

IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. _____EAL 2020

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

Petition of:

Donald J. Trump for President, Inc.

**EMERGENCY PETITION FOR ALLOWANCE OF APPEAL
BY DONALD J. TRUMP for PRESIDENT, INC.**

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS
BELOW AND THE ORDER IN QUESTION 2

QUESTION PRESENTED FOR REVIEW 3

STATEMENT OF THE CASE..... 4

 I. FORM OF ACTION AND PROCEDURAL HISTORTY 4

 II. FACTUAL HISTORY 7

 A. Pennsylvania Enacts no-Excuse Mail-In Voting 7

 B. Bucks County Board of Elections Votes to Count 2,177 Non-
 Conforming Absentee and Mail-In Ballots. 14

 C. The Trial Court Affirms the Bucks County Board of Elections’
 Decision..... 15

REASONS RELIED UPON FOR GRANTING
ALLOWANCE OF APPEAL 17

 I. The Bucks County Board of Elections failed to provide the basic
 constitutional protection of equal protection by deviating both from
 the Pennsylvania Election Code and the Secretary of State’s
 Guidance regarding the pre-canvass and canvass of absentee and
 mail-in ballots. 17

 II. When different counties employ different standards in counting or not
 counting ballots, that disparate treatment implicates equal protection
 concerns. 20

CONCLUSION 25

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT..... 27

CERTIFICATE OF COMPLIANCE RE PUBLIC ACCESS POLICY..... 28

PROOF OF SERVICE..... 29

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

TABLE OF AUTHORITIES

Page(s)

Cases

<i>In re: 2,349 Ballots in the 2020 General Election, Appeal of: Nicole Zicarelli, No. 1162 C.D. 2020(November 19, 2020)</i>	5, 24
<i>Bush v. Gore</i> , 531 U.S. 98, 105–07 (2000).....	13, 23, 24
<i>In Re: Canvass of Absentee and Mail-In Ballots, et al</i> , J-118A- 2020, J-118B-2020, J-118c-2020, J-118D-2020, J-119E- 2020 and J-118F-2020, November 23, 2020	6, 16
<i>In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election</i> , 843 A.2d 1223 (Pa. 2004).....	18, 19
<i>Gray v. Sanders</i> , 372 US 368, 379 (1963).....	20
<i>League of Women Voters of Ohio v. Brunner</i> , 548 F.3d 463, 477-78 (6th Cir. 2008)	17
<i>Pa. Dem. Party v. Boockvar</i> , 238 A.3d 345 (Pa. 2020).....	7, 18
<i>Pierce v. Allegheny County Bd. of Elections</i> , 324 F. Supp. 2d 684 (W.D. Pa. 2003).....	20, 21, 22, 23
<i>Reed v. Town of Gilbert</i> , 135 S. Ct. 2218, 2226 (2015)	23
<i>Reynolds v. Sims</i> , 377 U.S 533, 568 (1964).....	24
<i>Rowland v. Smith</i> , 83 Pa. D. & C. 99 (Pa. Ct. Com. Pl. Dauphin 1952)	17

Statutes

Act 2019-77 (S.B. 421), § 8, approved October 31, 2019, eff. October 31, 2019.....	7
Pa. Const. art. I, §5.....	1
Pa. Const. art. 5, § 9	22, 24

25 P.S. § 3146.6(a).....*passim*
25 P.S. §§ 3150.11-3150.16.....18
25 P.S. § 3150.16(a).....*passim*
25 P.S. § 31574, 15, 22
U.S. Const. amend. XIV, § 2.*passim*

INTRODUCTION

Petitioner-Plaintiff, Donald J. Trump for President, Inc., (the “Campaign”), asks this Court to accept emergency review of the November 25, 2020 decision of the Commonwealth Court. On November 25, 2020, the Commonwealth Court affirmed the Order of the Court of Common Pleas of Bucks (Bucks County) that overruled the Campaign’s objections to specific absentee and/or mail-in ballots, denied the relief requested by the Campaign and dismissed the Campaign’s appeal from the Bucks County Board of Elections’ decision that the challenged ballots, with the exception of 69 ballots received with unsealed secrecy envelopes, were valid and could be counted, relying on the November 23, 2020 Supreme Court Opinion in a similar matter. Regarding the 69 ballots received in unsealed secrecy envelopes, the Commonwealth Court found that these ballots did not meet the requirements of the Pennsylvania Election Code but that its decision should be applied prospectively, such that the 69 ballots at issue would not be invalidated.

A Petition for Allowance of Appeal is appropriate “when there are special and important reasons therefor.” Pa. R. App. P. 1114. Here, neither Bucks County nor the Commonwealth Court addressed the violation of both the Fourteenth Amendment’s Equal Protection Clause and of the guarantee of the Pennsylvania Constitution that “Elections shall be free and equal.” Pa. Const. art. I, §5. Because

of this failure to address the most salient issues, an appeal is appropriate and should be allowed.

**REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS
BELOW AND THE ORDER IN QUESTION**

The Opinion and Order of the Commonwealth Court of Pennsylvania filed on November 25, 2020 is attached hereto as Appendix A. The trial court's Memorandum and Order is attached hereto as Appendix B and the trial court's order, which the Commonwealth Court affirmed, is attached hereto as Appendix C.

Order in Question (Appendix A)

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

/s/ Renée Cohn Jubelirer
Renée Cohn Jubelirer, Judge

QUESTION PRESENTED FOR REVIEW

Should absentee and mail-in ballots that fail to conform to the mandatory legislative requirements set forth in Election Code Sections 1306(a) and 3150.16(a) be declared void and not subject to being counted because to do otherwise would violate the rights of Pennsylvania voters to the equal protection of the laws and to a free and equal election?

Suggested answer: Yes

STATEMENT OF THE CASE

I. FORM OF ACTION AND PROCEDURAL HISTORY.

The Commonwealth Court affirmed the decision of the Court of Common Pleas of Bucks County that denied Appellant's appeal in the nature of a petition for review under Election Code Section 1407(a), codified at 25 P.S. § 3157(a).

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

On November 19, 2020, the trial court issued its order denying the Campaign's appeal. On that same day, the Commonwealth Court issued a Memorandum Opinion in a separate case dealing with an almost identical issue, reversing a decision by the Allegheny County Board of Elections that affirmed the Allegheny County Board of Elections decision to canvass and count 2,349 absentee or mail-in ballots for the November 3, 2020 General Election despite the lack of a date of signature by the voter on the declaration on the ballot envelope.

In re: 2,349 Ballots in the 2020 General Election, Appeal of: Nicole Zicarelli, No. 1162 C.D. 2020 (November 19, 2020) App. D.

The Campaign appealed the trial court decision to the Commonwealth Court and, on November 23, 2020, filed an Application for Expedited Treatment and Summary Relief. The application sought expedited consideration of the issues in a summary fashion given the Commonwealth Court's decision in *In re: 2,349 Ballots in the 2020 General Election, Appeal of: Nicole Zicarelli*. Both matters addressed ballots that failed to conform to the mandatory legislative requirements set forth in Election Code Sections 1306(a) and 3150.16(a) .

The Commonwealth Court issued an order on November 23, 2020, granting the request for expedited treatment but denying summary relief. The Court required the parties to file and serve their briefs no later than 5:00 pm that same day. Shortly after the issuance of the scheduling and briefing order, but prior to 5:00 pm, the Supreme Court issued an Opinion¹ addressing similar issues regarding ballots that failed to conform to the mandatory legislative requirements set forth in Election Code Sections 1306(a) and 3150.16(a) arising out of both Philadelphia and Allegheny Counties. The Pennsylvania Supreme Court held, “[W]e conclude that the Election Code does not require board of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their

¹ See *In Re: Canvass of Absentee and Mail-In Ballots, et al*, J-118A-2020, J-118B-2020, J-118c-2020, J-118D-2020, J-119E-2020 and J-118F-2020, November 23, 2020 App E.

ballot's outer envelope but did not handwrite their name, their address, and/or date where no fraud or irregularity has been alleged.” *In Re: Canvass of Absentee and Mail-In Ballots, et al*, J-118A-2020, J-118B-2020, J-118c-2020, J-118D-2020, J-119E-2020 and J-118F-2020, November 23, 2020. However, Justice Wecht filed a Concurring and Dissenting Opinion, noting: “[I]n future elections, I would treat the date and sign requirement as mandatory in both particulars, with the omission of either item sufficient without more to invalidate the ballot in question. [footnote omitted]. However, under the circumstances in which the issue has arisen, I would apply my interpretation only prospectively.” *Id.* Additionally, in his Concurring and Dissenting Opinion, Justice Dougherty opined: “[I] cannot agree that the obligation of electors to set forth the date they signed the declaration on that envelope does not carry weighty interests.” *Id.* Accordingly, the Supreme Court concluded, on a 4-3 basis, that the date was a mandatory requirement and the ballots cast in that matter should be void, although Justice Wecht noted that the decision should only be applied on a prospective basis, thus not disturbing the decision of the lower court with regard to the ballots cast in the November 3, 2020 General Election. Appendix E.

On November 25, 2020, the Commonwealth Court issued a Memorandum Opinion relating to this matter, finding that all but 69 of the ballot challenges at issue were resolved by the Supreme Court's November 23, 2020 Opinion.

II. FACTUAL HISTORY.

A. **Pennsylvania Enacts No-Excuse Mail-In Voting.**

On October 31, 2019, the Pennsylvania General Assembly enacted Act 77. *See* Act 2019-77 (S.B. 421), § 8, approved October 31, 2019, eff. October 31, 2019. Act 77 radically and abruptly altered the administration of elections in the Commonwealth of Pennsylvania by allowing qualified Pennsylvania electors the choice to vote by mail without providing a reason or excuse. *See, e.g.*, 25 P.S. §§ 3150.11-3150.17; *see also Pa. Dem. Party v. Boockvar*, 238 A.3d 345 (Pa. 2020).

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

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

b. The marked ballot then must be placed and securely sealed in the secrecy envelope bearing the official stamp “Official Election Ballot,” and then placed inside a second envelope (the “Outer Envelope”), on which must be printed “the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector”;

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

d. “[The Outer Envelope] **shall** then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.”

25 P.S. §§ 3146. 6(a) & 3150.16(a). (emphasis added).

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

§ 3146.4. Envelopes for official absentee ballots

The county boards of election shall provide two additional envelopes for each official absentee ballot of such size and shape as shall be prescribed by the Secretary of the Commonwealth, in order to permit the placing of one within the other and both within the mailing envelope. On the smaller of the two envelopes to be enclosed in the mailing envelope shall be printed, stamped or endorsed the words “Official Election Ballot,” and nothing else. On the larger of the two envelopes, to be enclosed within the mailing envelope, shall be printed the form of the declaration of the elector, and the name and address of the county board of election of the proper county. The larger envelope shall also contain information indicating the local election district of the absentee voter. Said form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain among other things a statement of the electors qualifications, together with a statement that such elector has not already voted in such primary or election. The mailing envelope addressed to the elector shall contain the two envelopes, the official absentee

ballot, lists of candidates, when authorized by section 1303 subsection (b) of this act, the uniform instructions in form and substance as prescribed by the Secretary of the Commonwealth and nothing else.

25 P.S. § 3146.4.

§ 3150.14. Envelopes for official mail-in ballots

...

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

25 P.S. § 3150.14(b).

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

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

...

(g)

...

(3) When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board **shall** examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and **shall** compare the

information thereon with that contained in the “Registered Absentee and Mail-in Voters File,” the absentee voters’ list and/or the “Military Veterans and Emergency Civilians Absentee Voters File,” whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the “Registered Absentee and Mail-in Voters File,” the absentee voters’ list and/or the “Military Veterans and Emergency Civilians Absentee Voters File” verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3).

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

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

[BAR CODE]

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

X_____

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

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

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

25 P.S. § 3146.8(g)(3).

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

3. EXAMINATION OF DECLARATION ON BALLOT RETURN ENVELOPES:

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

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

After setting aside ballots of elector’s who died prior to the opening of the polls, the county board of elections shall examine the Voter’s Declaration on the outer envelope of each returned ballot and compare the information on the outer envelope, i.e., the voter’s name and address, with the information contained in the “Registered Absentee and 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.

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

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

With regard to the outer ballot return envelope:

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

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

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

...

Pre-canvass and Canvass Procedures

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

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

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

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

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

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

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

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

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

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

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

During the pre-canvass on Election Day, the Bucks County Board of Elections, following both the Pennsylvania Election Code and the Secretary’s September 28, 2020 Guidance, *supra*, set aside the absentee and mail-in ballots because they failed to conform to Election Code Sections 1306(a) and 3150.16(a). Then, seven (7) days after the Election, the Bucks County Board of Elections voted to count the non-conforming ballots.

In making its decision, the Board of Elections did not dispute that the ballots do not conform with Election Code Sections 1306(a) and 3150.16(a) or the Secretary’s September 28, 2020 Guidance. (11/19/2020 Order, p. 9-11.) Nevertheless, the Bucks County Board of Elections voted to count the non-conforming absentee and mail-in ballots.

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

On November 17, 2020, the Honorable Robert O. Baldi held oral argument on the Campaign’s appeal. Thereafter, the trial court entered an order dated November 19, 2020 affirming the Bucks County Board of Elections’ decision to count the 2,177 absentee and mail-in ballots. A stipulation was later entered as to

182 ballots so that the actual number of ballots at issue was reduced to 1,995. *See App. B.* In its order, the trial court denied the Campaign's appeal and affirmed the Bucks County Board of Elections' decision. Subsequently, the Commonwealth Court affirmed the trial court's decision, relying on the Supreme Court's November 23, 2020 Opinion in the similar matter of *In Re: Canvass of Absentee and Mail-In Ballots, et al*, J-118A-2020, J-118B-2020, J-118c-2020, J-118D-2020, J-119E-2020 and J-118F-2020, November 23, 2020. App E.

REASONS RELIED UPON FOR GRANTING

ALLOWANCE OF APPEAL

- I. The Bucks County Board of Elections failed to provide the basic constitutional protection of equal protection by deviating both from the Pennsylvania Election Code and the Secretary of State’s Guidance regarding the pre-canvass and canvass of absentee and mail-in ballots.**

This appeal addresses a question of substantial public importance. Every illegal vote that is counted in an election undermines democracy and disenfranchises an American citizen who cast a legal vote. And when such illegal votes are counted in some counties and not others, federal equal protection concerns are implicated. Indeed, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution imposes a “minimum requirement for nonarbitrary treatment of voters” and forbids voting systems and practices that distribute resources in “standardless” fashion, without “specific rules designed to ensure uniform treatment.” *Bush v. Gore*, 531 U.S. 98, 105–07 (2000); see also *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477-78 (6th Cir. 2008) (“[T]he use of standardless manual recounts violates the Equal Protection Clause.”). The Bucks County Board of Elections failed to provide this basic constitutional protection.

When the Pennsylvania General Assembly enacted Act 77 over a year ago, it permitted no excuse mail-in voting and described the process for absentee and

mail-in voters to follow in completing their ballots. Specifically, Election Code Sections 1306(a) and 3150.16(a) state that “the [absentee/mail-in] elector *shall*, in secret, proceed to mark the ballot ...” 25 P.S. §§ 3146.6(a) & 3150.16(a). Sections 1306(a) and 3150.16(a) then describe the process whereby an absentee/mail-in voter “shall” place his/her ballot inside a secrecy envelope marked “Official Mail-in Ballot”, and then place that ballot-filled envelope inside another outer envelope which has a printed declaration for the elector to sign. *Id.* The sections then specify: “the elector *shall ... fill out, date and sign* the declaration printed on [the Outer Envelope].” *Id.* (emphasis added). Finally, the Sections 1306(a) and 3150.16(a) provide that “[s]uch envelope *shall* then be securely sealed and the elector *shall* send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.” *Id.* See also *Pa. Democratic Party v. Boockvar*, 238 A.3d at ___, 2020 Pa. LEXIS 4872, at *59.

Years ago, consistent with the dictates of the Statutory Construction Act, the Pennsylvania Supreme Court declared the use of the term “shall” in Election Code Sections 1306(a) and 3150.16(a) is mandatory. *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231-1232, & 1234 (Pa. 2004); *Pa. Democratic Party v. Boockvar*, 2020 Pa. LEXIS 4872, at *70-*74. Moreover, the Pennsylvania Supreme Court has recognized that the “so-called technicalities of

[Election Code Sections 1306(a) and 3150.16(a)] are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed -- particularly where, as here, they are designed to reduce fraud.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1234. Accordingly, it has long been understood that absentee or mail-in ballots cast in contravention of the requirements of Election Code 1306(a) and 3150.16(a) are “void” and cannot be counted. *Id.* Indeed, the Secretary’s September 28, 2020 Guidance, *supra*, confirmed this concept such that, in advance of the November 3, 2020 election, officials in all of Pennsylvania’s 67 counties presumably knew and understood these long held procedures.

But Bucks County significantly deviated from both the dictates of the Election Code and the Secretary’s September 28, 2020 guidance. When counties flout the basic legal requirements for voting and apply starkly different standards to determine which ballots to count and which ballots to set aside, then whether a vote counts or not depends on the county where the voter resides. This violates the fundamental and constitutionally guaranteed right enshrined in the U.S. Constitution’s Equal Protection Clause.

When Bucks County voted to accept ballots with missing or partial dates, or missing or partial names and addresses, or unsealed privacy envelopes, it applied a standard different than that applied in Pennsylvania’s other counties and different

from what was laid out in the Pennsylvania Election Code. Therefore, whether an absentee or mail-in ballot was counted depended on geography, including the whim and caprice of local election officials, rather than uniform, statewide standards.

II. When different counties employ different standards in counting or not counting ballots, that disparate treatment implicates equal protection concerns.

In a Commonwealth-wide election such as the November 3, 2020 election, the voting process across the entire Commonwealth must be reasonably consistent so as to treat voters similarly, regardless of where they reside. *Gray v. Sanders*, 372 U.S. 368, 379 (1963). Accordingly, if different standards have been employed in different counties across the Commonwealth of Pennsylvania to determine whether an absentee ballot should be counted, that “disparate treatment implicates the equal protection clause because uniform standards will not be used statewide to discern the legality of a vote in a statewide election.” *Pierce v. Allegheny Cty. Bd. of Elections*, 324 F. Supp. 2d 684, 699 (W.D. Pa. 2003).

Here, if Bucks County’s decision is permitted to stand, not only would lawfully cast votes be diluted, but the votes of residents of certain counties would be counted while votes of similarly situated residents in other counties would not. Indeed, Bucks County chose to count ballots that other counties rejected and thus denied Pennsylvanian voters the equal protection of the laws. There is no

persuasive or legal basis for this disparate treatment and neither the trial court nor the Commonwealth Court addressed or resolved this significant constitutional issue.

Moreover, concluding that the term “shall” in Election Code Sections 1306(a) and 3150.16(a) is not mandatory raises serious equal protection concerns. *See, e.g., Pierce v. Allegheny County Bd. of Elections*, 324 F. Supp. 2d 684, 699 (W.D. Pa. 2003). As the Western District of Pennsylvania noted years ago when addressing the “in person” delivery requirement in Election Code Section 3146.6(a): “If the state courts hold that the phrase ‘in person’ is merely directory, then different standards have been employed in different counties across the Commonwealth of Pennsylvania to determine whether an absentee ballot should be counted. That kind of disparate treatment implicates the equal protection clause because uniform standards will not be used statewide to discern the legality of a vote in a statewide election.” *Id.*

The Equal Protection Clause requires every county in the Commonwealth, within reason, to enforce and apply the same standards and procedures for an election, and it does not allow a select few counties to either decline to enforce or employ those standards or develop their own contradicting standards that benefit their voters to the detriment of voters outside their counties. *Id.* The same

conclusion applies to Election Code Sections 1306(a) and 3150.16(a)'s "fill out" requirement.

Voters in Bucks County whose non-conforming ballots the Bucks County Board of Elections has decided to count are being afforded greater voting strength than similarly-situated voters in counties which have decided to follow Election Code Sections 1306(a) and 3150.16(a)'s mandatory "fill out" requirement and not count such non-conforming ballots.

The lack of statewide standards and use of a hodgepodge of discretionary and ad hoc rules that vary, depending on the county, in a state wide election involving both federal and statewide candidates violates the Equal Protection Clause of the Fourteenth Amendment. *Pierce*, 324 F. Supp. 2d at 689-99. Arbitrary and disparate treatment values one person's vote over that of another. *Bush*, 531, U.S. at 104-05.

"The right to vote extends to all phases of the voting process, from being permitted to place one's vote in the ballot box to having that vote actually counted. Thus, the right to vote applies equally to the 'initial allocation of the franchise' as well as 'the manner of its exercise.' Once the right to vote is granted, a state may not draw distinctions between voters that are inconsistent with the guarantees of the Fourteenth Amendment's equal protection clause." *Pierce*, 324 F. Supp. 2d at 695.

The use of “standardless” procedures can violate the Equal Protection Clause. *Bush*, 531 U.S. at 103. “The problem inheres in the absence of specific standards to ensure . . . equal application” of even otherwise unobjectionable principles. *Id.* At 106. Any voting system that involves discretion by decision makers about how or where voters will vote must be “confined by specific rules designed to ensure uniform treatment.” *Id.* Allowing a patchwork of different rules from county to county, and as between similarly situated absentee and mail-in voters, in a statewide election involving federal and state candidates implicates equal protection concerns. *Pierce*, 324 F. Supp. 2d at 698-99.

The equal enforcement of election laws is necessary to preserve our most basic rights. And the requirement of equal treatment is stringently enforced as to laws that affect the exercise of fundamental rights. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Because of the loose interpretation of the requirements for absentee and mail-in ballots, voters in some Pennsylvania counties were treated differently than voters in other counties – for no discernible reason other than what appears to be a misplaced reliance requiring a showing of irregularity or fraud.

Utilizing objective criteria across the Commonwealth during the pre-canvass and canvass of absentee and mail-in ballots prevents haphazard interpretations of the Pennsylvania Election Code treating voters differently solely based on their

county of residence. The Commonwealth Court has recognized that the counting or not counting of votes must be grounded in law:

Such adherence to the law ensures equal elections throughout the Commonwealth, on terms set by the General Assembly. The danger to our democracy is not that electors who failed to follow the law in casting their ballots will have their ballots set aside due to their own error; rather, the real danger is leaving it to each county board of election to decide what laws must be followed (mandatory) and what laws are optional (directory), providing a patchwork of unwritten and arbitrary rules that will have some defective ballots counted and others discarded, depending on the county in which a voter resides. Such a patchwork system does not guarantee voters an ‘equal’ election, [footnote omitted] particularly where the election involves inter-county and statewide offices. We do not enfranchise voters by absolving them of their responsibility to execute their ballots in accordance with law. *In Re: 2, 349 Ballots in the 2020 General Election, Appeal of: Nicole Ziccarelli*, No. 1162 C.D. 2020, Pa. Commw. Ct., November 19, 2020.

The decision of the Bucks County Board of Elections thus violated the “clear and strong command of our Constitution’s Equal Protection Clause” that “voters cannot be classified, constitutionally, on the basis of where they live.” *Reynolds v. Sims*, 377 U.S 533, 568 (1964). Unless *Bush v. Gore* is toothless, a fair and impartial election must only count lawful votes and invalidate unlawful votes. Allowing arbitrary and non-uniform interpretations of the Election Code from county to county violates the Fourteenth Amendment’s Equal Protection Clause and the Pennsylvania Constitution’s guarantee that: “[e]lections shall be free and equal.” Pa.Const. Art. I, §5.

CONCLUSION

The Commonwealth Court erred by affirming Bucks County Board of Elections' decision to count the 1,995 absentee and mail-in ballots that failed to conform to the legislative mandates of Election Code Sections 1306(a) and 3150.16(a). To hold otherwise violates the plain and ordinary meaning of the section's mandatory language and creates serious equal protection concerns for voters throughout the Commonwealth who properly cast absentee and mail-in ballots in the November 3, 2020 General Election.

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

Date: December 4, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the foregoing Brief of Appellant complies with the length requirements of Pa. R.A.P. 2135. According to the word count of the word processing system used to prepare this Brief, the brief contains 5,127 words, not including the supplementary matter as described in Pa. R.A.P. 2135(b).

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CERTIFICATE OF COMPLIANCE

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

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PROOF OF SERVICE

I hereby certify that on the 4th day of December 2020, a true and correct copies of the foregoing Brief were served upon counsel of record by email and regular mail which satisfies the requirements of Pa.R.A.P. 121:

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
JUDGE COHN JUBELIRER**

FILED: November 25, 2020

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

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

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

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

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

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

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

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

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

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

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

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

As to Categories 1 through 3, which challenged the ballots on the basis of a deficiency on the outer envelopes, common pleas held that the information missing was not mandatory under the Election Code, but directory and, therefore, its absence would not invalidate those ballots. (Common pleas’ op. at 14-19.) Appellant challenges these determinations before this Court. However, after the filing of the appeal, the Supreme Court of Pennsylvania rejected these same legal challenges in *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election* (Pa., Nos. 31-35 EAP 2020 and 29 WAP 2020, filed November 23, 2020) (*Philadelphia/Allegheny*), slip op. 19-32.⁵ In doing so, the Supreme Court “conclude[d] that the . . . Code does not require boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot’s outer envelope but did not handwrite their name, their address, and/or date, where no fraud or irregularity has been alleged.” *Id.*, slip op. at 3. Appellant acknowledges this holding in its brief, but points out that, per a majority of the Supreme Court, dating the outer envelope is a mandatory requirement, but would be applied prospectively. (Appellant’s Brief (Br.) at 27.)

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

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

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

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

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

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

[was] insufficient evidence to determine whether the specific language of the mandated law was violated” and “it would be an injustice to disenfranchise these voters when it cannot be shown that the ballots in question were not ‘securely sealed’ in the [secrecy] envelope prior to the canvassing of those ballots,” particularly where “there ha[d] been no suggestion or evidence that the absence of a sealed inner envelope in anyway jeopardized the privacy of the ballot.” (*Id.*)

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

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

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

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

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

at any time after receiving an official absentee ballot, but on or before eight o’clock P.M. the day of the primary or election, **the elector shall**, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, **enclose and securely seal the same in the envelope on which is printed, stamped or endorsed “Official Election Ballot.** This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector’s county board of election and the local election

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

district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3146.6(a) (emphasis added). Section 3150.16(a) contains the nearly identical statement that “**the mail-in elector shall**, in secret, proceed to mark the ballot . . . and then fold the ballot, **enclose and securely seal the same in the envelope** on which is printed, stamped or endorsed ‘Official Election Ballot’” and “[t]his envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector” 25 P.S. § 3150.16(a) (emphasis added).

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

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

. . . .

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

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

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

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

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

The operative provisions at issue here involve the statutory direction that “the elector shall . . . fold the ballot, **enclose and securely seal** the same in the envelope on which is printed, stamped or endorsed ‘Official Election Ballot.’” 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added). At canvassing, “[t]he county board shall then **break the seals** of such envelopes, remove the ballots and count” 25 P.S. § 3146.8(g)(4)(iii) (emphasis added).

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

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

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

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

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

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

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

Accordingly, common pleas’ Order is affirmed.



RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

ORDER

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



RENÉE COHN JUBELIRER, Judge

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

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

MEMORANDUM AND ORDER

I. Introduction

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

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

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

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

Appendix B

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Undisputed factual record

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

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

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

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

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

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

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

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

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

III. Discussion

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

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

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

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

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

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

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

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

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

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

25 P.S. § 3150.16(a).

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

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

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

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

See Written Decision of Board.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In reflecting on this issue, the undersigned cannot help but see the irony in the fact that the absence of a signature invalidates the ballot. Respondent refused to Canvass ballots that had not been signed. However, if someone put an obviously false signature on the ballot, the ballot would have been most probably counted because the Court has also ruled that nothing in the language of the Statute compelled a County Board to compare the signature; whereas if someone put a date on the envelope which demonstrated that the vote was made at an improper time, ~~that~~ that fact would be readily apparent to the Board when Canvassing and it would result in a ballot being set aside. During oral argument, the Court pointed out ~~that~~ 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

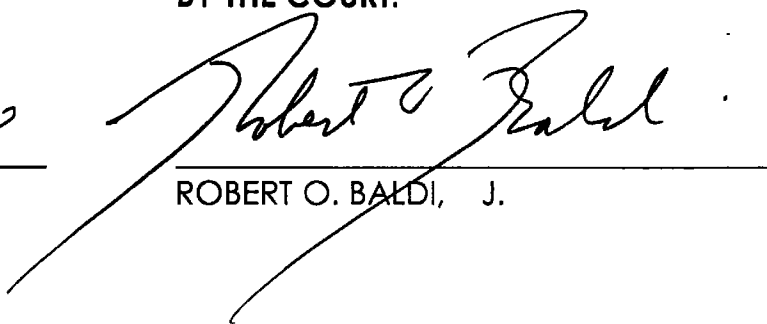
The ballots at issue in this category are not "naked ballots," which would be invalid pursuant to the Supreme Court's decision in Boockvar, 2020 Pa. LEXIS 4872, at *73. Rather, these ballots were enclosed within their respective privacy envelopes; however, those envelopes were not sealed at the time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

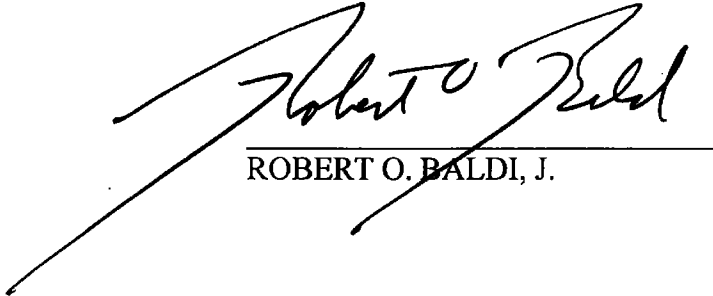
1. 1,196 ballots with no date or a partial date handwritten on the outer envelope;
2. 644 ballots with no handwritten name or address on the outer envelope;
3. 86 ballots with a partial written address on the outer envelope;

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

Appendix B

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

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:

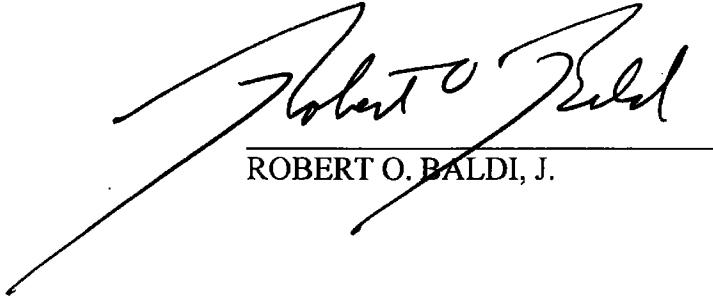
1. 1,196 ballots with no date or a partial date handwritten on the outer envelope;
2. 644 ballots with no handwritten name or address on the outer envelope;
3. 86 ballots with a partial written address on the outer envelope;

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

Appendix C

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

BY THE COURT:



A handwritten signature in black ink, appearing to read "Robert O. Baldi". The signature is written in a cursive, flowing style with a long horizontal stroke extending to the left.

ROBERT O. BALDI, J.

11/19/20

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: 2,349 Ballots in the
2020 General Election
Appeal of: Nicole Zicarelli

:
: No. 1162 C.D. 2020
: Submitted: November 19, 2020
:

BEFORE: HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE BROBSON**

FILED: November 19, 2020

Nicole Zicarelli, a Republican candidate for State Senator from the 45th Senatorial District in the General Election (Candidate), initiated a statutory appeal under the Pennsylvania Election Code¹ (Election Code) in the Court of Common Pleas of Allegheny County (Common Pleas Court) from a decision by the Allegheny County Board of Elections (Elections Board) to canvass and count 2,349 absentee or mail-in ballots for the November 3, 2020 General Election (General Election) notwithstanding the lack of a date of signature by the elector on the statutorily required elector declaration on the outside envelope of the ballots. On appeal, the Common Pleas Court rejected the Campaign Committee’s arguments and affirmed the Elections Board’s decision in a November 18, 2020 Order.²

¹ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

² On application by Candidate, this Court issued an Order late on November 18, 2020, enjoining the Elections Board from canvassing and counting the disputed ballots and directed that the Elections Board segregate those ballots pending further order of the Court.

The Committee filed a timely appeal from the Common Pleas Court’s order with this Court, contending that the disputed ballots are invalid and cannot be counted. The parties have submitted briefs in support of their respective arguments on the merits.

Given the exigency,³ we dispense with an extensive summary of the parties’ respective positions on appeal. Generally, the Candidate alleges that the absentee and mail-in ballots that are the subject of this appeal are defective and, therefore, cannot be counted under the Election Code. The Elections Board and DNC Services Corp./Democratic National Committee (DNC)⁴ generally contend that we must interpret and apply the Election Code to enfranchise, rather than disenfranchise voters. This means, according to the Elections Board and the DNC, that what they term “minor irregularities” in elector declarations can, and in this case should, be overlooked in the absence of any evidence of fraud.

Each county board of election is required to provide the mail-in ballot elector with the following: (1) two envelopes—an inner secrecy envelope in which the executed ballot is placed and an outer mailing envelope in which the secrecy envelope (containing the executed ballot) is placed for mailing (or drop off); (2) a list of candidates, if authorized; and (3) “the uniform instructions in form and substance as prescribed by the Secretary of the Commonwealth and nothing else.” Sections 1304 and 1304-D(c) of the Election Code, 25 P.S. §§ 3146.4, 3150.14(c). The outer mailing envelope must include an elector declaration and the name and

³ “The integrity of the election process requires immediate resolution of disputes that prevent certification.” *In re 2003 Election for Jackson Twp. Supervisor*, 840 A.2d 1044, 1046 (Pa. Cmwlth. 2003) (Kelly, S.J.).

⁴ Though not a named party originally, the Common Pleas Court granted the DNC intervenor status as a respondent.

address of the proper county board of election. Sections 1304 and 1304-D(a) of the Election Code. The form of the declaration is left up to the Secretary of the Commonwealth (Secretary). It must, however, include “a statement of the elector’s qualifications, together with a statement that the elector has not already voted in the primary or election.” Sections 1304 and 1304-D(b) of the Election Code. The Secretary adopted a form declaration that includes the required statutory language and space for the elector to sign, date, and fill out the elector’s name and address.

In its recent decision in *In re November 3, 2020 General Election*, ___ A.3d ___ (Pa., No. 149 MM 2020, filed Oct. 23, 2020), the Pennsylvania Supreme Court reviewed the requirements in the Election Code with respect to the elector declaration on mail-in and absentee ballots. To execute a mail-in or absentee ballot, the Election Code requires the elector to “fill out, date and sign the declaration printed on [the outside] envelope.” Sections 1306(a) and 1306-D(a), 25 P.S. §§ 3146.6(a), 3150.16(a). During the pre-canvass or canvass of mail-in and absentee ballots, the board of election “is required to determine if the ballot declaration is ‘sufficient.’” *In re: November 3, 2020 Gen. Election*, ___ A.3d at ___, slip op. at 25 (quoting Section 1308(g)(3) of the Election Code,⁵ 25 P.S. § 3146.8(g)(3)). With respect to determining the sufficiency of the declaration, the Pennsylvania Supreme Court explained the boards of election’s obligation: “[I]n 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.” *Id.* (emphasis added).

⁵ Added by the Act of March 6, 1951, P.L. 3.

The concern that an elector might fail to “fill out” the declaration in full, let alone date and sign the declaration, in part prompted the Pennsylvania Democratic Party and Democratic elected official and candidates (Democratic Party) to initiate a suit in this Court’s original jurisdiction against the Secretary and every Pennsylvania county board of election earlier this year, seeking declaratory and injunctive relief. The Pennsylvania Supreme Court, pursuant to Section 726 of the Judicial Code, 42 Pa. C.S. § 726, assumed jurisdiction over the case to address issues relating to the interpretation and implementation of Act 77 of 2019⁶—the statute that amended the Election Code to authorize mail-in voting (a/k/a no-excuse absentee voting).

Among the issues/concerns raised by the Democratic Party was that electors may submit their mail-in or absentee ballots with “minor facial defects resulting from their failure to comply with the statutory requirements for voting by mail.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 372 (Pa. 2020). The Democratic Party asked the Pennsylvania Supreme Court to require county boards of election to give those electors notice and an opportunity to cure the defective ballots. In advancing that argument, the Democratic Party relied on the same principles the Board relies on in this case—*i.e.*, liberal construction of the Election Code requirements and the favoring of enfranchising voters, not disenfranchising them. *Id.* at 372-73. The Secretary opposed the relief requested:

Unlike the other claims asserted herein, the Secretary opposes [p]etitioner’s request for relief in this regard. She counters that there is no statutory or constitutional basis for requiring the [b]oards [of election] to contact voters when faced with a defective ballot and afford them an opportunity to cure defects. The Secretary further notes that, while [p]etitioner relies on the Free and Equal Elections Clause [of the

⁶ Act of October 31, 2019, P.L. 552, No. 77 (Act 77).

Pennsylvania Constitution], that Clause cannot create statutory language that the General Assembly chose not to provide.

The Secretary submits that so long as a voter follows the requisite voting procedures, he or she “will have an equally effective power to select the representative of his or her choice.” Emphasizing that [p]etitioner presents no explanation as to how the [b]oards [of election] would notify voters or how the voters would correct the errors, the Secretary further claims that, while it may be good policy to implement a procedure that entails notice of defective ballots and an opportunity to cure them, *logistical policy decisions like the ones implicated herein are more properly addressed by the Legislature, not the courts.*

Pa. Democratic Party v. Boockvar, 238 A.3d at 373 (emphasis added) (citations omitted) (quoting *League of Women Voters v. Cmwlth.*, 178 A.3d 737, 809 (Pa. 2018)). Apparently persuaded by the Secretary’s arguments, the Pennsylvania Supreme Court rejected the request for a judicially mandated notice and opportunity to cure:

Upon review, we conclude that the [b]oards [of election] are not required to implement a “notice and opportunity to cure” procedure for mail-in and absentee ballots that voters have filled out incompletely or incorrectly. Put simply, as argued by the parties in opposition to the requested relief, [p]etitioner has cited no constitutional or statutory basis that would countenance imposing the procedure [p]etitioner seeks to require (*i.e.*, having the [b]oards [of election] contact those individuals whose ballots the [b]oards [of election] have reviewed and identified as including “minor” or “facial” defects—and for whom the [b]oards [of election] have contact information—and then afford those individuals the opportunity to cure defects until the [federal Uniformed and Overseas Citizens Absentee Voting Act⁷] deadline).

While the Pennsylvania Constitution mandates that elections be “free and equal,” it leaves the task of effectuating that mandate to the Legislature. As noted herein, although the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for the “notice and opportunity to cure” procedure sought by [p]etitioner. *To the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, we agree that the decision to provide a “notice and*

⁷ 52 U.S.C. §§ 20301-20311.

opportunity to cure” procedure to alleviate that risk is one best suited for the Legislature. We express this agreement particularly in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots, all of which are best left to the legislative branch of Pennsylvania’s government. Thus, for the reasons stated, the [p]etitioner is not entitled to the relief it seeks in Count III of its petition.

Id. at 374 (emphasis added) (citation omitted).

We must presume that the Elections Board was aware of the Pennsylvania Supreme Court’s decision in *In re: November 3, 2020 General Election* and its earlier decision in *Pennsylvania Democratic Party* when the Elections Board began the canvass and pre-canvass process for mail-in and absentee ballots. The Elections Board chose, nonetheless, to ignore its obligations under the Election Code to determine the sufficiency of the mail-in and absentee ballots at issue, as recapitulated by the Supreme Court in *In re: November 3, 2020 General Election*, and apparently took the Pennsylvania Supreme Court’s decision in *Pennsylvania Democratic Party* as both a ruling against a notice and opportunity to cure remedy for defective ballots and an invitation to, instead, simply *ignore* defects when canvassing and pre-canvassing. In so doing, the Elections Board even acted in conflict with September 28, 2020 guidance from the Secretary: “At the pre-canvass or canvass, as the case may be, the county board of election[] should . . . [s]et aside any ballots without a filled out, dated and signed declaration envelope.” Pennsylvania Dep’t of State, *Guidance Concerning Civilian Absentee and Mail-In Ballot Procedures*, 9/28/2020, at 8, available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/DOS%20Guidance%20Civilian%20Absentee%20and%20Mail-In%20Ballot%20Procedure>

[s.pdf](#) (last visited Nov. 20, 2020).⁸ Where the Elections Board tacitly derived its authority to ignore its statutory obligation to determine the sufficiency of ballots and to violate the will of the General Assembly reflected in Act 77, approved by the Governor, and the guidance of the Secretary is a mystery.

The General Assembly’s authority in this regard, however, is certain. Under the United States Constitution, the General Assembly determines the “Times, Places and Manner of holding Elections for . . . Representatives,” subject to any rules that Congress may establish.⁹ The General Election, during which the voters of Pennsylvania select their representatives to the United States House of Representatives, falls within the provision. Even in cases involving the right to vote, the rules of statutory construction apply. *See In re: November 3, 2020 Gen. Election*, ___ A.3d at ___, slip op. at 19-20; *Pa. Democratic Party*, 238 A.3d at 355-56. The Pennsylvania Supreme Court has already determined that the above statutory language regarding the casting and pre-canvassing and canvassing of mail-in and absentee ballots is “plain,” *In re: November 3, 2020 Gen. Election*, ___ A.3d at ___, slip op. at 24, and “unambiguous,” *id.*, slip op. at 25, with respect to an elector’s obligation to “fill out, date and sign” the declaration and the county board of election’s obligation to determine the sufficiency of that declaration. The constitutionality of these provisions is not in question here. It is not the judiciary’s role, let alone the role of the Elections Board, to relax or ignore

⁸ We note that the Pennsylvania Supreme Court cited to this supplemental guidance from the Secretary in its opinion in *In re: November 3, 2020 Gen. Election*, ___ A.3d at ___, slip op. at 4.

⁹ U.S. Const. art. I, § 4, cl. 1 (“Elections Clause”). The full text of the Elections Clause provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”

requirements that the General Assembly, with the Governor's approval, chose to include in the Election Code.

In this regard, while we recognize the well-settled principle of statutory construction that the Election Code should be liberally construed in favor of voter enfranchisement, not disenfranchisement, like all principles of statutory construction this rule is only implicated where there is ambiguity in the Election Code. *See In re: Canvassing Observation*, ___ A.3d ___, (Pa., No. 30 EAP 2020, filed Nov. 13, 2020), slip op. at 15-16; *Pa. Democratic Party*, 238 A.3d at 356. In *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223 (Pa. 2004), the Pennsylvania Supreme Court reversed a decision by this Court that would have allowed the Elections Board to count absentee ballots that were hand-delivered by a third person on behalf of electors *who were not disabled*. Then, and now, the Election Code expressly prohibits this practice. This Court's reason for disregarding the mandatory language of the Election Code that authorized only "in person" delivery as an alternative to mail was our view "that it was more important to protect the interest of the voters by not disenfranchising them than to adhere to the strict language of the statute under these circumstances." *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 839 A.2d 451, 460 (Pa. Cmwlth.) (en banc), *rev'd*, 843 A.2d 1223 (Pa. 2004).

In reversing this Court, the Pennsylvania Supreme Court looked to the rules of statutory construction. *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d at 1230. Critically for purposes of this matter, in terms of the Election Code, the Supreme Court held: "[A]ll things being equal, the law will be construed liberally in favor of the right to vote *but at the same time, we cannot ignore the clear mandates of the Election Code.*" *Id.* at 1231 (emphasis added).

The relevant language in Section 1306(a) of the Election Code provided at the time what it provides today: “[T]he elector *shall* send [the absentee ballot] by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.” (Emphasis added.) The Supreme Court held that the General Assembly’s use of the word “shall” had a clear “imperative or mandatory meaning.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d at 1231. While the appellees argued that the word should be construed liberally (as directory and not mandatory) in favor of the right to vote, the Supreme Court disagreed:

In Section [1306(a)], there is nothing to suggest that an absentee voter has a choice between whether he mails in his ballot or delivers his ballot in person, or has a third-party deliver it for him. To construe Section [1306(a)] as merely directory would render its limitation meaningless and, ultimately, absurd.

Id. at 1232.¹⁰ Alternatively, even if the statutory language were ambiguous, the Court held that “there is an obvious and salutary purpose—grounded in hard experience—behind the limitation upon the delivery of absentee ballots.” *Id.* The court explained:

The provision at issue limits the number of third persons who unnecessarily come in contact with the ballot and thus provides some safeguard that the ballot was filled out by the actual voter, and not by a perpetrator of fraud, and that once the ballot has been marked by the actual voter in secret, no other person has the opportunity to tamper

¹⁰ The dissent chooses to rely on *Appeal of James*, 105 A.2d 64 (Pa. 1954), a case that did not involve mail-in or absentee ballots, but whether actual votes cast for one candidate in particular on election day should count where the intent of the electors to vote for that particular candidate was clearly manifested, albeit imperfectly, on the actual ballot. *Appeal of James* does not stand for the proposition that courts can and should disregard the clear and unambiguous terms of the Election Code, as the Pennsylvania Supreme Court’s more recent pronouncements cited above establish. This case is about whether electors followed the law in submitting their ballots. Accordingly, *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election* is much more on point than *Appeal of James*.

with it, or even to destroy it. The provision, thus, is consistent with the spirit and intent of our election law, which requires that a voter cast his ballot alone, and that it remain secret and inviolate.

Id. (citation omitted). The Supreme Court concluded:

Our precedent is clear: we cannot simply ignore substantive provisions of the Election Code. . . . [S]o-called technicalities of the Election Code are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed—particularly where, as here, they are designed to reduce fraud.

Id. at 1234.

Here, we agree with, and are bound by, the Pennsylvania Supreme Court’s ruling in *In re: November 3, 2020 General Election* that Sections 1306(a) (absentee ballots), 1306-D(a) (mail-in ballots), and 1308(g)(3) (pre-canvass and canvass) of the Election Code, are plain and unambiguous. The General Assembly’s use of the word “shall” in these provisions has a clear imperative and mandatory meaning. *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d at 1231. The elector “**shall** . . . fill out, date and sign the declaration.” The board of election “**shall** examine the declaration on the envelope of each ballot” and be “satisfied that the declaration is sufficient.” A sufficient declaration is one where the elector filled out, dated, and signed the declaration. *In re: November 3, 2020 Gen. Election*, ___ A.3d at ___, slip op. at 25. To remove the date requirement would constitute a judicial rewrite of the statute, which, as the Pennsylvania Supreme Court recently held, “would be improper.” *In re: Canvassing Observation*, ___ A.3d at ___, slip. op. at 17.¹¹

¹¹ See also *In re Silcox*, 674 A.2d 224, 225 (Pa. 1996) (holding that signatures on nomination petition without date must be stricken under clear and unambiguous language of statute, reasoning that “until the legislature chooses to amend [the statutory requirement for a date], we are constrained to find that the elector shall sign the petition as well as add . . . date of signing”).

As noted above, the Election Code requires the county boards of election to determine whether absentee and mail-in ballots are satisfactory. Under the law, a satisfactory ballot is one where the elector has filled out, signed, and dated the statutorily-required declaration. This was the policy choice of the General Assembly and the Governor in approving Act 77, and it is not the role of this Court or the Elections Board to second guess those policy choices. It is a myth that all ballots must be counted in the absence of proof of fraud. Ballots, under the law, may be set aside for “fraud *or* error.” *See* Section 1407(b) of the Election Code, 25 P.S. § 3157 (emphasis added). While there may not be an allegation of fraud in this matter, there was clear error *at two levels*. First, the electors erred in failing to date their declarations, as required by the Election Code.¹² Second, the Elections Board erred when it failed to execute its duty during the canvass and pre-canvass process to determine the sufficiency of the declarations and set deficient ballots aside. Accordingly, the Common Pleas Court erred as a matter of law by failing to reverse the Elections Board’s determinations with respect to counting these defective mail-in and absentee ballots.

Even if we were to conclude that one of the relevant provisions of the Election Code suffered from some ambiguity that required us to resort to statutory construction to discern the General Assembly’s intent, our result would be the same.

¹² This is not a situation involving an ambiguity or question as to what an elector must do to cast a ballot and, seeking assistance, a confused elector relies on advice of a local election official. As noted above, the Pennsylvania Supreme Court has already held that there is no ambiguity in this scheme as far as what the Election Code requires of the elector and the boards of election in determining whether a mail-in or absentee ballot is satisfactory. Moreover, there is simply no evidence that the electors who signed their declarations in this case failed to date the declaration in reliance on advice from a public official. *See In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1234 n.14 (rejecting reliance argument where no evidence of reliance and where alleged advice is in clear contravention of law).

As was the case in *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, there is an obvious and salutary purpose behind the requirement that a voter date the declaration. The date provides a measure of security, establishing the date on which the elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place. The presence of the date also establishes a point in time against which to measure the elector’s eligibility to cast the ballot, as reflected in the body of the declaration itself.¹³

While we realize that our decision in this case means that some votes will not be counted, the decision is grounded in law. It ensures that the votes will not be counted because the votes are invalid as a matter of law. Such adherence to the law ensures equal elections throughout the Commonwealth, on terms set by the General Assembly. The danger to our democracy is not that electors who failed to follow the law in casting their ballots will have their ballots set aside due to their own error; rather, the real danger is leaving it to each county board of election to decide what laws must be followed (mandatory) and what laws are optional (directory), providing a patchwork of unwritten and arbitrary rules that will have some defective ballots counted and others discarded, depending on the county in which a voter resides. Such a patchwork system does not guarantee voters an “equal” election,¹⁴

¹³ In this regard, it does not matter whether the ballots at issue in this case were, setting aside these defects, otherwise valid. Our Election Code does not contemplate a process that bogs down county boards of election or the many election day volunteers to track down voters who committed errors of law in casting their ballots in order to verify the information that the elector, through his or her own negligence, failed to provide on the elector’s mail-in or absentee ballot. *See Pa. Democratic Party*, 238 A.3d at 373-34. Decisions as to whether these defective ballots must be set aside are to be made at the canvass or pre-canvass based on objective criteria established by the General Assembly and what is before the elections board—that being the ballot itself. *See id.* at 388-89 (Wecht, J., concurring).

¹⁴ “Elections shall be free and equal.” Pa. Const. art. I, § 5.

particularly where the election involves inter-county and statewide offices. We do not enfranchise voters by absolving them of their responsibility to execute their ballots in accordance with law.

Accordingly, the Common Pleas Court's order is reversed. This matter is remanded to the Common Pleas Court to issue an order sustaining the Campaign Committee's challenge to the Elections Board's determination and directing the Elections Board to exclude the challenged 2,349 ballots from the certified returns of election for the County of Allegheny under Section 1404 of the Election Code, 25 P.S. § 3154.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: 2,349 Ballots in the :
2020 General Election : No. 1162 C.D. 2020
 :
Appeal of: Nicole Zicarelli :

ORDER

AND NOW, this 19th day of November, 2020, the November 18, 2020
Order of the Court of Common Pleas of Allegheny is REVERSED, and this matter
is REMANDED to the court of common pleas for further proceedings in accordance
with the accompanying opinion.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: 2,349 Ballots in the :
2020 General Election :
: No. 1162 C.D. 2020
Appeal of: Nicole Zicarelli :

BEFORE: HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge

DISSENTING OPINION
BY JUDGE WOJCIK

FILED: November 19, 2020

I respectfully dissent from the majority's decision to reverse the order of the Court of Common Pleas of Allegheny County (trial court) in this matter.

The Pennsylvania Supreme Court has explained:

'The power to throw out a ballot for minor irregularities, like the power to throw out the entire poll of an election district for 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.'

In resolving election controversies it would not be amiss to consider the following criteria:

1. Was any specific provision of the Election Code violated?

2. Was any fraud involved?
3. Was the will of the voter subverted?
4. Is the will of the voter in doubt?
5. Did the loser suffer an unfair disadvantage?
6. Did the winner gain an unfair disadvantage?

Appeal of James, 105 A.2d 64, 67 (Pa. 1954) (citation omitted). It is undisputed that only the first of the foregoing six criteria is at issue with respect to the contested ballots herein.

Regarding the submission of a vote by absentee ballot, Section 1306(a) of the Pennsylvania Election Code¹ provides, in relevant part:

[A]t 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.

Likewise, with respect to voting by mail-in ballot, Section 1306-D(a) of the Pennsylvania Election Code² states:

¹ Act of June 3, 1937, P.L. 1333, added by the Act of March 6, 1951, P.L. 3, as *amended*, 25 P.S. §3146.6(a).

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.

In light of the foregoing statutory requirements, the majority seeks to disenfranchise 2,349 registered voters who timely returned their absentee or mail-in ballots to the Allegheny County Board of Elections (Board), which ballots were sealed in secrecy envelopes and inserted in sealed outer envelopes containing a declaration that the voters signed, but did not date, and which ballots the Board received by 8:00 p.m. on the date of the General Election, November 3, 2020. Unlike the majority, I do not believe that *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), compels such a massive disenfranchisement as that case addressed a voter's ability to cure a "minor" defect on a mail-in or absentee ballot declaration page that consisted of a voter failing to "fill out, date and sign the declaration." In contrast, this case involves neither a voter's ability to cure a defective declaration page nor an unsigned declaration page. Moreover, as

² Added by the Act of October 31, 2019, P.L. 552, 25 P.S. §3150.16a.

noted above, this case does not involve any claim that any of the ballots in question were in any way fraudulent.

There is no dispute that the voters who cast the questioned 2,349 ballots were qualified, registered electors. Moreover, there is no allegation that any of the 2,349 voters in question had voted more than once. Importantly, there is no allegation that the subject 2,349 ballots were not received by the Board prior to the deadline for receipt on General Election Day. The only sin that would lead these votes to be discarded is that the qualified, registered voters failed to enter a date on the declaration portion of the ballot's outer envelope. I would agree that an entirely blank declaration properly would be discarded, as this is the situation contemplated by *Boockvar*. I would suppose that a declaration that the voter did not sign likewise would be discarded, as there would be no confirmation that the ballot is genuinely that of the registered elector. Both of these results would ameliorate purported voter fraud, which is not at issue here.

What then is the protection afforded by the insertion of a date in the declaration? I would posit that it is to ensure that the ballot was timely cast, that is, before the 8:00 p.m. deadline on General Election Day. This interest is protected in this case by the Board's procedures, *i.e.*, the ballots were processed in the Statewide Uniform Registry of Electors and time stamped when received by the Board. Thus, I would hold that this process ensures that the ballots were timely cast.

The majority posits that the voter's entry of the date onto the declaration is material in that it measures a point in time to establish a voter's eligibility to cast a vote. This is simply incorrect, as the date on which a voter fills in a mail-in or absentee ballot is not the critical date, it is receipt on or before

General Election Day that is determinative. If a voter fills in a mail-in or absentee ballot, including the complete declaration, and dies prior to General Election Day, the vote is not valid regardless of when it was executed.³

I view the requirement of a voter-inserted date on the declaration as similar to the issue of the color of ink that is used to fill in the ballot. As outlined above, Sections 1306(a) and 1306-D(a) of the Pennsylvania Election Code plainly state the voter “*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.” 25 P.S. §§3146.6(a), 3150.16(a) (emphasis added). Our Supreme Court approved the marking of absentee ballots with green or red pen to be appropriate despite the General Assembly’s use of the word “shall” when describing the method of marking the ballots. *See In re Luzerne County Return Board*, 290 A.2d 108, 109 (Pa. 1972). There, our Supreme Court construed the Election Code liberally so as to not disenfranchise Pennsylvania voters over a technicality.⁴ In light of the foregoing criteria, I would do so here as well, and I

³ In this regard, I strongly disagree with the majority’s reliance on case law interpreting the inapposite provisions of the Pennsylvania Election Code requiring the inclusion of the date of signature on nomination petitions as that requirement implicates a distinct consideration relating to the timeliness of the circulation of the petitions. As indicated, the timeliness of the ballots cast herein is not at issue.

⁴ Similarly, I would revisit the so-called “naked ballot” issue where counties have been instructed to disqualify mail-in and absentee ballots that were returned without first being sealed in the “secrecy envelope.” I believe that the “secrecy envelope” is an anachronism that should have been abandoned when the Pennsylvania Election Code was recently amended. Under the prior version, absentee ballots were delivered to the corresponding polling places and opened there after the polls closed on General Election Day. Typically, there were a mere handful of absentee ballots at each poll. Without the “secrecy envelope,” there was a high probability that the poll worker would know the voters whose absentee ballots were opened there, which would impair those voters’ right to cast a secret ballot. As a result of the recent amendments to the Pennsylvania Election Code, mail-in and absentee ballots are retained at a centralized location

would not blithely disenfranchise those 2,349 voters who merely neglected to enter a date on the declaration of an otherwise properly executed and timely-submitted ballot.

Accordingly, unlike the majority, I would affirm the trial court's order in this case.

MICHAEL H. WOJCIK, Judge

and opened *en masse* beginning on General Election Day. Under the current regime, in cases of “naked ballots,” I would favor a voter’s right to cast a vote over the right to cast a secret ballot, because I believe that it is extremely unlikely that the election official who opens the envelope would know the voter whose ballot is being processed.

**[J-118A-2020, J-118B-2020, J-118C-2020, J-118D-2020, J-118E-2020 and J-118F-2020]
IN THE SUPREME COURT OF PENNSYLVANIA**

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION : No. 31 EAP 2020
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: SUBMITTED: November 18, 2020
: :
APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC. :

IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION : No. 32 EAP 2020
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: SUBMITTED: November 18, 2020
: :
APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC. :

IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION : No. 33 EAP 2020
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: SUBMITTED: November 18, 2020
: :
APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC. :

IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION : No. 34 EAP 2020
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: SUBMITTED: November 18, 2020
: :
APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC. :

IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION : No. 35 EAP 2020
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: SUBMITTED: November 18, 2020
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APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC. :

IN RE: 2,349 BALLOTS IN THE 2020 GENERAL ELECTION : No. 29 WAP 2020

APPEAL OF: ALLEGHENY COUNTY BOARD OF ELECTIONS : Appeal from the Order of the Commonwealth Court entered November 19, 2020 at No. 1162 CD 2020, reversing the Order of the Court of Common Pleas of Allegheny County entered November 18, 2020 at No. GD 20-011654 and remanding

: SUBMITTED: November 20, 2020

Justice Donohue announces the judgment of the Court, joined by Justices Baer, Todd and Wecht, and files an opinion joined by Justices Baer and Todd

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

JUSTICE DONOHUE

DECIDED: November 23, 2020

These appeals present the question of whether the Election Code requires a county board of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot’s outer envelope but did not handwrite their name, their address, and/or a date, where no fraud or irregularity has been alleged. Pursuant to our longstanding jurisprudence, central to the disposition of these appeals is whether the information is made mandatory by the Election Code or whether the inclusion of the information is directory, i.e., a directive from the Legislature that should be followed but the failure to provide the information does not result in invalidation of the ballot.

We are guided by well-established interpretive principles including that where the language of a statute is unambiguous, the language shall be controlling. 1 Pa.C.S. §

1921(b). In the case of ambiguity, we look to ascertain the legislative intent, and in election cases, we adhere to the overarching principle that the Election Code should be liberally construed so as to not deprive, inter alia, electors of their right to elect a candidate of their choice. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020). Stated more fully:

Election 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 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.

Appeal of James, 105 A.2d 64, 65-66 (Pa. 1954).

Guided by these principles and for the reasons discussed at length in this opinion, we conclude that the Election Code does not require boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or date, where no fraud or irregularity has been alleged.

* * *

In connection with five of these consolidated appeals, Petitioner Donald J. Trump for President, Inc. (the "Campaign") challenges the decision of the Philadelphia County Board of Elections (the "Philadelphia Board") to count 8,329 absentee and mail-in ballots. The Campaign does not contest that these ballots were all timely received by the Philadelphia Board prior to 8:00 p.m. on November 3, 2020 (election day); that they were cast and signed by qualified electors; and that there is no evidence of fraud associated

with their casting. The Campaign instead contends that these votes should not be counted because the voters who submitted them failed to handwrite their name, street address or the date (or some combination of the three) on the ballot-return outer envelope. The Philadelphia County Court of Common Pleas, per the Honorable James Crumlish, upheld the Philadelphia Board's decision to count the ballots, ruling that the Election Code does not mandate the disqualification of ballots for a failure to include the challenged information, stressing that the inclusion or exclusion of this information does not prevent or promote fraud. The Campaign pursued an appeal to the Commonwealth Court. This Court granted the Philadelphia Board's application to exercise our extraordinary jurisdiction, 42 Pa. C.S. § 726, over these cases then pending in the Commonwealth Court.

At or around the same time that the matters were being litigated in Philadelphia, across the state in Allegheny County, Nicole Zicarelli, a candidate for the Pennsylvania Senate in the 45th Senatorial District (Allegheny-Westmoreland counties) challenged the November 10, 2020 decision of the Allegheny County Board of Elections (the "Allegheny County Board") to canvass 2,349 mail-in ballots that contained a signed – but undated – declaration. Again, all of the outer envelopes were signed, they are conceded to be timely and there are no allegations of fraud or illegality. On November 18, 2020, the Court of Common Pleas of Allegheny County, per the Honorable Joseph James, upheld the decision of the Allegheny County Board to count the ballots. *Zicarelli v. Allegheny County Board of Elections*, No. GD-20-011654 (Allegheny Cty. Ct. Com. Pl.). Zicarelli filed an appeal to the Commonwealth Court and an application in this Court requesting that we exercise extraordinary jurisdiction over her appeal. During the pendency of the

request to this Court, on November 19, 2020, a three-judge panel of the Commonwealth Court, with one judge dissenting, reversed the common pleas court decision.

On November 20, 2020, the Allegheny County Board filed an emergency petition for allowance of appeal, which we granted, limited to whether the ballots contained in undated outer envelopes should be invalidated. We stayed the order of the Commonwealth Court pending the outcome of this appeal and consolidated it with the Philadelphia Board cases.

In these appeals, we are called upon to interpret several provisions of the Election Code. We set them forth at the outset since they guide the resolution of these appeals.

Section 3146.6(a) provides as follows with respect to absentee ballots:

(a) 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) (emphasis added).

Section 3150.16(a) sets forth the procedure for the submission of a mail-in ballot:

(a) General rule.--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) (emphasis added).

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

§ 3146.4. Envelopes for official absentee ballots

The county boards of election shall provide two additional envelopes for each official absentee ballot of such size and shape as shall be prescribed by the Secretary of the Commonwealth, in order to permit the placing of one within the other and both within the mailing envelope. On the smaller of the two envelopes to be enclosed in the mailing envelope shall be printed, stamped or endorsed the words "Official Election Ballot," and nothing else. **On the larger of the two envelopes, to be enclosed within the mailing envelope, shall be printed the form of the declaration of the elector, and the name and address of the county board of election of the proper county.** The larger envelope shall also contain information indicating the local election district of the absentee voter. **Said form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain among other things a statement of the electors qualifications, together with a statement that such elector has not already voted in such primary or election.** The mailing envelope addressed to the elector shall contain the two envelopes, the official absentee ballot, lists of candidates, when authorized by section 1303 subsection (b) of this act, the uniform instructions in form and substance as

prescribed by the Secretary of the Commonwealth and nothing else.

25 P.S. § 3146.4 (emphasis added).

§ 3150.14. Envelopes for official mail-in ballots

* * *

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

25 P.S. § 3150.14(b) (emphasis added).

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

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

When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), **the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File" verifies his right to vote,** the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3) (emphasis added).

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

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

[BAR CODE]

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

X _____

Date of signing (MM/DD/YYYY)/Fechade firme (MM/DD/YYYY)

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

Voter, address (street)/Votante, dirreccion (calle)

[LABEL – Voters' name and address]

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

3. EXAMINATION OF DECLARATION ON BALLOT RETURN ENVELOPES:

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

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

After setting aside ballots of elector's who died prior to the opening of the polls, the county board of elections shall examine the Voter's Declaration on the outer envelope of each returned ballot and compare the information on the outer envelope, i.e., the voter's name and address, with the information contained in the "Registered Absentee and 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.

Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes, 9/11/2020, at 3. On September 28, 2020, the Secretary offered additional guidance on the treatment of ballot return envelopes:

With regard to the outer ballot-return envelope:

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

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

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

* * *

Pre-canvass and Canvass Procedures

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

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

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

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

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

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

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

I. FACTUAL AND PROCEDURAL BACKGROUND

Pursuant to the General Assembly's passage of Act 77 of 2019, voters in Pennsylvania may cast their ballots in elections by absentee or no-excuse mail-in ballots. To do so, they must submit applications to county boards of elections, and in connection therewith must provide the address at which they are registered to vote. They must also 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." 25 P.S. §§ 3150.12, 3146.2. Upon receipt of the application, 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. Upon the county board of elections' approval of the application, the elector is provided with a ballot, an inner "secrecy envelope" into which the ballot is to be placed, and an outer envelope into which the secrecy envelope is to be placed and returned to the board. The outer envelope has pre-printed on it (1) a voter's declaration, (2) a label containing the voter's name and address, and (3) 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 the outer envelope, the board of elections stamps the date of receipt on it and then scans the unique nine-digit bar code, which links the voter's ballot to his or her registration file.

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

When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File" verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3).

Pursuant to this section, on November 9, 2020, the Philadelphia Board met to determine whether ballots separated into nine categories were "sufficient" to be pre-canvassed or canvassed. It concluded that four categories were not sufficient to be pre-canvassed or canvassed: (1) 472 ballots where the outer envelope lacked a signature and any other handwritten information; (2) 225 ballots where the outer envelope was not signed by the voter; (3) 112 ballots where the individual who completed the declaration appeared to be different from the individual who had been assigned the ballot; and (4) 4,027 ballots that were not submitted in a secrecy envelope.

In contrast, the Philadelphia Board approved as sufficient to be pre-canvassed or canvassed the ballots in five categories: (1) 1,211 ballots that lacked a handwritten date, address, and printed name on the back of the outer envelope (but were signed); (2) 1,259 ballots that lacked only a handwritten date on the back of the outer envelope (but were signed and contained a handwritten name and address); (3) 533 ballots that lack only a

handwritten name on the back of the outer envelope (but were signed and dated and contained a handwritten address); (4) 860 ballots that lack only a handwritten address on the back of the outer envelope (but were signed and dated and contained a handwritten name); (5) 4,466 ballots that lack only a handwritten name and address on the back of the outer envelope (but were signed and dated).

On November 10, 2020, the Campaign filed five pleadings entitled “Notice of Appeal via Petition for Review of Decision by the Philadelphia County Board of Elections,” one for each of the five categories referenced above that the Philadelphia Board approved as sufficient to be pre-canvassed or canvassed. In each petition for review, the Campaign alleged that this Court, in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), declared that absentee and mail-in ballots cast in violation of the Election Code’s mandatory requirements are void and cannot be counted. Petition for Review, 11/10/2020, ¶ 14. The Campaign further alleged that failures to include hand-written names, addresses and dates constituted violations of mandatory obligations under Sections 3146.6(a) and/or 3150.16(a) of the Election Code. *Id.* at 15-16. Accordingly, the Campaign alleged that the Board’s decisions with respect to the absentee and mail-in ballots in the above-referenced five categories were based on a clear error of law and must be reversed. *Id.* at 32.

On November 13, 2020, Judge Crumlish held oral argument on the issues raised in the Petition for Review. In response to questions from Judge Crumlish, counsel for the Campaign agreed that the Petition for Review was “not proceeding based on allegations of fraud or misconduct.” Transcript, 11/13/2020, at 13-14. She further agreed that the Campaign was not challenging the eligibility of the 8,329 voters in question and did not

contest either that all of the ballots at issue were signed by the voters or that they had been timely received by the Board. *Id.* at 30-31, 37. Instead, she indicated that the Campaign was “alleging that the ballots were not filled out correctly.” *Id.* at 14. Counsel for the DNC¹ argued that the failures to handwrite names, addresses and dates “are, at most, minor technical irregularities that the Supreme Court of Pennsylvania has repeatedly said do not warrant disenfranchisement.” *Id.* at 14. Counsel for the Philadelphia Board added that the Election Code includes no provision requiring “absolute technical perfection” when filling out the declaration on the outer envelope containing an absentee or mail-in ballot. *Id.* at 38.

Later that same day, Judge Crumlish entered five orders affirming the Philadelphia Board’s decision to count the contested ballots. In his orders, Judge Crumlish noted that while the declaration contained a specific directive to the voter to sign the declaration, it made no mention of filling out the date or other information. Trial Court Orders, 11/13/2020, ¶ 2. He further found that while the Election Code provides that while the voter shall “fill out” and date the declaration, the term “‘fill out’ is not a defined term and is ambiguous.” *Id.* at ¶ 4. He indicated that the outer envelope already contains a pre-printed statement of the voter’s name and address, and that “[n]either a date nor the elector’s filling out of the printed name or of the address are requirements necessary to prevent fraud.” *Id.* at ¶ 5-6. Concluding that “[t]he Election Code directs the Court of Common Pleas in considering appeals from the County Board of Elections to make such

¹ DNA Services Corp./Democratic National Committee (hereinafter “DNC”) intervened in the proceedings before the trial court.

decree as right and justice may require[,]" *id.* at ¶ 8 (quoting 25 P.S. § 3157), Judge Crumliss upheld the decision of the Philadelphia Board.

The Campaign filed appeals from Judge Crumliss's orders in the Commonwealth Court on November 14, 2020, and the next day the Commonwealth Court issued an order consolidating the five appeals and setting an expedited briefing schedule. On November 17, 2020, the Philadelphia Board filed an application with this Court to exercise its extraordinary jurisdiction, 42 Pa.C.S. § 726, over the consolidated appeals, which we granted by order dated November 18, 2020.

In our order granting the Philadelphia Board's application for the exercise of extraordinary jurisdiction, we stated the issue to be decided as follows:

Does the Election Code require 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?

On November 10, 2020, the Allegheny County Board decided to canvass 2,349 mail-in ballots that contained a signed but undated declaration. Zicarelli challenged the decision in an appeal to the court of common pleas ultimately heard and decided by the Honorable Joseph James. It was not disputed that all 2,349 voters signed and printed their name and address on the outer envelopes and returned the ballots to the Allegheny County Board on time. Each of the ballots was processed in the Statewide Uniform Registry of Electors ("SURE") system and was time-stamped when it was delivered to the Allegheny County Board on or before November 3, 2020. At a hearing, via Microsoft Teams, on November 17, 2020, the Democratic Party and James Brewster (Zicarelli's opponent in the 45th Senatorial District race) moved to intervene, which motion was

granted. At the hearing, Zicarelli stated that she was not claiming voter fraud regarding the challenged ballots.

In an opinion and order dated November 18, 2020, Judge James affirmed the Allegheny County Board's decision to count the ballots. He concluded that the date provision in Section 3150.16(a) is directory, not mandatory, and that "ballots containing mere minor irregularities should only be stricken for compelling reasons," citing *Shambach v. Shambach*, 845 A.2d 793, 798 (Pa. 2004). Noting that the ballots were processed in the SURE system and time-stamped when delivered to the Allegheny County Board, he found that the technical omission of the handwritten date on a ballot was a minor technical defect and did not render the ballot deficient.

Zicarelli immediately appealed Judge James' decision to the Commonwealth Court and contemporaneously filed an application to this Court requesting our exercise of extraordinary jurisdiction, noting that the issue presented was accepted by this Court as part of the Philadelphia Board appeals. While the application was pending, the Commonwealth Court ordered expedited briefing and on November 19, 2020, issued an opinion and order reversing the Court of Common Pleas of Allegheny County and remanded. *In Re: 2,349 Ballots in the 2020 General Election; Appeal of: Nicole Zicarelli*, ___ A.3d ___, 1162 C.D. 2020 (Commw. Ct. 2020). Zicarelli then withdrew her application for extraordinary jurisdiction.

On November 20, 2020, this Court granted the Allegheny County Board's Petition for Allowance of Appeal limited to the question of whether the ballots contained in undated but signed outer envelopes should be invalidated. The opinion of the Commonwealth

Court will be discussed, as necessary, in the analysis that follows. The order was stayed pending our disposition of these consolidated cases.

The pertinent scope and standard of review follow: the Court of Common Pleas' decision is reviewed on appeal "to determine whether the findings are supported by competent evidence and to correct any conclusions of law erroneously made." *In re Reading Sch. Bd. of Election*, 634 A.2d 170, 171–72 (Pa. 1993). The Court of Common Pleas, in turn, could reverse the Philadelphia Board's decision only for an abuse of discretion or error of law. *See Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952). As the issue involves the proper interpretation of the Election Code, it presents a question of law and our standard of review is de novo and our scope of review is plenary. *See, e.g., Banfield v. Cortés*, 110 A.3d 155, 166 (Pa. 2015).

II. ARGUMENTS OF THE PARTIES

Although more fully developed in our analysis set forth later in this opinion, we here briefly summarize the arguments of the parties and intervenors.

The Campaign argues that the General Assembly set forth in the Election Code the requirements for how a qualified elector can cast a valid absentee or mail-in ballot. Campaign's Brief at 22. One of those requirements is for each elector to "fill out, date, and sign" the declaration on the Outside Envelope. *Id.* (citing 25 P.S. §§ 3146.6(a) and 3150.16(a)). According to the Campaign, this Court has repeatedly ruled that the requirements of the sections of Election Code relevant here impose mandatory obligations, and that ballots cast in contravention of the these requirements are void and cannot be counted. *Id.* at 23. As a result, the Campaign insists that the trial court erred

in affirming the Board's decision to count the 8,329 non-conforming absentee and mail-in ballots. *Id.*

The Philadelphia Board, conversely, contends that the Election Code does not require the Philadelphia Board to set aside timely-filed ballots by qualified electors that are merely missing handwritten names, street addresses, and/or dates on the signed voter declaration. Philadelphia Board's Brief at 12. Contrary to the Campaign's contention that the provisions of the Election Code at issue here impose exclusively mandatory requirements, the Philadelphia Board argues that Pennsylvania courts have long held that minor errors or omissions should not result in disenfranchisement, particularly in cases where the errors or omissions do not implicate the board's ability to ascertain the voter's right to vote or the secrecy or sanctity of the ballot. *Id.* Here, the Philadelphia Board notes that the Campaign does not allege that the voters at issue here were not qualified to vote and have not asserted that any fraud or other impropriety has occurred. *Id.* As such, it concludes that it acted properly and within its discretion in determining that these omissions were not a basis for setting aside those ballots. *Id.*

The DNC largely concurs with the Philadelphia Board's arguments, indicating that there is no statutory requirement that voters print their full name or address on the outer envelopes and that adding a date to the envelope serves no compelling purpose. DNC's Brief at 9-10.

Zicarelli argues further that, in regard to outer envelopes not containing a voter-supplied date, this Court's opinion in *In Re: Nov. 3, 2020 General Election*, No. 149 MM 2020, 2020 WL 6252803 (Pa. Oct. 23, 2020) definitively speaks to the mandatory nature of the date requirement and, without much extrapolation, requires that such ballots not be

counted. The Allegheny County Board agrees with its Philadelphia counterpart. It counters Zicarelli's reliance on *In Re Nov. 3, 2020 General Election* by noting that Zicarelli's challenge to the ballots for lack of a date is based on the premise that the date is essential to the validity of the signature. Allegheny County Board points out this is the precise type of challenge that was disavowed in the case upon which Zicarelli relies.

III. ANALYSIS

We begin by recognizing from the outset that it is the “longstanding and overriding policy in this Commonwealth to protect the elective franchise.” *Shambach v. Birkhart*, 845 A.2d 793, 798 (Pa. 2004). “The Election Code must be liberally construed so as not to deprive ... the voters of their right to elect a candidate of their choice.” *Ross Nomination Petition*, 190 A.2d 719, 719 (Pa. 1963). It is therefore a well-settled principle of Pennsylvania election law that “[e]very rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.” *Appeal of Norwood*, 116 A.2d 552, 554–55 (Pa. 1955). It is likewise settled that imbedded in the Election Code is the General Assembly's intent to protect voter privacy in her candidate choice based on Article VII, Section 4 of the Pennsylvania Constitution and to prevent fraud and to otherwise ensure the integrity of the voting process.

We agree with the Campaign's observation that in Sections 3146.6(a) and 3150.16(a), the General Assembly set forth the requirements for how a qualified elector may cast a valid absentee or mail-in ballot. Campaign's Brief at 22. We further agree that these sections of the Election Code specifically provide that each voter “shall fill out, date, and sign” the declaration on the outside envelope. *Id.* We do not agree with the Campaign's contention, however, that because the General Assembly used the word

“shall” in this context, it is of necessity that the directive is a mandatory one, such that a failure to comply with any part of it requires a board of elections to declare the ballot void and that it cannot be counted. It has long been part of the jurisprudence of this Commonwealth that the use of “shall” in a statute is not always indicative of a mandatory directive; in some instances, it is to be interpreted as merely directory. See, e.g., *Commonwealth v. Baker*, 690 A.2d 164, 167 (Pa. 1997) (citing *Fishkin v. Hi-Acres, Inc.*, 341 A.2d 95 (Pa. 1975)); see also *Commonwealth ex rel. Bell v. Powell*, 94 A. 746, 748 (Pa. 1915) (quoting *Bladen v. Philadelphia*, 60 Pa. 464, 466 (1869) (“It would not perhaps be easy to lay down any general rule as to when the provisions of a statute are merely directory, and when mandatory and imperative.”)). The Campaign’s reliance on this Court’s recent decision in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) for the proposition it asserts is misplaced.

In *Pa. Democratic Party*, we held that the requirement in Section 3150.16(a) that a mail-in voter place his or her ballot in the inner secrecy envelope was a mandatory requirement and thus a voter’s failure to comply rendered the ballot void. *Pa. Democratic Party*, 238 A.3d at 380. In concluding that the use of the secrecy envelope was a mandatory, rather than a discretionary directive, we reviewed our prior decisions on the distinction between mandatory and discretionary provisions in the Election Code, including *Shambach v. Bickhart*, 845 A.2d 793 (Pa. 2004), *In re Luzerne County Return Board, Appeal of Elmer B. Weiskerger*, 290 A.2d 108 (Pa. 1972), and *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, Appeal of John Pierce*, 843 A.2d 1223 (Pa. 2004).

In *Shambach*, the Court declined to invalidate a write-in vote cast for a candidate who was named on the ballot, in direct violation of the Election Code's instruction that a voter could only write in a person's name if the name of said individual was "not already printed on the ballot for that office." *Shambach*, 845 A.2d at 795. In reaching that conclusion, the Court observed that "[m]arking a ballot is an imprecise process, the focus of which is upon the unmistakable registration of the voter's will in substantial conformity to the statutory requirements." *Id.* at 799 (quoting *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa 1945)).

In *Weiskerger*, this Court refused to invalidate a ballot based upon the "minor irregularity" that it was completed in the wrong color of ink. The provision of the Election Code in question provided that "[a]ny ballot that is marked in blue, black or blue-black ink ... shall be valid and counted." *Weiskerger*, 290 A.2d at 109 (citing 25 P.S. § 3063). In providing that ballots completed in the right color must be counted, we noted that the General Assembly "neither stated nor implied that ballots completed in a different color must not be counted." *Id.* We thus treated the instruction to use blue, black or blue-black ink as merely directory.

In *Pa. Democratic Party*, we compared these cases to our decision in *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, Appeal of John Pierce*, 843 A.2d 1223 (Pa. 2004), where we held that the Election Code's "in-person" ballot delivery requirement, see 25 P.S. § 3146.6, was mandatory, and that votes delivered by third persons must not be counted. *Appeal of Pierce*, 843 A.2d at 1231. There, we recognized that the in-person requirement served important purposes in the Election Code, including "limit[ing] the number of third persons who unnecessarily come in contact with the ballot[.]"

... provid[ing] some safeguard that the ballot was filled out by the actual voter, ... and that once the ballot has been marked by the actual voter in secret, no other person has the opportunity to tamper with it.” *Id.* at 1232. We thus explained in *Pa. Democratic Party* that “the clear thrust of *Appeal of Pierce*, ... is that, even absent an express sanction, where legislative intent is clear and supported by a weighty interest like fraud prevention, it would be unreasonable to render such a concrete provision ineffective for want of deterrent or enforcement mechanism.” *Pa. Democratic Party*, 238 A.3d at 380 (citing *Appeal of Pierce*, 843 A.2d at 1232).

Based upon this comparison between *Shambach*, *Weiskerger* and *Appeal of Pierce*, in *Pa. Democratic Party* we determined that the decision in *Appeal of Pierce* provided the appropriate guidance for the analysis of the secrecy envelope requirement. We held that “[i]t is clear that the Legislature believed that an orderly canvass of mail-in ballots required the completion of two discrete steps before critical identifying information on the ballot could be revealed. The omission of a secrecy envelope defeats this intention.” *Pa. Democratic Party*, 238 A.3d at 380. Unlike in *Shambach* and *Weiskerger* which involved “minor irregularities,” the use of a secrecy envelope implicated a “weighty interest,” namely secrecy in voting protected expressly by Article VII, Section 4 of our state charter. *Id.* As such, we recognized the use of a secrecy envelope as a mandatory requirement and that failures to comply with the requirement required that the ballot must be disqualified.” *Id.*; see also *id.* at 378 (quoting *JPay, Inc. v. Dep’t of Corr. & Governor’s Office of Admin.*, 89 A.3d 756, 763 (Pa. Commw. 2014) (“While both mandatory and directory provisions of the Legislature are meant to be followed, 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.”)).

To determine whether the Election Code’s directive that the voter handwrite their names, address and the date of signing the voter declaration on the back of the outer envelope is a mandatory or directory instruction requires us to determine whether the intent of the General Assembly was clear and whether the failure to handwrite the information constitutes “minor irregularities” or instead represent “weighty interests,” like fraud prevention or ballot secrecy that the General Assembly considered to be critical to the integrity of the election.

(1) Failures to include handwritten names and addresses

Beginning with the Campaign’s contention that ballots may not be counted if a voter fails to handwrite their name and/or address under the full paragraph of the declaration on the back of the outer envelope, we conclude that given the factual record in this case and the mechanics of the pre-canvassing and canvassing procedures including the incorporation of reliance on the SURE system, this “requirement” is, at best, a “minor irregularity” and, at worst, entirely immaterial. More to the point, the direction to the voter to provide a handwritten name and/or address is not only not mandatory, it is not a directive expressed in the Election Code. Thus, these directions do not meet the first prong of the test used in *Pa. Democratic Party*: the clear intent of the General Assembly.

The Election Code does not require that the outer envelope declaration include a handwritten name or address at all. Instead, Sections 3146.4 (absentee) and 3150.14(b) (mail-in) provide only that the declaration must 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. §§ 3146.4, 3150.14(b). Aside from this information (none of which is relevant to the present issue), the General Assembly delegated to the Secretary of the Commonwealth the obligation to prescribe the form of declaration and envelope for absentee and mail-in ballots, presumably to allow the inclusion of information that would be helpful for administrative or processing purposes. *Id.*² As such, the decision to include spaces in the declaration for handwritten names and addresses was made solely by the Secretary of the Commonwealth, not the General Assembly. It would be a stretch to divine that the General Assembly was advancing any weighty interest for the inclusion of handwritten names and addresses in the declaration such that a voter’s failure to include them should result in the ballot not being counted. Moreover, the Campaign does not argue that the Secretary’s request for handwritten names and addresses implicated any “weighty interests” that would compel a finding that the request to provide them constituted a mandatory requirement.³

² None of the parties have challenged whether these provisions constituted improper delegations of legislative authority. *Protz v. Workers’ Compensation Appeal Board (Derry Area School District)*, 161 A.3d 827 (Pa. 2017).

³ Conversely, the Philadelphia Board and the DNC have both selectively relied upon guidance provided by the Secretary to the county boards of election that indicated that a voter’s failure to handwrite his/her name and address was not a ground to set the ballot aside. Philadelphia Board’s Brief at 19; DNC’s Brief at 15. They have directed the Court to the Guidance published on September 11, 2020, in which the Secretary advised that “[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.” Guidance, 9/11/2020, at 3. As discussed *infra* at n.6, however, on September 28, 2020 the Secretary issued arguably contrary guidance stating that “[a] ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted.” Guidance,

The Campaign argues that we should read the “handprinted name and address” requirement into the directives in Section 3146.6(a) and 3150.16(a) that the voter “fill out” the declaration. Campaign’s Brief at 30. Citing to dictionary definitions, the Campaign contends that “fill out” means “to write or type information in spaces that are provided for it.” *Id.* at 32. Because 8,349 voters did not “fill out” one or more spaces provided on the outer envelope provided in the declaration (including the voter’s name and/or address), the Campaign argues that those ballots were non-conforming and could not be counted. *Id.* at 29. The directive to “fill out” does not give any legislative definition to the specific information to be placed in the blank spaces. It is the weight of the information that must be tested in the analysis. As stated, since the General Assembly did not choose the information to be provided, its omission is merely a technical defect and does not invalidate the ballot.

Further, as Judge Crumlish observed, the term “fill out” is ambiguous.⁴ Trial Court Opinion, 11/13/2020, ¶ 4. As Judge Crumlish recognized, the term “fill out” is not a defined term under the Election Code. *Id.* Moreover, and contrary to the Campaign’s contention that no alternative understanding of the term “fill out” has been proffered, the Campaign has failed to recognize, **the voter’s name and address are already on the back of the outer envelope on a pre-printed label affixed no more than one inch**

9/28/20, at 9. Confusingly, she also incorporated by reference the September 11, 2020 Guidance. Both sets of Guidance are set forth on pages 8-10 *supra*.

⁴ Where an election statute is ambiguous, courts apply the interpretative principle that “election laws ... ordinarily will be construed liberally in favor of the right to vote.” *Pa. Democratic Party*, 238 A.3d at 360–61.

from the declaration itself. A voter could reasonably have concluded that the blanks requesting his or her name and address needed to be “filled out” only if the name and/or address on the label was incorrect or incomplete, as it was unnecessary to provide information that was already on the back of the outer envelope.⁵ To add further confusion, the declaration itself can be read to refer to the label: “I hereby declare that I am qualified to vote from the below stated address” can be read to mean the address as already stated on the label.

The text of the Election Code provides additional evidence of the directory nature of the provisions at issue. With regard to individuals who are not able to sign their name due to illness or physical disability, the General Assembly imposed a requirement that the declarant provide his or her “complete address.” 25 P.S. § 3146.6(a)(3); 25 P.S. §

⁵ The DNC argues, with some persuasive force, that the Campaign’s requested interpretation of Pennsylvania’s Election Code could lead to a violation of federal law by asking the state to deny the right to vote for immaterial reasons. 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).

Under this section, the so-called “materiality provision” of the Voting Rights Act, federal courts have barred the enforcement of similar administrative requirements to disqualify electors. *See, e.g., Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003) (disclosure of voter’s social security number is not “material” in determining whether a person is qualified to vote under Georgia law for purposes of the Voting Rights Act); *Washington Ass’n of Churches v. Reed*, 492 F.Supp.2d 1264 (W.D. Wash. 2006) (enjoining enforcement of “matching” statute, requiring state to match potential voter’s name to Social Security Administration or Department of Licensing database, because failure to match applicant’s information was not material to determining qualification to vote); *Martin v. Crittenden*, 347 F.Supp.3d 1302 (N.D. Ga. 2018), *reconsideration denied*, 1:18-CV-4776-LMM, 2018 WL 9943564 (N.D. Ga. Nov. 15, 2018) (voter’s ability to correctly recite his or her year of birth on absentee ballot envelope was not material to determining said voter’s qualifications).

3150.16(a.1). These provisions demonstrate that the General Assembly clearly knew how to impose such a requirement when it wishes to do so. *In re Nov. 3, 2020 Gen. Election*, ___ A.3d ___, 2020 WL 6252803, at *14 (Pa. 2020) (stating that the General Assembly’s prior inclusion of a signature comparison requirement demonstrated that “it understands how to craft language requiring signature comparisons at canvassing when it chooses to do so”). Moreover, Sections 3146.6(a)(3) and 3150.16(a.1) contain a precise form of declaration, crafted by the General Assembly, pertaining to voters with disabilities evidencing the General Assembly’s understanding of how to mandate a precise declaration without resort to delegating non-essential information to the Secretary.

Finally, the text of the Election Code further demonstrates the lack of any need for handwritten names and addresses. Section 3146.8(g)(3), which relates to the canvassing of official absentee ballots and mail-in ballots, provides, in relevant part:

When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable.

25 P.S. § 3146.8(g)(3). The county board of elections’ duty to keep a “Military Veterans and Emergency Civilians Absentee Voters File,” which is not relevant to the current dispute, is governed by 25 P.S. § 3146.2c(b). Section 3146.2c(a) previously housed the board’s duty to keep a "Registered Absentee and Mail-in Voters File." However, the General Assembly recently eliminated this directive. See 2020, March 27, P.L. 41, No.

12, § 8, imd. effective (deleting subsection (a), which required county board of elections to maintain at its office “a file containing the duplicate absentee voter's temporary registration cards of every registered elector to whom an absentee ballot has been sent”). By virtue of this amendment, the General Assembly eliminated one of the reference points that still appear in Section 3146.8(g)(3). The current Section 3146.2c(c) directs the county board to maintain the “the absentee voters' list” referenced in Section 3146.8(g)(3). The General Assembly also amended Section 3146.2c(c), which previously only directed the chief clerk to “prepare a list for each election district showing the names and post office addresses of all voting residents thereof to whom official absentee ballots shall have been issued,” to include such voting residents who were issued mail-in ballots. See 2019, Oct. 31, P.L. 552, No. 77, § 5.1, imd. effective (inserting “or mail-in” twice in subsection (c)).

As such, as relevant for our purposes, Section 3146.8(g)(3) directs that “the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the ... the absentee voters' list,” which, pursuant to Section 3146.2c(c), now also contains voters who received mail-in ballots. A close reading of the language chosen by the General Assembly here is telling. Section 3146.8(g)(3) directs the board to “examine the declaration **on the envelope**” and “compare the information **thereon**” to the absentee (and mail-in) voters' list. 25 P.S. § 3146.8(g)(3) (emphasis added). Reading these phrases together, it is clear that the General Assembly intended that the information to be compared to the absentee (and mail-in) voters' list is the information on the outer envelope which includes the pre-printed name and address. If

the General Assembly intended for the information written by the voter to be compared to the absentee voters' list, it would have used the term "therein," thus directing the board to compare the information contained "within" the declaration (the handwritten name and address).

The following sentence in this section further suggests that the General Assembly intended such bifurcation. Section 3146.8(g)(3) next states:

If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the ... the absentee voters' list ... verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3). Here, the board is directed to consider whether the declaration is sufficient (i.e., the examination contained in the previous sentence) and also ensure that the absentee voters' list confirms the voter's right to vote (i.e., the comparison of the printed information to the relevant list from the prior sentence).

(2) Failures to include dates

Both the Campaign and Ziccarelli argue that the requirement to state the date on which declaration was signed is a mandatory obligation requiring disenfranchisement for lack of compliance. We disagree, as we conclude that dating the declaration is a directory, rather than a mandatory, instruction, and thus the inadvertent failure to comply does not require that ballots lacking a date be excluded from counting. As reviewed hereinabove, in our recent decision in *Pa. Democratic Party*, we reiterated that the distinction between directory and mandatory instructions applies with respect to a voter's obligations under the Election Code, and that only failures to comply with mandatory

obligations, which implicate both legislative intent and “weighty interests” in the election process, like ballot confidentiality or fraud prevention, will require disqualification. *Pa. Democratic Party*, 238 A.3d at 379-80.

The Commonwealth Court and Zicarelli relied upon the Election Code’s use of the of “**shall** ... date” language in construing the date obligation as mandatory. *In Re: 2,349 Ballots in the 2020 General Election, Appeal of: Nicole Zicarelli*, ___ A.3d ___, 1162 C.D. 2020, 10 (Pa. Comm. 2020). Although unlike the handwritten name and address, which are not mentioned in the statute, the inclusion of the word “date” in the statute does not change the analysis because the word “shall” is not determinative as to whether the obligation is mandatory or directive in nature. That distinction turns on whether the obligation carries “weighty interests.” The date that the declaration is signed is irrelevant to a board of elections’ comparison of the voter declaration to the applicable voter list, and a board can reasonably determine that a voter’s declaration is sufficient even without the date of signature. Every one of the 8,329 ballots challenged in Philadelphia County, as well as all of the 2,349 ballots at issue in Allegheny County, were received by the boards of elections by 8:00 p.m. on Election Day, so there is no danger that any of these ballots was untimely or fraudulently back-dated. Moreover, in all cases, the receipt date of the ballots is verifiable, as upon receipt of the ballot, the county board stamps the date of receipt on the ballot-return and records the date the ballot is received in the SURE system. The date stamp and the SURE system provide a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superflous.

Zicarelli offers two alternative “weighty interests” for our consideration. She first contends that the date on which the declaration was signed may reflect whether the

person is a “qualified elector” entitled to vote in a particular election. Pursuant to Section 3150.12b (entitled “Approval of application for mail-in ballot”), a board of elections may have determined that the person was a qualified elector and thus entitled to receive a mail-in ballot. Pursuant to Section 2811, however, to be a qualified elector, “[h]e or she shall have resided in the election district where he or she shall offer to vote at least thirty days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within thirty days preceding the election.” 25 P.S. § 2811. As a result, Zicarelli contends that the person may have been qualified to vote in a particular voting district at the time of applying for a mail-in ballot, but no longer a qualified elector in that voting district on Election Day. Zicarelli’s Brief at 16.

This unlikely hypothetical scenario is not evidence of a “weighty interest” in the date on the document for assuring the integrity of Pennsylvania’s system for administering mail-in voting. Among other things, the canvassing statute, 25 P.S. § 3146.8(g)(3), directs the board to examine the declaration on the envelope of each ballot and compare the information thereon with that contained in the now defunct “Registered Absentee and Mail-in Voters File.” See discussion *supra* pp. 27-29. The date of signing the declaration will not be of any benefit in performing this task, as the name of the voter at issue will be on this list (as a result of his or her approval to receive a mail-in ballot), and the date of signing will provide no information with respect to whether or not he or she has left the voting district in the interim. Most critically, our current statutory framework includes no requirement that a county board of elections investigate whether an individual who had

been confirmed as a qualified elector at the time of approval to receive a mail-in ballot remains as a qualified elector on Election Day. If the General Assembly had so intended, it would certainly have expressly stated it, as opposed to nebulously tucking such an unprecedented requirement into the instructions to the Secretary for designing the declaration.

Second, Zicarelli argues that the date of signature of the declaration will serve to prevent double voting, as “whether an elector has already voted in the election for which the ballot is issued, by its very nature, depends on the date on which the declaration was signed.” Zicarelli’s Brief at 16. Boards of elections do not use signatures or any handwritten information to prevent double voting. Duplicate voting is detected by the use of bar codes through the SURE system, and the board identifies the earlier cast vote by referencing the date it received the ballot, not the date on which the declaration was signed.

Zicarelli and the Commonwealth Court insist that this Court “has already held that mail-in ballots with undated declarations are not ‘sufficient’ and, thus, must be set aside.” Zicarelli’s Brief at 9; *In Re: 2,349 Ballots in the 2020 General Election*, 1162 C.D. 2020, at 10. In support of this contention, they reference an observation in our recent decision in *In re November 3, 2020 General Election*, ___ A.3d ___, 2020 WL 6252803 (Pa. 2020), that when assessing the sufficiency of a voter’s declaration, “the county board is required to ascertain whether the return envelope has been filled out, dated, and signed – and if it fails to do so then the ballot cannot be designated as “sufficient” and must be set aside.⁶

⁶ In her brief, Zicarelli cites to the Guidance distributed by the Secretary of the Commonwealth on September 28, 2020 to the county boards of elections, advising that

Id. at *12-13. This statement is being taken out of context. Our statement in 2020 *General Election* was in reference to the limitations on what an election board is directed by the statute to do when assessing the sufficiency of a voter’s declaration for the express purpose of indicating what they were not to do, i.e., signature comparisons. The question in *In Re: Nov. 3, 2020 General Election* was a narrow one. We did not address (as it was not at issue) whether a county board of elections could find a declaration as sufficient even though it was undated. That question requires an entirely different analysis that

“[a] ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted.” As noted in footnote 3 *supra*, however, the Secretary also issued Guidance on September 11, 2020, which was cited with approval by the Philadelphia Board and the DNC. No party referenced both sets of Guidance, however, even though the September 28 Guidance incorporated the September 11 Guidance. See Guidance, 9/28/2020, at 9 (“For more information about the examination of return envelopes, please refer to the Department’s September 11, 2020 Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes.”).

In any event, we will not consider this Guidance in making our decision. Neither of the parties explain how the potentially contradictory directives are to be understood. More importantly, the Secretary has no authority to definitively interpret the provisions of the Election Code, as that is the function, ultimately, of this Court. The Secretary also clearly has no authority to declare ballots null and void. “[I]t is the Election Code’s express terms that control, not the written guidance provided by the Department and as this Court repeatedly has cautioned, even erroneous guidance from the Department or county boards of elections cannot nullify the express provisions of the Election Code.” *In re Scroggin*, 237 A.3d 1006, 1021 (Pa. 2020). Moreover, the Secretary has no authority to order the sixty-seven county boards of election to take any particular actions with respect to the receipt of ballots. 25 P.S. § 2621(f.2).

Finally, with respect to the September 28 Guidance indicating that undated ballots must be set aside, we note that in addition to the Philadelphia and Allegheny County Boards, at least two other boards of elections also did not follow it. *Donald J. Trump for President Inc. v. Bucks Cnty. Bd. of Elections*, No. 2020-05786 (Bucks Cty. Ct. Com. Pl.); *Donald J. Trump for President, Inc., et al. v. Montgomery Cnty. Bd. of Elections*, No. 2020-18680 (Nov. 13, 2020). Both the Bucks County and Montgomery County Courts of Common Pleas affirmed the counting of the ballots even though the declarations had not been filled out in full. Each of the courts of common pleas appropriately applied this Court’s precedent in doing so.

depends in significant part on whether dating was a mandatory, as opposed to a directive, requirement. We have conducted that analysis here and we hold that a signed but undated declaration is sufficient and does not implicate any weighty interest. Hence, the lack of a handwritten date cannot result in vote disqualification.

IV. CONCLUSION

As we recognized in *Pa. Democratic Party*, “while both mandatory and directory provisions of the Legislature are meant to be followed, 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.” *Pa. Democratic Party*, 238 A.3d at 378. Here we conclude that while failures to include a handwritten name, address or date in the voter declaration on the back of the outer envelope, while constituting technical violations of the Election Code, do not warrant the wholesale disenfranchisement of thousands of Pennsylvania voters. As we acknowledged in *Shambach*, “ballots containing mere minor irregularities should only be stricken for compelling reasons.” *Shambach*, 845 A.2d at 799; *see also Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945) (“[T]he 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.”). Having found no compelling reasons to do so, we decline to intercede in the counting of the votes at issue in these appeals.

The decision of the Philadelphia Court of Common Pleas is hereby affirmed. The decision of the Commonwealth Court is hereby reversed and the decision of the Allegheny County Court of Common Pleas is reinstated.

Justices Baer and Todd join the opinion.

Justice Wecht concurs in the result and files a concurring and dissenting opinion.

Justice Dougherty files a concurring and dissenting opinion in which Chief Justice Saylor and Justice Mundy join.

Judgment Entered 11/23/2020

Therica D. Wallace
DEPUTY PROTHONOTARY

**[J-118A-F-2020] [OAJC: Donohue, J.]
IN THE SUPREME COURT OF PENNSYLVANIA**

IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION	: No. 31 EAP 2020 : : :
APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	: SUBMITTED: November 18, 2020 : : : : : : : : :
IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION	: No. 32 EAP 2020 : : :
APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	: SUBMITTED: November 18, 2020 : : : : : : : : :
IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION	: No. 33 EAP 2020 : : :
APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	: SUBMITTED: November 18, 2020 : : : : : : : : :
IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION	: No. 34 EAP 2020 : : :
APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	: SUBMITTED: November 18, 2020 : : : : : : : : :
IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION	: No. 35 EAP 2020 : : :
APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	: SUBMITTED: November 18, 2020 : : : : : : : : :
IN RE: 2,349 BALLOTS IN THE 2020 GENERAL ELECTION	: No. 29 WAP 2020 : : :

APPEAL OF: ALLEGHENY COUNTY
BOARD OF ELECTIONS

: Appeal from the Order of the
: Commonwealth Court entered
: November 19, 2020 at No. 1162 CD
: 2020, reversing the Order of the
: Court of Common Pleas of
: Allegheny County entered November
: 18, 2020 at No. GD 20-011654 and
: remanding

:
:

SUBMITTED: November 20, 2020

CONCURRING AND DISSENTING OPINION

JUSTICE WECHT

DECIDED: November 23, 2020

I agree with the conclusion that no mail-in or absentee ballot should be set aside solely because the voter failed to hand print his or her name and/or address on the declaration form on the ballot mailing envelope. These items are prescribed not by statute but by the Secretary of the Commonwealth under legislatively delegated authority. Absent evidence of legislative intent that what in context amounts to redundant information must be furnished to validate a mail ballot, their omission alone should not deny an elector his or her vote. But I part ways with the conclusion reflected in the Opinion Announcing the Judgment of the Court (“OAJC”) that a voter’s failure to comply with the statutory requirement that voters date the voter declaration should be overlooked as a “minor irregularity.” This requirement is stated in unambiguously mandatory terms, and nothing in the Election Code¹ suggests that the legislature intended that courts should

¹ Act of June 3, 1937, P.L. 1333, art. I, § 101, *codified as amended at 25 P.S. §§ 2601, et seq.*

construe its mandatory language as directory. Thus, in future elections, I would treat the date and sign requirement as mandatory in both particulars, with the omission of either item sufficient without more to invalidate the ballot in question.² However, under the circumstances in which the issue has arisen, I would apply my interpretation only prospectively. So despite my reservations about the OAJC's analysis, I concur in its disposition of these consolidated cases.

Concurring in this Court's recent decision in *Pennsylvania Democratic Party v. Boockvar*, I expressed my increasing discomfort with this Court's willingness to peer behind the curtain of mandatory statutory language in search of some unspoken directory intent.

[If this Court is] to maintain a principled approach to statutory interpretation that comports with the mandate of our Statutory Construction Act,^[3] if we are to maximize the likelihood that we interpret statutes faithfully to the drafters' intended effect, we must read mandatory language as it appears, and we must recognize that a mandate without consequence is no mandate at all.⁴

There, I wrote separately in support of this Court's ruling requiring the invalidation of mail-in ballots that were returned to boards of elections not sealed in their secrecy envelopes as required by statutory language. The secrecy envelope requirement at issue in that case was no less ambiguous than the "fill out, date and sign" mandate at issue in this

² None of the parties or courts involved in these consolidated cases dispute that a voter's failure to sign a mail-in or absentee ballot's declaration requires invalidation.

³ Act of Dec. 6, 1972, No. 290, § 3, *codified as amended at* 1 Pa.C.S. §§ 1501, *et seq.*

⁴ 238 A.3d 345, 391 (Pa. 2020) (Wecht, J., concurring) (hereinafter "*PDP*").

case.⁵ Nonetheless, departing from that holding for reasons that do not bear close scrutiny, the OAJC concludes that invalidation should *not* follow for failure to comply with the Election Code provisions requiring that “the elector shall . . . fill out, date and sign the declaration printed on” the ballot mailing envelope, even though this requirement appears in precisely the same statutory provisions as were at issue in *PDP*.

Section 3150.16 of the Election Code, governing “[v]oting by mail-in electors”—and its counterpart for absentee ballots, which employs the same operative language⁶—provides:

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.⁷

⁵ Specifically, 25 P.S. § 3150.16(a) provides that the mail-in ballot 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.’*”

⁶ Compare 25 P.S. § 3150.16(a) (“Voting by mail-in electors”) with 25 P.S. § 3146.6(a) (“Voting by absentee electors”). Each provision governing the form of mail-in ballots and the voter’s obligations in preparing and transmitting them has its verbatim equivalent for absentee ballots, and the issue presented applies equally to both. Hereinafter, for simplicity’s sake, I refer exclusively to mail-in ballots and cite and quote only the provisions that apply to mail-in ballots, but my analysis applies identically to both. The OAJC reproduces the relevant sections at length. See OAJC at 5-7.

⁷ 25 P.S. § 3150.16(a) (emphasis added).

While this Court has not reviewed every constituent step this provision prescribes, we have addressed several of the requirements, taking it upon ourselves to weigh in each instance whether to interpret the mandatory statutory language as being mandatory in fact. The law those cases now comprise is so muddled as to defy consistent application, an inevitable consequence of well-meaning judicial efforts to embody a given view of what is faithful to the spirit of the law, with the unfortunate consequence that it is no longer clear what “shall” even means.

Nearly fifty years ago, this Court considered whether a ballot completed in red or green ink should be counted given that the statute provided by its terms only for the canvassing of ballots completed in blue/black ink.⁸ Then-applicable Section 3063 of the Election Code provided that “[a]ny ballot that is marked in blue, black or blue-black ink, in fountain pen or ball point pen, or black lead pencil or indelible pencil, shall be valid and counted.”⁹ The Court determined that the Code did not require the invalidation of ballots completed in other colors, holding that the mandatory language was merely directory in effect:

[T]he power to throw out a ballot for minor irregularities should be sparingly used. It should be done only for very compelling reasons. 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 requirements. In construing election laws[,] while we must strictly enforce all provisions to prevent fraud over overriding concern at all times must be to be flexible in order to favor the right to vote. Our goal must be to enfranchise and not to disenfranchise. This section of the code merely assures the validity of ballots marked in blue, black or blue-black ink. It does not . . . specify that any other type of marking will necessarily be void. We have noted in other cases that the dominant theme of this section is to prevent ballots from being identifiable. A ballot should not be invalidated

⁸ *Appeal of Weiskerger*, 290 A.2d 108 (Pa. 1972).

⁹ 25 P.S. § 3063 (applicable through October 30, 2019).

under [25 P.S. § 3063] unless the voter purposely makes a mark thereon or commits some other act in connection with this ballot to distinguish and identify it. The 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.¹⁰

As this Court later stressed in *Appeal of Pierce, Weiskerger* “was decided before the enactment of the Statutory Construction Act [(“SCA”)], which dictates that legislative intent is to be considered only when a statute is ambiguous.”¹¹ Thus, while *Pierce* focused on distinguishing *Weiskerger*, it nonetheless implicitly called into question the *Weiskerger* Court’s casual dismissal of the language of the statute there at issue because the various factors the *Weiskerger* Court cited as relevant to its decision not to give “shall” mandatory effect are relevant under the SCA only when the statute is susceptible of two or more reasonable interpretations.¹²

In insisting that a court’s goal should be to “enfranchise and not to disenfranchise” and to be “flexible” in furtherance of that goal, the *Weiskerger* Court found itself awash in

¹⁰ *Weiskerger*, 290 A.2d at 109 (cleaned up).

¹¹ *Appeal of Pierce*, 843 A.2d 1223, 1231 (Pa. 2004); see 1 Pa.C.S. 1921(b) (“When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”); see also *Oberneder v. Link Computer Corp.*, 696 A.2d 148, 150 n.2 (Pa. 1997) (rejecting a party’s reliance upon a 1965 case because it was at odds with the ambiguity-first, reliance-upon-rules-of-construction-later approach to statutory construction required by the SCA).

¹² Without suggesting that the ink color language at issue in that case was ambiguous on its face, the *Weiskerger* Court suggested that interpreting the language required it to consider, *inter alia*, “the occasion for its enactment” and “the mischief to be remedied.” *Weiskerger*, 290 A.2d at 109. Section 1921 of the SCA similarly provides that courts may consider “[t]he occasion and necessity for the statute” and “[t]he mischief to be remedied”—but *only* “[w]hen the words of the statute are not explicit.” 1 Pa.C.S. § 1921(c).

language so slippery as to defy consistent application. The Court posited the existence of “minor irregularities,” a term we repeat often but have yet to define with suitable rigor,¹³ and posited that ballots should be invalidated only for “very compelling reasons.”¹⁴ It also blessed “substantial conformity,” and directed courts to “be flexible in order to favor the right to vote”—evidently even when doing so runs counter to statutory directives stated in mandatory terms.¹⁵

Perhaps most troublingly, the Court posited that its “goal must be to enfranchise and not to disenfranchise.”¹⁶ A court’s only “goal” should be to remain faithful to the terms of the statute that the General Assembly enacted, employing only one juridical presumption when faced with unambiguous language: that the legislature *meant what it said*. And even where the legislature’s goal, however objectionable, is to impose a requirement that appears to have a disenfranchising effect, it may do so to any extent that steers clear of constitutional protections. In any event, even if the *Weiskerger* Court

¹³ See, e.g., *Appeal of Norwood*, 116 A.2d 552, 555 (Pa. 1955); *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945).

¹⁴ *Weiskerger*, 290 A.2d at 109 (quoting *In re Petitions to Open Ballot Boxes*, 188 A.2d 254, 256 (Pa. 1963)).

¹⁵ In contrast to *Weiskerger*’s capacious understanding of this principle, the Court adopted a more measured tone in *Appeal of Urbano*, 190 A.2d 719 (Pa. 1963). There, citing the presumption in favor of counting votes, it allowed for relief from the apparent consequences of failing to satisfy mandatory statutory language, but did so specifically because the common-law presumption was in keeping with additional statutory language expressly granting the court discretion to permit amendments to cure even “material errors or defects.” *Id.*

¹⁶ *Weiskerger*, 290 A.2d at 109 (emphasis added).

faithfully applied the common-law principles it cited, it did so inconsistently with the SCA's contrary guidance, which issued later the same year and binds us today.¹⁷

But the advent of the SCA did not prevent this Court from repeating the same mistake even decades later. In *Shambach v. Bickhart*,¹⁸ a voter wrote in a candidate for office despite the fact that the candidate appeared on the official ballot for that office. This facially violated the Election Code, which provided that the voter shall, in the designated area, “write the identification of the office in question and the name of *any person not already printed on the ballot for that office*, and such mark and written insertion shall count as a vote for that person for such office.”¹⁹ Echoing *Weiskerger*, the *Shambach* Court observed that, “although election laws must be strictly construed to prevent fraud, they

¹⁷ To be clear, *Weiskerger* was by no means our original sin in this area. In one earlier example cited by the OAJC, this Court discerned reason to disregard the mandatory connotation of “shall” in *Appeal of James*, 105 A.2d 64 (Pa. 1954). Indeed, one can detect aspects of the same open-ended analysis in, e.g., our 1922 decision in *In re Fish's Election*, 117 A. 85, 87 (Pa. 1922) (quoting *Knight v. Borough of Coudersport*, 92 A. 299, 300 (Pa. 1914)) (“If the law declares a specified irregularity to be fatal, the court will follow that command, irrespective of their views of the importance of the requirement. In the absence of such declaration the judiciary endeavor, as best they may, to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a full and free expression of the popular will. . . . [If not], it is considered immaterial.”). Our willingness to substitute our judgment for that of the legislature perhaps reached its nadir in *Norwood*, where we held that “[e]very rationalization within the realm of common sense should aim at saving [a] ballot rather than void it,” 116 A.2d at 554-55, an expression that the OAJC embraces as a “well-settled principle of Pennsylvania election law.” OAJC at 19. Perhaps no passage better illustrates the liberties this Court has taken when probing for reasons to treat mandatory language as anything but mandatory.

¹⁸ 845 A.2d 793 (Pa. 2004).

¹⁹ 25 P.S. § 3031.12(b)(3) (emphasis added). The language in question has been amended in the intervening years.

ordinarily will be construed liberally in favor of the right to vote.”²⁰ Thus, the Court “[has] held that ballots containing mere irregularities should only be stricken for compelling reasons.”²¹ In support of this particular proposition, though, the Court cited only decisions that predated the SCA.²² Much as in *Weiskerger*, the Court held that the absence of statutory language requiring the invalidation of a ballot completed in violation of the mandatory language of Section 3031.12(b)(3), combined with the amorphous principles it drew from the Court’s prior cases, precluded the invalidation of a nonconforming ballot, effectively writing unambiguous language out of the Election Code entirely.

We restored a greater degree of rigor in *Pierce*. In that case, we considered whether absentee ballots delivered by third persons on behalf of non-disabled voters were invalid under the Election Code, which 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.*”²³ There, in a step the *Shambach* Court tacitly bypassed, the Court underscored the SCA’s direction that a court’s sole objective in construing a statute is to “ascertain and effectuate the intention of the General Assembly,” and that, “[g]enerally speaking, the best indication of legislative intent is the plain language of a

²⁰ *Shambach*, 845 A.2d at 798 (quoting *James*, 105 A.2d at 65).

²¹ *Id.* at 798.

²² See *Appeal of Mellody*, 296 A.2d 782, 784 (Pa. 1972); *Reading Defense Committee*, 188 A.2d at 256; *Gallagher*, 41 A.2d at 632. The OAJC similarly relies substantially for these principles on pre-SCA case law. See, e.g., OAJC at 3 (quoting *James*, 105 A.2d at 65-66 (Pa. 1954)); *id.* at 19 (quoting *Urbano*, 190 A.2d at 719, and *Norwood*, 116 A.2d at 554).

²³ 25 P.S. § 3146.6(a) (emphasis added); see *Pierce*, 843 A.2d at 1231.

statute.”²⁴ “[I]t is only when the words of a statute ‘are not explicit’ that a court may resort to other considerations, such as the statute’s perceived ‘purpose,’ in order to ascertain legislative intent.”²⁵ In this light, the Court turned to the legislature’s use of the word “shall.” “Although some contexts may leave the precise meaning of the word ‘shall’ in doubt,” the Court opined, “this Court has repeatedly recognized the unambiguous meaning of the word in most contexts.”²⁶ As noted *supra*, this Court in *Pierce* declined to treat *Weiskerger* as controlling in part because it was decided before the enactment of the SCA. While we did not assert *Weiskerger*’s abrogation, we certainly cast doubt upon its probity, as well, by extension, as all similarly permissive Election Code case law relying upon the presumption to count votes that violated the Code’s unambiguous directives.

In *In re Scroggin*,²⁷ too, we applied the relevant statutory language strictly in conformity with its terms, despite colorable arguments that doing so would deny ballot access to a candidate who had “substantially complied” with the statutory requirements. And at issue in that case was not merely the votes of a small percentage of otherwise qualified voters, but whether a political body’s Presidential candidate would appear on the ballot at all in the wake of a placeholder nominee’s failure to satisfy the Code’s mandatory affidavit requirement. “[T]he provisions of the election laws relating to the form of nominating petitions and the accompanying affidavits are not mere technicalities,” we

²⁴ *Pierce*, 843 A.2d at 1230 (citations omitted).

²⁵ *Id.*

²⁶ *Id.* at 1231-32 (citing, *inter alia*, BRYAN GARNER, *DICTIONARY OF MODERN LEGAL USAGE* 939 (2d ed. 1995)).

²⁷ 237 A.3d 1006 (Pa. 2020).

explained, “but are necessary measures to prevent fraud and to preserve the integrity of the election process. . . . Thus, the policy of the liberal reading of the Election Code cannot be distorted to emasculate those requirements necessary to assure the probity of the process.”²⁸

Finally, in *PDP*, we held that the failure strictly to comply with the Election Code’s mandatory requirement that mail-in ballots be sealed in the provided “Official Election Ballot” envelope required invalidation. Again, we specifically rejected the appellants’ reliance upon *Weiskerger* and *Shambach*, relying instead upon *Pierce*. As in *Pierce*, we found that to interpret “shall” as directory rather than mandatory would render the Code’s requirements “meaningless and, ultimately, absurd,” notwithstanding the absence of an express, statutorily-prescribed sanction for non-compliance.²⁹ While we did not go out of our way to express a jaundiced a view of our cases holding that “minor irregularities” might be overlooked, the gravamen of our decision in that case, as in *Pierce*, was clear: shall means *shall*.³⁰

Although I joined the Majority in that case, I wrote separately to underscore the difficulties endemic to judicial efforts to discern ulterior meanings ostensibly obscured by the legislature’s use of mandatory language. I observed that relying upon such unbounded investigations invited courts “to bend unclear texts toward whatever ends that

²⁸ *Id.* at 1019 (quoting *Appeal of Cabbage*, 359 A.2d 383, 384 (Pa. 1976)).

²⁹ *PDP*, 238 A.3d at 379 (quoting *Pierce*, 843 A.2d at 1232).

³⁰ *Id.* at 380 (“[*Pierce*] leads to the inescapable conclusion that a mail-in ballot that is not enclosed in the statutorily-mandated secrecy envelope must be disqualified. . . . Accordingly, we hold that the secrecy [envelope] language in Section 3150.16(a) is mandatory and the mail-in elector’s failure to comply . . . renders the ballot invalid.”).

they believe to be consonant with legislative intent, but with little or no contemporaneous insight into whether they have done so successfully.”³¹ Acknowledging that legislation is sometimes less than a model of clarity, and that this Court consequently will continue to face invitations to treat mandatory language as something less, I wrote: “[I]f we are to maintain a principled approach to statutory interpretation that comports with the mandate of [the SCA], if we are to maximize the likelihood that we interpret statutes faithfully to the drafters’ intended effect, we must read mandatory language as it appears, and we must recognize that a mandate without consequence is no mandate at all.”³²

It is against this case law, and particularly the views I expressed in *PDP*, that I review the question now before us, briefly addressing the Secretary-imposed name and address requirement first, before proceeding to consider the statutory requirement that the voter date and sign the voter declaration.

As to the former question, I agree with the OAJC’s conclusion, although I subscribe to the narrower approach briefly set forth by Justice Dougherty in his Concurring and Dissenting Opinion and developed variously in the OAJC’s analysis. But while the OAJC acknowledges the reasons that Justice Dougherty cites as militating against invalidation, it supplements them with the minor-irregularity analysis familiar from *Weiskerger* and *Shambach*, which is neither necessary nor advisable. Justice Dougherty’s approach requires no reliance upon cases that *Pierce* and *PDP* rightly have called into question. Rather, the fact that the name and address requirement does not stem from mandatory

³¹ *Id.* at 391 (Wecht, J., concurring).

³² *Id.*

statutory language,³³ as well as questions about the Secretary’s authority to compel county boards of elections to conform with whatever guidance the Secretary offers,³⁴ combined with our presumption in favor of treating qualified voters’ ballots as valid absent clear legal mandates to the contrary where statutory language is less than clear,³⁵ collectively recommend against invalidating ballots for this omission alone.³⁶ That is enough for me.

The same cannot be said about the date and sign requirement, which derives from an unmistakable statutory directive. Drawing upon our less rigorous case law, and relying heavily upon the interpretive latitude this Court has arrogated to itself sporadically for generations, the OAJC assumes that our mission is to determine whether the apparent mandate is in fact directory, hanging the entire inquiry upon the question of mandatory versus directory effect. That reading, in turn, must rely upon the “minor

³³ See Conc. & Diss. Op. at 2 (Dougherty, J.).

³⁴ See OAJC at 32-33 n.6.

³⁵ See *PDP*, 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.”). Notably, the OAJC cites *PDP* for the same proposition, correctly qualifying the principle by noting that liberal construction comes into play only “[w]here an election statute is *ambiguous*.” OAJC at 25 n.4 (emphasis added).

³⁶ I also find cause for concern in the absence of clear instruction on the ballot materials indicating that a ballot lacking a name or address will be disqualified, a concern that informs my preference for prospective application of the statutory date requirement. *Cf. Reading*, 188 A.2d at 256 (declining to invalidate ballots upon which voters did not signal their intended votes strictly with the X or check mark mandated by statute for various reasons—including a “minor irregularity” approach I reject—especially where the printed instruction on the ballot did not specify that only those two methods of signaling one’s vote would be recognized).

irregularity” / “weighty interest” dichotomy underlying the cases that *Pierce* and *PDP* have called into question.

To determine whether the Election Code’s directive that the voter handwrite their names, address, and the date of signing the voter declaration on the back of the outer envelope is a mandatory or directory instruction requires us to determine whether the intent of the General Assembly was clear and whether the failure to handwrite the information constitutes “minor irregularities” or instead represent[s] “weighty interests” . . . that the General Assembly considered to be critical to the integrity of the election.³⁷

To be clear, the OAJC offers a commendably thorough analysis, but its length and involution is necessary only *because* of the open-ended inquiry it embarks upon. And it is no surprise that, like the cases upon which it relies, the OAJC involves protean characterizations of voting requirements as “technicalities,”³⁸ “minor irregularities,”³⁹ and

³⁷ OAJC at 23.

³⁸ See *id.* at 3 (quoting *James*, 105 A.2d at 66 (“Technicalities should not be used to make the right of the voter insecure.”)). *James*’s tendentious resort to the word “technicalities,” which seldom is used constructively when invoked in connection with the law, is contradicted at least in tenor by subsequent pronouncements. See *Pierce*, 843 A.2d at 1234 (“[S]o-called technicalities of the Election Code are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed”); *Appeal of Weber*, 159 A.2d 901, 905 (Pa. 1960) (“The technicalities of the Election Law (and they are many) are necessary for the preservation of the secrecy and purity of the ballot and must, therefore, be meticulously observed.”).

³⁹ See OAJC at 22-23 (counterposing “minor irregularities” and “weighty interests” as the framework for decision). Notably, the question as to which we granted review quite confused the meaning of “irregularity.” We proposed to answer the question 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.* at 15. But this formulation is irreconcilable with the question whether failing to date a ballot declaration is, itself, a “minor irregularity” and, as such, not subject to the sanction of ballot invalidation—the very crux of the case, as the OAJC defines it. I raise this discrepancy because it illustrates how these constructs lend themselves to confusion, complicating what should be simple questions by engrafting unenumerated considerations upon plainly worded statutes.

even “superfluous.”⁴⁰ As illustrated in my review of earlier case law, the OAJC does not conjure this terminology from the ether—all but the last of these terms have been central to this Court’s decisional law going back decades. But properly understood, all of these terms signal (and implicitly bless) the substitution of judicial appraisals for legislative judgments.

The OAJC approach ultimately requires that in *any* case requiring interpretation of the Election Code to determine the validity of votes nonconforming with facially mandatory requirements, the Court must assess the effect of that language *de novo* before deciding whether the legislature intended for it to be interpreted as mandatory or merely directory.⁴¹ Thus, while a court embracing that test might take it as obvious, *e.g.*, that the signature requirement should be construed as mandatory, it could not merely have taken its mandatory effect as a given by virtue of the statutory language alone. If the mandatory/directory inquiry is ever appropriately applied to mandatory language, then the Court can only conclude that mandatory language must be applied as such after applying its balancing test, with cases that *seem* obvious merely reflecting that the Court deemed the “interest” to be protected so “weighty” that its omission clearly cannot be viewed as a “minor irregularity.”

⁴⁰ See *id.* at 30 (“The date stamp and the SURE system provide a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superfluous.”); *cf. id.* at 23 (characterizing the handwritten name and address requirement as, “at best, a ‘minor irregularity’ and, at worst, entirely immaterial”).

⁴¹ See *id.* at 30 (“Although unlike the handwritten name and address, which are not mentioned in the statute, the inclusion of the word ‘date’ in the statute does not change the analysis *because the word ‘shall’ is not determinative as to whether the obligation is mandatory or direct[ory] in nature.*” (emphasis added)).

The only practical and principled alternative is to read “shall” as mandatory. Only by doing so may we restore to the legislature the onus for making policy judgments about what requirements are necessary to ensure the security of our elections against fraud and avoid inconsistent application of the law, especially given the certainty of disparate views of what constitute “minor irregularities” and countervailing “weighty interests.”

I do not dispute that colorable arguments may be mounted to challenge the necessity of the date requirement, and the OAJC recites just such arguments.⁴² But colorable arguments also suggest its importance, as detailed in Judge Brobson’s opinion as well as Justice Dougherty’s Concurring and Dissenting Opinion.⁴³ And even to *indulge* these arguments requires the court to referee a tug of war in which unambiguous statutory language serves as the rope. That reasonable arguments may be mounted for and against a mandatory reading only illustrates precisely why we have no business doing so.

Ultimately, I agree with Judge Brobson’s description of the greatest risk that arises from questioning the intended effect of mandatory language on a case-by-case basis:

While we realize that our decision in this case means that some votes will not be counted, the decision is grounded in law. It ensures that the votes will not be counted because the votes are invalid as a matter of law. Such adherence to the law ensures equal elections throughout the Commonwealth, on terms set by the General Assembly. The danger to our democracy is not that electors who failed to follow the law in casting their ballots will have their ballots set aside due to their own error; rather, the real danger is leaving it to each county board of election to decide what laws must be followed (mandatory) and what laws are optional (directory), providing a patchwork of unwritten and arbitrary rules that will have some defective ballots counted and others discarded, depending on the county in which a voter resides. Such a patchwork system does not guarantee voters

⁴² See *id.* at 30-32.

⁴³ See *In re 2,349 Ballots in the 2020 General Election*, 1162 C.D. 2020, slip op. at 12 (Pa. Cmwlth. Nov. 19., 2020) (memorandum); Conc. & Diss. Op. at 3 (Dougherty, J.).

an “equal” election, particularly where the election involves inter-county and statewide offices. We do not enfranchise voters by absolving them of their responsibility to execute their ballots in accordance with law.⁴⁴

We must prefer the sometimes-unsatisfying clarity of interpreting mandatory language as such over the burden of seeking The Good in its subtext. Substantive perfection is the ever-elusive concern of the legislature. Ours must be consistency of interpretive method without fear or favor, a goal that recedes each time a court takes liberties with statutory language in furtherance of salutary abstractions. Because the OAJC favors a more intrusive and ambitious inquiry, I respectfully dissent.

But just because I disagree with the OAJC’s interpretation of the date and sign requirement does not inexorably lead me to the conclusion that the votes at issue in this case must be disqualified. While it is axiomatic that *ignorantia legis neminem excusat* (ignorance of the law excuses no one), this Court may elect to apply only prospectively a ruling that overturns pre-existing law or issues a ruling of first impression not foreshadowed by existing law. Indeed, we have done so in at least one case under the Election Code. In *Appeal of Zentner*,⁴⁵ we confronted a statute governing candidates’ obligation to submit statements of financial interests by a time certain that had been revised specifically to correct our previously fluid interpretations of the predecessor statute. We were forced to consider whether our newly strict construal of the revised statute should result in the invalidation of entire ballots already cast because they included one or more candidates who had failed to satisfy the statutory disclosures. We

⁴⁴ *In re 2,349 Ballots*, slip op. at 12-13.

⁴⁵ 626 A.2d 146 (Pa. 1993)

held, as the legislature clearly intended, that a candidate’s “failure to file the requisite financial interests statement within the prescribed time shall be fatal to a candidacy.”⁴⁶ But we also concluded that to “void the results of an election where all candidates were submitted to the voters, with late but nonetheless filed financial statements which left adequate time for study by the electorate, would be an unnecessary disenfranchisement.”⁴⁷ Thus we determined that our holding should apply prospectively but not to the election at issue.⁴⁸

It goes without saying that 2020 has been an historically tumultuous year. In October of 2019, the legislature enacted Act 77,⁴⁹ introducing no-excuse mail-in voting with no inkling that a looming pandemic would motivate millions of people to avail themselves of the opportunity to cast their ballots from home in the very first year that the law applied. Soon thereafter, Act 12,⁵⁰ introduced and enacted with unprecedented

⁴⁶ *Id.* at 149.

⁴⁷ *Id.*

⁴⁸ *Cf. Andino v. Middleton*, No. 20A55, ___ U.S. ___, 2020 WL 5887393, *1 (Oct. 5, 2020) (staying the district court’s injunction of an absentee ballot witness requirement, “except to the extent that any ballots cast before this stay issues and received within two days of this order may not be rejected for failing to comply with the witness requirement” in light of the fact that voters cast nonconforming absentee ballots in reliance upon the guidance of state elections officials during the pendency of the injunction); *In re Beyer*, 115 A.3d 835, 843-44 (Pa. 2015) (Baer, J., dissenting) (finding it “reasonable for this Court to rule prospectively that a candidate may only designate his occupation or profession as ‘lawyer’ on nomination papers after he or she has graduated from law school, passed the bar exam, and is in good standing as an active member of the Pennsylvania Bar,” but dissenting because, “at the time Candidate Beyer filed his nomination papers, neither a majority of this Court nor the Commonwealth Court had ever made such an express declaration”).

⁴⁹ See Act of Oct. 31, 2019, P.L. 552, No. 77.

⁵⁰ See Act of March 27, 2020, P.L. 41, No. 12.

alacrity in response to the pandemic, further amended the Election Code to address emergent concerns prompted by the looming public health crisis. While aspects of the new provisions that are relevant to this case were not wholly novel to the Code, as such—for example, the provisions that authorized no-excuse mail-in voting by and large just expanded the pool of voters to whom the rules that long had governed absentee balloting applied—the massive expansion of mail-in voting nonetheless presented tremendous challenges to everyone involved in the administration of elections, from local poll workers to the Secretary of the Commonwealth. Importantly, it transformed the incentives of probing the mail-in balloting provisions for vulnerabilities in furtherance of invalidating votes. For the first time, a successful challenge arising from a given technical violation of statutory requirements might result in the invalidation of many thousands of no-excuse mail-in ballots rather than scores or hundreds of absentee ballots.

In advance of the 2020 election, neither this Court nor the Commonwealth Court had occasion to issue a precedential ruling directly implicating the fill out, date and sign requirement. Moreover, as the OAJC highlights in multiple connections, the Secretary issued confusing, even contradictory guidance on the subject.⁵¹ Thus, local election officials and voters alike lacked clear information regarding the consequence of, *e.g.*, failing to handwrite one's address on an envelope that already contained preprinted text with that exact address or record the date beside the voter's declaration signature.

I have returned throughout this opinion to our decision in *PDP*, and I do so once more. I maintained in that case that the Election Code should be interpreted with

⁵¹ See OAJC at 24 n.3, 32-33 n.6; see also *id.* at 8-10 (reproducing all relevant aspects of the guidance documents pertaining to the issues presented).

unstinting fidelity to its terms, and that election officials should disqualify ballots that do not comply with unambiguous statutory requirements, when determining noncompliance requires no exercise of subjective judgment by election officials.⁵² The date requirement here presents such a case. But I *also* emphasized that disqualification is appropriate “[s]o long as the Secretary and county boards of elections *provide electors with adequate instructions for completing the declaration of the elector—including conspicuous warnings regarding the consequences for failing strictly to adhere*” to those requirements.⁵³ I cannot say with any confidence that even diligent electors were adequately informed as to what was required to avoid the consequence of disqualification in this case. As in *Zentner*, it would be unfair to punish voters for the incidents of systemic growing pains.

In case after case involving the Election Code, especially this year, we have been reminded how important it is that the General Assembly provide unambiguous guidance for the administration of the election process. But it is imperative that we recognize when the legislature has done precisely that, and resolve not to question the legislature’s chosen language when it has done so. And perhaps it is a silver lining that many of the problems that we have encountered this year, in which a substantially overhauled electoral system has been forced to make its maiden run in stormy seas, are now clear enough that the legislature and Department of State have notice of what statutory refinements are most needful. It is my sincere hope that the General Assembly sees fit to refine and clarify the Election Code scrupulously in the light of lived experience. In particular, because this is the second time this Court has been called upon to address the

⁵² See *PDP*, 238 A.3d at 389 (Wecht, J., concurring).

⁵³ See *id.* (emphasis added).

declaration requirement, it seems clear that the General Assembly might clarify and streamline the form and function of the declaration, perhaps prescribing its form to advance clarity and uniformity across the Commonwealth.⁵⁴

⁵⁴ In this regard, the OAJC observes that the Democratic National Committee “argues, with some persuasive force, that the Campaign’s requested interpretation of Pennsylvania’s Election Code could lead to a violation of [the federal Voting Rights Act] by asking the state to deny the right to vote for immaterial reasons.” OAJC at 26 n.5; see 52 U.S.C. § 10101(a)(2) (No person acting under color of law shall . . . (B) deny the right of any individual 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 . . .”). The OAJC does not pursue this argument, except to acknowledge a handful of cases that might be read to suggest that the name and address, and perhaps even the date requirement could qualify as “not material in determining whether such individual is qualified under State law to vote.” Given the complexity of the question, I would not reach it without the benefit of thorough advocacy. But I certainly would expect the General Assembly to bear that binding provision in mind when it reviews our Election Code. It is inconsistent with protecting the right to vote to insert more impediments to its exercise than considerations of fraud, election security, and voter qualifications require.

**[J-118A-2020, J-118B-2020, J-118C-2020, J-118D-2020, J-118E-2020 and J-118F-2020] [OAJC]
IN THE SUPREME COURT OF PENNSYLVANIA**

IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION : No. 31 EAP 2020
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: SUBMITTED: November 18, 2020
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APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC. : :
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IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION : No. 32 EAP 2020
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: SUBMITTED: November 18, 2020
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APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC. : :
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IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION : No. 33 EAP 2020
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: SUBMITTED: November 18, 2020
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APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC. : :
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IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION : No. 34 EAP 2020
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: SUBMITTED: November 18, 2020
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APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC. : :
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IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION : No. 35 EAP 2020
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: SUBMITTED: November 18, 2020
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APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC. : :
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IN RE: 2,349 BALLOTS IN THE 2020
GENERAL ELECTION

APPEAL OF: ALLEGHENY COUNTY
BOARD OF ELECTIONS

: No. 29 WAP 2020
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: Appeal from the Order of the
: Commonwealth Court entered
: November 19, 2020 at No. 1162 CD
: 2020, reversing the Order of the
: Court of Common Pleas of
: Allegheny County entered November
: 18, 2020 at No. GD 20-011654 and
: remanding
:
:
: SUBMITTED: November 20, 2020

CONCURRING AND DISSENTING OPINION

JUSTICE DOUGHERTY

DECIDED: November 23, 2020

I concur in the decision to affirm the lower courts’ orders pertaining to ballots where the qualified electors failed to print their name and/or address on the outer envelope containing their absentee or mail-in ballots. However, I cannot agree that the obligation of electors to set forth the date they signed the declaration on that envelope does not carry “weighty interests.” Opinion Announcing the Judgment of the Court (OAJC) at 30. I therefore respectfully dissent from the holding at Section III(2) of the OAJC which provides that the undated ballots may be counted.

The applicable statutes require that electors “shall [] fill out, date and sign” the declaration printed on the ballot envelope. 25 P.S. §§3146.6(a), 3150.16(a). In my view, the term “fill out” is subject to interpretation. Maybe it means printing one’s name and address on the envelope, and maybe it does not. Given that our goal in interpreting the Election Code is to construe ambiguous provisions liberally, in order to avoid disenfranchisement where possible, I do not consider the failure of qualified electors to “fill out” their name and address, particularly where the name and address already appear

on the other side of the envelope, to require disqualification of the ballot. I am further persuaded of this position by the fact that the blank spaces on the envelope indicating where the name and address should be “filled out” were designated by the Secretary, not the General Assembly. 25 P.S. §3146.4 (“Said form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth[.]”); see *also* Concurring and Dissenting Opinion at 12-13 (Wecht, J.). But, the meaning of the terms “date” and “sign” — which **were** included by the legislature — are self-evident, they are not subject to interpretation, and the statutory language expressly requires that the elector provide them. See *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1231 (Pa. 2004) (“[A]ll things being equal, the law will be construed liberally in favor of the right to vote but, at the same time, we cannot ignore the clear mandates of the Election Code.”) (citation omitted). Accordingly, I do not view the absence of a date as a mere technical insufficiency we may overlook.

In my opinion, there is an unquestionable purpose behind requiring electors to date and sign the declaration. As Judge Brobson observed below, the date on the ballot envelope provides proof of when the “elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place. The presence of the date also establishes a point in time against which to measure the elector’s eligibility to cast the ballot[.]” *In Re: 2,349 Ballots in the 2020 General Election*, 1162 C.D. 2020, slip op. at 12 (Pa. Cmwlth. Nov. 19, 2020) (memorandum). The date also ensures the elector completed the ballot within the proper time frame and prevents the tabulation of potentially fraudulent back-dated votes. *Cf. In re Canvass of Absentee Ballots of November 4, 2003 General Election*, 843 A.2d at 1232-33 (statutory requirement that ballot be submitted by elector and not third-party is mandatory safeguard against fraud). I recognize there is presently no dispute that all undated ballots at issue here arrived in a

timely manner. But I am also cognizant that our interpretation of this relatively new statute will act as precedential guidance for future cases.

Chief Justice Saylor and Justice Mundy join this concurring and dissenting opinion.