives can observe every portion of the prec canvassing and canvassing process. They can

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

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

The only record evidence of anything specific a candidate representative cannot do—but would like to do—under the current access regulations is to (1) read the declarations on individual envelopes so that the representative can make

his own determination of whether the individual declaration is “sufficient” and (2) determine whether individual secrecy envelopes bear markings that identify the voter, the voter’s political affiliation, of for whom the voter voted.³ (Tr. 37:19-38:11.) Even there, the representative witness conceded that he was able to see *that* the canvassing staff was examining individual declaration envelopes; he simply could not perceive what was written on those individual envelopes. (Tr. 37:13-18.)

The witness testified that he wanted access to that individual-ballot-envelope detail so that he could make his own assessment of whether each declaration was “sufficient” and, if he deemed it insufficient, make “an objection to th[e] processing of that ballot.” (Tr. 37:22-38:4.) In fact, as explained below, the Code does not permit *any* time-of-canvassing challenges or objections from candidates, parties, or their representatives. Independently, however, it is dispositive that nothing in §§ 3146.8(b) or 3146.8(g)(1.1), (2) require that representatives or watchers be given sufficient access to allow them to read the text printed on individual ballots. The General Assembly could, of course, easily have codified such a right. But it did not. It required only that candidate and party

³ See 25 Pa. Stat. § 3146.8(g)(4)(ii) (“If any of the [secrecy] envelopes ... contain any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.”).

representatives “be permitted to remain in the room in which the ... ballots are” pre-canvassed and canvassed, § 3146.8(1.1), (2), or, assuming *arguendo* that § 3146.8(b) applies, to “be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded.” Endorsing Plaintiff’s argument would require the courts to interpolate additional language into the statute that the Legislature did not see fit to add. It is well settled that such judicial legislation is improper. *See Rogele, Inc. v. Workers’ Comp. Appeal Bd.*, 969 A.2d 634, 638 (Pa. Commw. Ct. 2009) (“First and foremost, this Court is not authorized to engraft language onto a statute.”); *accord SEPTA v. City of Phila.*, 159 A.3d 443, (Pa. 2017) (Wecht, J., concurring) (“Should the General Assembly wish to enact such language, it may do so. We may not engraft such language onto a statute that lacks it through an act of judicial fiat.”).⁴

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

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

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

The relevant history begins with the 1968 amendments to the Code. Those amendments added language making clear that the *only* permissible grounds for challenging an absentee ballot during the canvassing process were those expressly identified in the canvassing provision itself. *See* Act of December 11, 1968, No. 375, sec. 8, § 1308(e), 1968 Pa. Laws. 1183, 1200 ("All absentee ballots not challenged for any of the reasons provided herein shall be counted and included with the general return of paper ballots or voting machines, as the case may be as follows.") At that time, the identified grounds for challenge were "(1) that the absentee elector is not a qualified elector; or (2) that the absentee elector was

within the county of his residence on the day of the primary or election during the period the polls were open, except where he was in military service or except in the case where his ballot was obtained for the reason that he was unable to appear personally at the polling place because of illness or physical disability; or (3) that the absentee elector was able to appear personally at the polling place on the day of the primary or election during the period the polls were open in the case his ballot was obtained for the reason that he was unable to appear personally at the polling place because of illness or physical disability.” *Id.*; see *In re November 3, 2020 General Election*, No. 149 MM 2020, --- A.3d ----, 2020 WL 6252803, at *13 (Pa. Oct. 23, 2020) (“Prior to the recent Code amendments,” “[t]here were three permissible grounds for challenge[.]”). Notably, insufficiency of the ballot-envelope declaration was not an identified basis for challenging an absentee ballot.

As our Supreme Court recently explained, “when the legislature first allowed for no-excuse mail-in voting in 2019, the legislature simultaneously reduced the bases on which canvassing challenges could be made by eliminating the present-in-his-municipality objection Then, in 2020, the legislature eliminated time-of-canvassing challenges *entirely* from Section 3146.8(g)(3).... Accordingly, the Election Code presently provides no mechanism for time-of-canvassing challenges by candidate or party representatives.” *In re November 3, 2020 General Election*, 2020 WL 6252803, at *14 (second emphasis added). The

Court further noted that the purpose for eliminating challenges was likely tied directly to the anticipated effect of no-excuse mail-in voting on the size and scope of the canvassing process: “Presumably, in expanding voting my mail, the legislature sought to streamline the process for canvassing such ballots, perhaps to avoid undermining the expansion effort by eliminating the prospect that voters—including a potentially large number of new mail-in voters—would be brought before the board or the courts to answer third-party challenges.” *Id.*

In sum, the Election Code does not allow party or candidate representatives to raise objections to the sufficiency of particular ballot envelopes or to make *any* other time-of-canvassing challenges. Accordingly, Plaintiff cannot avoid the plain text of § 3146.8(g)(1.1), (2) and § 3146.8(b)—which requires only that representatives “be permitted to remain in the room” or “be present” during canvassing—by arguing that representatives need to be within six feet of every canvasser to avail themselves of a statutory right to raise objections to the processing of particular ballots; no such right exists.

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

The Board keeps returning to the language of § 3146.8 of the Election Code because it alone is sufficient to require affirmance. Notably, Plaintiff does not dispute that any right of access it has to the canvassing room is solely a creation of statutory law—and its scope and limits are therefore defined by the Election

Code.⁵ Nor could Plaintiff reasonably dispute this. It is well established that there is no constitutional right to “poll watch.” Indeed, both the Pennsylvania Supreme Court and Judge Ranjan have so held in rejecting arguments advanced by Plaintiff. *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, --- A.3d ----, 2020 WL 5554644, at *30 (Pa. Sept. 17, 2020) (citing approvingly *Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 408, 415 (E.D. Pa. 2016)) (“there is no individual constitutional right to serve as a poll watcher; rather, the right to do so is conferred by statute”; nor does poll watching implicate anyone’s First Amendment rights); *Trump*, 2020 WL 5997680, at *72 (same); accord *Harris v. Conradi*, 675 F.2d 1212, 1216 n.10 (11th Cir. 1982); *Baer v. Meyer*, 728 F.2d 471, 476 (10th Cir. 1984); *Cotz v. Mastroeni*, 476 F. Supp. 2d 332, 364 (S.D.N.Y. 2007); *Republican Party*, 218 F. Supp. 3d at 414 (“Because the Pennsylvania Election Code, not the United States Constitution, grants parts the ability to appoint poll watchers, the state is free to regulate their use”). This case law is equally applicable to this case.

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

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

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

Finally, the decision below is also directly support by recent case law, which is particularly on point because it also involves canvassing during the COVID-19 pandemic. Within the last week, a Nevada state court rejected the petition for mandamus filed by the plaintiffs—including Plaintiff—who similarly complained about the amount of access they were given to the canvassing process. *See* Order Den[y]ing Emergency Petition for Writ of Mandamus, or, in the Alternative, Writ of Prohibition, *Kraus v. Cegavske*, No. 20 OC 00142 1B (Nev. Dist. Ct. filed Oct. 29, 2020) (attached as **Exhibit 3 to our Commonwealth Court brief**). Plaintiff contended that it had “a right to observers having meaningful observation under [certain Nevada statutes regarding the canvassing process].” *Id.* at 10. Notably, those statutes provided, if anything, *more specific* rights than the Pennsylvania

Election Code provide Plaintiff here. One of the Nevada statutes required the county to “allow members of the general public to observe the counting of the ballots.” *Id.* at 8. Another provided that “the counting procedure must be public.” *Id.* at 9. As the court pointed out—as is also true of the Pennsylvania Election Code—the Nevada statutes “do not use the modified ‘meaningful.’”

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

A portion of the opinion is worth quoting in full:

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

...

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

COVID-19 pandemic.

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

Id. at 10-11.⁶

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

To the same effect is the decision of a California court in September 2020. Minute Order, *Election Integrity Project Cal. Inc. v. Lunn*, No. 56-2020-00540781 (Cal. Super. Ct. filed Sept. 15, 2020) (Exhibit 4 to our Commonwealth Court Brief). There, the California Election Code “authorize[d] the presence of observers for the ballot counting process.” *Id.* at 1. The defendant official “established

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

certain protocols which include having observers stay in certain designated areas in the ballot counting area, prohibiting observers from communicating with election workers, and requiring that observers request permission to move from one designated area to another.” *Id.* Like Plaintiff here, the plaintiff “concede[d] that these protocols allow[ed] them to observe, but not sufficiently so that they can lodge a challenge if they believe that an election workers has made an error in accepting a mail ballot.” *Id.* The court rejected plaintiff’s position because the statute did not require what plaintiffs demanded: “The court finds that the defendant’s procedures in place are reasonable considering the need to effectively conduct the business of counting ballots and the restrictions imposed by the distancing requirements of the Covid pandemic.... [T]he court finds that the role of the observer is observation of the process, and does not extend to challenging the decisions of the election workers.” *Id.* at 2. Here, as in that case, the court’s conclusion rested on factual findings made after a hearing with live witnesses. (*See* Opinion at 8 (“[W]e conclude, based on the witness’s testimony, that the Board of Elections has complied with the observations requirements under 25 P.S. § 3146.8 and that Plaintiff is not entitled to the relief he seeks.”)). There is no basis to disturb that conclusion on appeal.

CONCLUSION

For the foregoing reasons, this Court should grant allowance of appeal from the decision of the Commonwealth Court below.

November 5, 2020

Respectfully submitted,

CITY OF PHILADELPHIA
LAW DEPT.
Marcel S. Pratt, City Solicitor

/s/ Sean J. McGrath

Sean J. McGrath, Assistant City Solicitor
Craig Gottlieb, Senior Attorney
Zach Strassburger, Assistant City Solicitor
1515 Arch Street, 16th Floor
Philadelphia, PA 19102-1595
(215) 683-5444

Sean.McGrath@phila.gov

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Mark A. Aronchick (I.D. No. 20261)

Robert A. Wiygul (I.D. No. 310760)

One Logan Square, 27th Floor

Philadelphia, PA 19103

Telephone: (215) 496-7050

Email: maronchick@hanglely.com

Counsel for Appellees

CERTIFICATION OF COMPLIANCE WITH RULE 1115(f)

This brief complies with the type-volume limitation of Pennsylvania Rule of Appellate Procedure 1115(f), because this brief contains 6487 words.

Date: November 5, 2020

/s/ Craig Gottlieb

Craig Gottlieb

CERTIFICATE OF COMPLIANCE

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

Date: November 5, 2020

/s/ Craig Gottlieb

Craig Gottlieb

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for Allowance of Appeal upon counsel of record by electronic filing.

Date: November 5, 2020

/s/ Craig Gottlieb

Craig Gottlieb

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Canvassing Observation :
 :
Appeal of: Donald J. Trump :
for President, Inc. :
 : No. 1094 C.D. 2020

ORDER

AND NOW, November 5, 2020, upon review of arguments contained in briefs submitted by Donald J. Trump for President, Inc. (Appellant), the Philadelphia County Board of Elections, and the Pennsylvania Democratic Party, it is hereby ORDERED that the November 4, 2020 order of the Court of Common Pleas of Philadelphia County (trial court) denying Appellant’s oral motion to allow closer observation of the canvassing of ballots is REVERSED. The matter is REMANDED to the trial court to enter an ORDER no later than 10:30 a.m. today, November 5, 2020, effective immediately, requiring that all candidates, watchers, or candidate representatives be permitted to be present for the canvassing process pursuant to 25 P.S. § 2650 and/or 25 P.S. § 3146.8 and be permitted to observe all aspects of the canvassing process within 6 feet, while adhering to all COVID-19 protocols, including, wearing masks and maintaining social distancing. Opinion to follow.

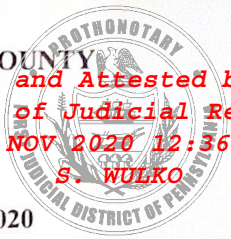
s/Christine Fizzano Cannon

Christine Fizzano Cannon, Judge

EXHIBIT B

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
 IN THE COURT OF COMMON PLEAS FOR PHILADELPHIA COUNTY
 ELECTION COURT- General Election: November 3, 2020

Filed and Attested by the
 Office of Judicial Records
 04 NOV 2020 12:36 pm
 S. WULKO



In Re: : ELECTION MATTER
 :
 :
Canvassing Observation : NOVEMBER TERM, 2020
 :
 :
 _____ : NO. 7003

ORDER

AND NOW, this 3rd day of November, 2020, in connection with the matter of: petition by Donald J. Trump for President Inc. to allow closer observation of canvassing of ballots, upon consideration of the:

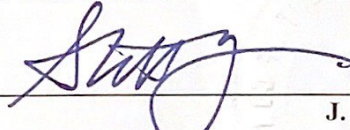
- oral Petition and Argument and any responses thereto written Petition and Argument and any responses thereto
 testimony and evidence presented by the witnesses and Argument; or

IT IS HEREBY ORDERED and DECREED that:

The oral motion to allow closer observation of the canvassing of ballots is DENIED for the following reasons:

The Petitioner’s witness provided copious testimony as to his ability to observe the opening and sorting of ballots. His concerns pertained to his inability to observe the writing on the outside of the ballots. Given that observers are directed only to observe and not to audit ballots, we conclude, based on the witness’s testimony, that the Board of Elections has complied with the observation requirements under 25 P.S. 3146.8. We, however, would not discourage the Board from considering the implementation of arrangements to allow for an additional corridor for observation along the side of the canvassing tables if feasible – subject to spatial distancing under COVID-19 and voting privacy requirements.

BY THE COURT:


 _____ J.
 Presiding Election Day Judge

Page 1 of 1

IMPORTANT NOTICE

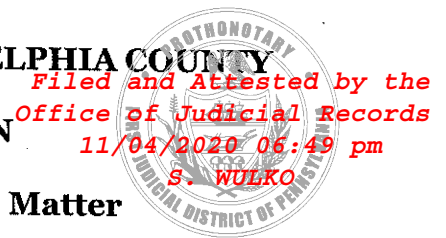
This Order is issued by the Judge assigned by the President Judge of the Court of Common Pleas to decide legal issues which may arise in connection with the above Election. Failure to comply with the terms of this order may result in contempt proceedings and the imposition of criminal or civil penalties. Any interested party should consult an attorney, or rules of court, for additional information regarding the impact of this order and how to request appropriate relief.

Certified copies of this order may be obtained through the Office of Judicial Records, OJR_Civil@courts.phila.gov upon the payment of the required fee. Notes of testimony of the hearing may be requested through the Court Reporters Office, Land Title Building, 100 S. Broad Street, Second Floor, Philadelphia, PA by completing a Request for Transcript form. See www.courts.phila.gov/departments/courtreporters.

The following Parties participated in connection with the above matter:

Name of Party	Name of Attorney
Donald J. Trump for President Inc.	LINDA KRAMS, ESQ
City of Philadelphia	SEAN MCGRATH, ESQ
PA Dems	SUSAN LIN, ESQ.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT
TRIAL DIVISION – CIVIL SECTION



IN RE: : Election Matter
: :
CANVASSING OBSERVATION : :
: : NOVEMBER TERM 2020
: : No. 07003
: : (201107003)
: :
APPEAL OF DONALD J. TRUMP for : :
PRESIDENT, INC. : 1094 CD 2020

OPINION

Tsai, J.

I. Introduction

Donald J. Trump for President, Inc. (“Appellant”) has taken an appeal from our November 3, 2020 Order denying his oral petition to conduct closer inspection of the ballot canvassing process at the Philadelphia Convention Center. In his oral petition, Appellant argued that the Commissioners did not provide his designated observers meaningful access to observe the Election Board employees who are canvassing the absentee and mail-in ballots under 25 P.S. § 3146.8(b) so they could report back to the Candidate as to the integrity of the canvassing process. Appellant had filed two similar motions earlier in the day, but withdrew them both without prejudice and presented the instant petition to the Election Court about 15 minutes before Election Court was scheduled to close at 10 p.m. EST. Based on the testimony of the witness presented by Appellant in support of the Petition, we found that the accommodations afforded to campaign representatives to observe the Election Board employees complied with the relevant provisions of the Election Code and denied the Petition.

For the reasons that follow, we respectfully ask this Court to affirm our decision.

II. Factual Findings

Appellant's representative, Jeremy Mercer, is a volunteer for Appellant's campaign. He served as an observer of the canvassing process on November 3, 2020 starting at 7 a.m. throughout the entire day. Mr. Mercer testified via Zoom technology.

The observer described how the canvassing room is set up. There are 3 rows of 15 tables spaced apart and observers are asked to stand behind a metal barrier facing the first table, which is about 15-18 feet away. Nov. 3, 2020 Tr. at 21:20-24:23. From that vantage point, Mr. Mercer can see the workers prepare the forms for evaluation, examine them, and sort the ballot into separate bins. He also described in detail the various stages of the process that he could observe, including "extraction" from about 20 feet away, "where the ballot envelopes are being fed through machines to slice them open so that what's inside the outer envelope can be removed, and then another set of what appear to be the same or very similar machines so that the inner secrecy envelopes then can be sliced open so that what's inside those can be removed." Nov. 3, 2020 Tr. At 28:14-30.

When asked about impediments to his line of sight, he identified the easels that identify each section of the canvassing process around which he can move. Nov. 3, 2020 Tr. 23:2-11. The observer was free to walk around the premises as he wished except beyond the metal safety or "crowd control" barrier. He recounted the specific steps followed by the staff to canvass a ballot. He cited concerns about the long distance between him and the employees, not because he could not see what they were doing, but because he could not see individual markings on the ballot or whether the signature page was completed properly and assess whether the Election Board employee was

handling the ballot properly under the Election Code. He was able to use binoculars, but he did not find them to be useful because the process is fast. Nov. 3, 2020 Tr. 36:2-14.

The Board designed the layout of the Philadelphia Convention Center for the canvassing process in keeping with CDC guidelines on social distancing between individuals and safety protocols.¹ In creating this physical layout, the Board struck the proper balance between the observer's ability to observe the canvassing process and the paramount interest of voter privacy, as there are declaration envelopes that are being opened, secrecy envelopes that are being opened, and ballots that are being extracted.²

III. Discussion

This Court ordered as it did based on our analysis of the statutory provision invoked by the Appellant, 25 P.S. § 3146.8(b), which states: "Watchers [also referred to herein as "observers"] shall be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded." Despite Appellant's argument that the Board of Elections was not providing observers the opportunity to "meaningfully observe" the canvassing of ballots, Appellant was unable to point to any statutory language or case law using the word "meaningful" or elaborating on what constitutes "meaningful observation."

¹ The Election Board allows the public to observe the canvassing process on You Tube on their website at <https://youtu.be/-Zzb-7EH-MQ>

² The observer, who has worn a mask while observing the canvassing, testified that he saw Election Board workers who occasionally stood shoulder to shoulder, contrary to the CDC social distancing guidelines. The Appellant appears to contend that these incidents undercut the legitimacy of the social distancing guidelines which have influenced the design of the layout for observers. We do not believe these occasional, likely necessary, instances of shoulder-to-shoulder interactions between fellow workers to carry out their canvassing duties, is a legitimate reason to direct the Board to relax its current distancing requirements on observers.

Furthermore, § 3146.8(b), explicitly allows only for the watchers to “be present” for three activities: (1) the opening of the envelopes containing the ballots, (2) the counting of the ballots, and (3) the recording of the ballots.

The Appellant presented a witness, Jeremy Mercer, who provided copious testimony as to his ability to observe the opening and sorting of ballots. He testified as to his ability to observe the ballots being opened, placed in trays, and sorted – including the separation of so-called “naked ballots,” which do not have inner secrecy envelopes. This satisfies the three explicit objects of the statute. The witness’s concerns, however, pertained to his inability to observe the writing on the outside of the ballots. But observing the writing on the outside of the ballots is not necessary in order to simply be able to “be present” to watch the **opening** of the ballots or to watch the **counting and recording** of the ballots. The statute provides no further specific activities for the watchers to observe, and no activities for the watchers to do other than simply “be present.” Watchers are not directed to audit ballots or to verify signatures, to verify voter address, or to do anything else that would require a watcher to see the writing or markings on the outside of either envelope, including challenging the ballots or ballot signatures.³

³ “[I]n 2020, the legislature eliminated time-of-canvassing challenges *entirely* from Section 3146.8(g)(3). ... Accordingly, the Election Code presently provides no mechanism for time-of-canvassing challenges by candidate or party representatives. ... Moreover, as is plain from the above account, at no time did the Code provide for challenges to ballot *signatures*.”

Presumably, in expanding voting by mail, the legislature sought to streamline the process for canvassing such ballots, perhaps to avoid undermining the expansion effort by eliminating the prospect that voters – including a potentially large number of new mail-in voters – would be brought before the board or the courts to answer third-party challenges. Regardless, Intervenor would have us interpret the Election Code, which

Moreover, the Pennsylvania courts have clearly delineated the purpose of having watchers observe canvassing by making “a distinction between votes which are improperly cast and the subsequent mismanagement of votes by the election board, when those votes were completed correctly by the absentee voter.” *In re Canvass of Absentee Ballots of Gen. Election*, 39 Pa. D. & C.2d 429, 433 (Pa. Com. Pl. 1965).

The court further elaborated that:

In the first situation, the strict requirements must be followed to protect the individual's vote; in the latter case, although strict compliance is desired, it is not mandatory, because slight irregularities can be anticipated in the overall handling of absentee ballots. In the latter case, the principles of liberal interpretation should apply, consistent with the above-quoted approach of the Perles case, supra, viz.: “Every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it ...”D’

Id. at 433-34.

That line of reasoning ultimately led the court to hold that even when it does not condone a short-cutting of canvassing procedures under the act, such short-cutting does not by itself seriously breach the legislative intent. *See id.* at 434.⁴ The court thus

now does not provide for time-of-canvassing ballot challenges, and which never allowed for signature challenges, as both requiring signature comparisons at canvassing, and allowing for challenges on that basis. We reject this invitation.” *In re November 3, 2020 Gen. Election*, 149 MM 2020, 2020 WL 6252803, at *14 (Pa. Oct. 23, 2020) (footnotes, citations and quotations omitted).

⁴ “The Montgomery County Board of Elections, prior to the general election of November 2, 1965, met with representatives of both the Democratic and Republican Committees of this county for the purposes of setting up a facile procedure to expedite the handling of absentee ballots within the county. At that meeting, on September 7, 1965, it was agreed that certain procedures required for technical compliance with the dictates of the Absentee Voting Act would be eliminated or modified, so that, at time of canvass, there would be less confusion and involvement. This proposal was approved by Horace A. Davenport, Esq., the solicitor for the county board of elections, Peter P. Stevens, chief clerk for the election board, Sheldon W. Farber, Esq., attorney for the County Democratic Committee, and John G. Kauffman, Esq., attorney for the

denied a “general ‘blanket’ challenge presented by petitioner to all the absentee ballots on the basis of the election board’s departure from the statutory directions.” *Id.*

Likewise, we also recognized that canvassing arrangements may arguably be less than what the observer may deem as optimal without rising to the level of violating the statute, especially when the procedures need to be modified to promote safety during the COVID-19 pandemic. We therefore noted in our order that we “would not discourage the Board from considering the implementation of arrangements to allow for an additional corridor for observation along the side of the canvassing tables if feasible – subject to spatial distancing under COVID-19 and voting privacy requirements.” *In re: Canvassing Observation*, Order of November 3, 2020.

Additionally, in *In re Recanvassing of the First Election Dist. of Jefferson Twp.*, 12 Pa. D. & C.4th 536 (Pa. Com. Pl. 1991), the court reasoned that “the Election Code speaks only of canvassing absentee ballots, not single ones,” and that the “intent of the statute [is] to preserve and insure the secrecy and anonymity of the voter.” *Id.* at 538. Indeed, if watchers like the witness were permitted to observe the canvassing of ballots closely enough to view the names and addresses on single ballots, they would be going beyond the purpose of the statute, which is only to provide for the canvassing of the ballots **writ large**. The watchers would also threaten the secrecy and anonymity of the voter in direct frustration of the statute’s purpose. If the watcher intends to observe the canvassing with the intent of voiding ballots, we must emphasize that we “will not disenfranchise a voter for an act that may be contrary to procedure for

Republican Committee of the county.” *In re Canvass of Absentee Ballots of Gen. Election*, 39 Pa. D. & C.2d 429, 433 (Pa. Com. Pl. 1965)

canvassing the vote,” as ballots are not to be voided “because of some minor irregularities or inconsistencies in the canvassing of the ballots.” *Id.* at 538, 539.

Overall, the watchers’ purpose is not to audit the individual ballots, and “meaningful observation” or “meaningful access” is not a legally recognized reason for a watcher getting close enough to do so. Indeed, the term “meaningful” is not even used in the statute. We note that a similar conclusion has been reached in a similar case in Nevada. In that case, the court explained that the statute provides that “[t]he county...shall allow members of the general public to observe the counting of the ballots...,” but does not “use the modifier ‘meaningful.’” *Kraus v. Cegavske*, First Judicial Dist. Of Nevada, Case No. 20 OC 00142 1B, Dept. 2, October 29, 2020, at p. 10. That court also specifically noted that “Petitioners seem to request ... observation of all information involved in the ballot counting process so they can verify the validity of the ballot, creating in effect a second tier of ballot counters and/or concurrent auditors of the ballot counting election workers,” adding that the “statutes created observers not counters, validators, or auditors.” *Id.* at 10-11.

IV. Conclusion

Appellant's witness, Jerry Mercer, provided exacting and copious testimony as to his ability to observe the opening and sorting of ballots. Given that observers are directed only to observe and not to audit ballots, we conclude, based on the witness's testimony, that the Board of Elections has complied with the observation requirements under 25 P.S. § 3146.8 and that Appellant is not entitled to the relief that he seeks.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Stacy", is written over a horizontal line.

J.
Presiding Election Day Judge