

COUNSEL APPEARED AS FOLLOWS:

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for the Plaintiffs

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for Defendant Montgomery County
Board of Elections

TIMOTHY FORD, ESQUIRE
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Committee

UZOMA NKWONTA, ESQUIRE, PRO HOC VICE INTERVENOR
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for the Intervenors
Democratic National Committee

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2 P R O C E E D I N G S

3 (Proceedings were commenced with the
4 Court and Counsel being present.)

5 - - -

6 (Discussion held off the record.)

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8 THE COURT: Let's begin. Let's go on
9 the record.

10 Good morning, everybody. We are here
11 today for oral argument on the Petition for Review of
12 Decision by Montgomery County Board of Elections, filed
13 by Petitioner Donald J. Trump for President, Inc. And
14 the author of the petition and present to argue today
15 will be Jonathan Goldstein. My understanding is that
16 the relief which is being sought by the petitioner is
17 being imposed by the Montgomery County Board of
18 Elections and also by the Intervenor, Democratic
19 National Committee.

20 Before we begin the arguments, would
21 everyone please identify themselves for the record?
22 Why don't we start with Mr. Goldstein, since you are
23 the petitioner?

24 MR. GOLDSTEIN: Good morning, Your
25 Honor, Jonathan Goldstein on behalf of Donald J. Trump

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2 and related parties.

3 THE COURT: Good morning to you.

4 MR. GOLDSTEIN: Good morning, Your
5 Honor.

6 THE COURT: Next is the Board and the
7 County representatives.

8 MR. MCGARRY: Yes, Your Honor. Raymond
9 McGarry, on behalf of the Board of Elections. And with
10 me, Your Honor, is Mary Kay Brown and Joshua Stein.

11 THE COURT: Good morning to all of you.

12 And, Mr. McGarry, you will be arguing
13 solely on behalf of the Board and the County?

14 MR. MCGARRY: That is correct, Your
15 Honor.

16 THE COURT: All right. On behalf of the
17 DNC.

18 MR. NKWONTA: Good morning, Your Honor.
19 Uzoma Nkwonta, on behalf of Intervenor DNC. With me is
20 Mr. Kahlil Williams, Mr. Michael McDonald, Mr. John
21 Geise, Ms. Courtney Elgert, and Ms. Stephanie Command.

22 THE COURT: Good morning to all of you
23 collectively.

24 And my understanding is Mr. Geise is
25 participating by phone only; there is not a visual

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2 aspect to his participation.

3 And you will be arguing on behalf of the
4 DNC, you, yourself?

5 MR. NKWONTA: Yes, Your Honor.

6 THE COURT: Well, Mr. Goldstein, are you
7 prepared to begin your argument?

8 MR. GOLDSTEIN: I am, Your Honor.

9 THE COURT: Please, proceed.

10 MR. GOLDSTEIN: Thank you, Your Honor.
11 We're so grateful for the opportunity to be here today
12 with the Court and everybody else. Before I begin my
13 substantive argument, I should say Mr. McGarry, and
14 Mr. Stein in particular, have been very easy to work
15 with. We've just been so grateful for the way they've
16 been open with us and enabled this to proceed very
17 smoothly. I haven't had the opportunity to speak by
18 phone with any of the folks from the DNC, but I trust
19 they will proceed in much the same manner.

20 You know, in terms of the substantive
21 argument, the mail-in balloting, the ballot counting
22 statute at 25 P.S. 3150.16(a) says in pertinent part:
23 The elector shall then fill out, date, and sign the
24 declaration.

25 The Court has before it a narrow

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2 question: Does "fill out" mean anything other than
3 what its plain language calls for, and do we need to
4 look anywhere else to understand what "fill out" means?
5 I submit we do not need to look elsewhere. The meaning
6 of the language is self evident.

7 If a doctor's office hands you a form
8 and tells you to fill it out, and you hand it back with
9 blanks, they will tell you, "You didn't fill it out.
10 Go finish it." Fill it out means just that.

11 Why did the General Assembly want the
12 elector to fill out his address in his own hand? I
13 contend that the General Assembly believes that seeing
14 the elector write his address in his own hand serves
15 perhaps as a vital anti-fraud function as a part of the
16 declaration. This contention is as viable a claim as
17 those of the Board and the DNC. But the real truth is
18 it is speculation on everyone's part, what the General
19 Assembly intended.

20 What is not speculations is that it is
21 axiomatic that the General Assembly never uses an
22 extraneous word. That is a maxim under Pennsylvania
23 law: Shall. Fill out. Date and sign.

24 Filling out is as much a part as signing
25 or dating. It was in the view of the General Assembly,

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2 and it is their view that prevails here. It was as
3 much a vital part as either the signing or the dating.
4 We can't just substitute our judgment for that of the
5 General Assembly's incredibly clear language. "Fill
6 out" means fill out completely.

7 As for the argument that these ballots
8 were to be counted and are unchallengeable as cast,
9 this argument fails on its face. The DNC admits as
10 much by noting that the Secretary of State gave
11 guidance on how to handle challenges to the County's
12 ballot. The Secretary is not going to give guidance on
13 a procedure that is illegal. And the DNC knows this,
14 and the Secretary knows this, and everyone knows this.
15 These ballots can be challenged; otherwise, you can end
16 up with an absurd circumstance.

17 For example, imagine the Board
18 erroneously allowed a dead, non-citizen, convicted
19 felon to cast a ballot. Would we all sit here
20 powerless to do nothing about it? "Sorry, no
21 challenges"? Of course not. It is misread of the
22 election code to say challenges had to be made to
23 mail-in ballots by the Friday before the election.
24 That's why election is as the DNC contented [sic].
25 That won't work. Ballots cast in that way, by mail-in

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2 or absentee, or embargoed under 25 P.S. 3146.8(a),
3 which says in pertinent part, The County Boards of
4 Election, upon receipt of an official absentee ballot
5 in such envelopes, shall safely keep the same in sealed
6 or locked containers, until they distribute the same to
7 the appropriate local election districts in a manner
8 prescribed by the Secretary of the Commonwealth.

9 So to contend that we could have
10 challenged them back last Friday is false. They can't
11 be examined or challenged because they're held, sealed,
12 and locked in containers, by the County Board.

13 Finally, as for Secretary's guidance on
14 what constitutes a sufficiently filled-out declaration,
15 Secretary Boockvar can't issue guidance that changes
16 the statute. Again, 25 P.S. 3150.16(a) says in
17 pertinent part, The elector shall then fill out, date,
18 and sign the declaration. It's three independent acts
19 that are required.

20 "Fill out" means fill out. It has
21 independent meaning from "sign" and from "date." It is
22 mandatory because the word "shall" is joined in the
23 same sentence with all three required acts.
24 Accordingly, the Board erred, and the ballots go to the
25 subject of this appeal should not be counted.

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2 Thank you, Your Honor.

3 THE COURT: Suppose -- so I am looking
4 at the instructions. And in one of the instructions --
5 and I will ask this of the County, as to whether these
6 are from the Secretary or they are done locally. But
7 it says, sign and date the return envelope for the
8 absentee ballots. It doesn't talk about putting your
9 address on.

10 But suppose this and other instructions
11 are either ambiguous or faulty. Is the remedy to
12 invalidate that vote if the Secretary or the local
13 board has given faulty or ambiguous instructions --

14 MR. GOLDSTEIN: Yes.

15 THE COURT: -- that is relied upon?

16 MR. GOLDSTEIN: Yes, that is the remedy.
17 The fact that the County Board committed an error -- it
18 would be like the County Board misstating a deadline
19 that's laid out in statute. It is a tragedy perhaps.
20 It is an error perhaps, but you can't rewrite a statute
21 with a set of instructions or with guidance from the
22 Government official.

23 THE COURT: Both the DNC and the
24 County -- the DNC spent more time in their brief on it
25 than the County did. But they have suggested and

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2 argued that the new election code has eliminated,
3 either restricted and/or eliminated, the right of third
4 parties to challenge any deficiencies such as you're
5 doing right now. You didn't file a reply brief. They
6 only filed their materials yesterday. What is your
7 reply to that? You touched upon it.

8 MR. GOLDSTEIN: Yeah. So our reply is
9 that they misperceived what is going on. These
10 challenge procedures are still in the statute. They're
11 still viable and vital. And the place where they say a
12 challenge could be made is a place where a challenge
13 cannot be made. The Friday before the election, those
14 ballots are still locked in a sealed container, so I
15 can't examine them. I can't challenge them. And what
16 they propose as a scheme for challenging defies the
17 plain language of the statute, defies the procedures
18 that are in use everywhere in the state. We have to be
19 able to challenge them in this way or it yields the
20 certain results I've indicated.

21 If the Board had allowed somebody to
22 vote and they couldn't vote and we all knew it, under
23 their scheme, we would just have to allow it because
24 this person applied for something some manner of weeks
25 ago.

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2 THE COURT: In your petition, which is
3 right before me -- and I read it several times -- you
4 don't claim that any electors or the Board of the
5 County were guilty of fraud, correct? That's correct?

6 MR. GOLDSTEIN: Your Honor, accusing
7 people of fraud is a pretty big step. And it is rare
8 that I call somebody a liar, and I am not calling the
9 Board of the DNC or anybody else involved in this a
10 liar. Everybody is coming to this with good faith.
11 The DNC is coming with good faith. We're all just
12 trying to get an election done. We think these were a
13 mistake, but we think they are a fatal mistake, and
14 these ballots ought not be counted.

15 THE COURT: I understand. I am asking
16 you a specific question, and I am looking for a
17 specific answer. Are you claiming that there is any
18 fraud in connection with these 592 disputed ballots?

19 MR. GOLDSTEIN: To my knowledge at
20 present, no.

21 THE COURT: Are you claiming that there
22 is any undue or improper influence upon the elector
23 with respect to these 592 ballots?

24 MR. GOLDSTEIN: To my knowledge at
25 present, no.

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2 THE COURT: Does it make a difference
3 whether a claim of irregularity or technical
4 noncompliance with the election code is made with or
5 without an accompanying claim of fraud or improper
6 influence?

7 MR. GOLDSTEIN: It does not. I mean, to
8 claim the technical defects are immaterial, which is in
9 some sense some of the thrust of what the DNC argued,
10 is really to misperceive what is going on in the
11 election code. The election code is technical.

12 These requirements are all technical.
13 And some of them sit in that code for reasons that are
14 a mystery for all of us. I mean, I sort of recounted
15 for you my view of why the elector signing in his own
16 hand is material. The DNC have their reasons for why
17 they think it is material or immaterial. The fact of
18 the matter is, it is in the code. The code is itself
19 technical. Those technicalities are part and parcel of
20 the law and a violation of the results in a ballot that
21 can't be counted.

22 THE COURT: All right. I don't have any
23 questions for you.

24 I have a question for generally whoever
25 prepared the stipulation. So I will ask it of you and

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2 then we will go to Mr. McGarry.

3 So we're looking at the 592 ballots.

4 First of all, do you believe they all should be treated
5 the same?

6 MR. GOLDSTEIN: So one of the things
7 that happened as we negotiated the stipulation is, you
8 know, I pointed the DNC and the County to our paper
9 petition, right, where we said that there were defects,
10 facial defects. And I thought the objections I could
11 make would range from absence of a signature, a date
12 that was wrong, or a missing address. The other
13 parties to the stipulation thought that I had somehow,
14 in our initial phone call with the Court, limited
15 myself only to addresses.

16 I don't believe I so limited myself. I
17 think I am limited by the corners of my petition, and
18 that any of these ballots that have a missing
19 signature, a date that is wrong, or an address that is
20 wrong, would fail on the basis of both the pleading I
21 made and the oral argument that I just made. They're
22 required to fill out, date, and sign. And any of those
23 things missing is fatal to that ballot.

24 THE COURT: So your answer is that all
25 592 ballots should be invalidated?

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2 MR. GOLDSTEIN: Correct. Yes, Your
3 Honor.

4 THE COURT: And there should not be a
5 separate analysis for the subsets of different types of
6 irregularities that may exist on some ballots?

7 MR. GOLDSTEIN: Certainly if the Court
8 is going to deny my motion in its entirety on that
9 basis, I would look for perhaps smaller subsets that
10 the Court might find appropriate to strike.

11 If you were to say, for example, I am
12 not striking these on the basis that an address is
13 missing, I would want the opportunity to strike the
14 ones where the date is missing or wrong or somebody
15 wrote, for example, their birthdate or where the
16 signature is missing or, you know, illegible, things
17 like that.

18 THE COURT: Okay. You're raising
19 irregularity with respect to date. I am looking at
20 your stipulation; specifically, Footnote 1. And I
21 thought the scope of irregularities was only the
22 address, partial address, placed -- go ahead.

23 MR. GOLDSTEIN: I am sorry, Your Honor.
24 I didn't mean to talk over you.

25 THE COURT: Go ahead.

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2 MR. GOLDSTEIN: Zoom is challenging.

3 So, you know, in the interest of getting
4 the stipulation done -- and we had some back and forth
5 e-mails about it -- I said, "Look, I will stipulate to
6 this," you know to what we stipulated to. But I did
7 reserve the right and I did, I think, in my pleading
8 preserve the ability to challenge, you know, beyond
9 just a missing address.

10 THE COURT: Okay. So I will ask -- I
11 will ask the County. They're the ones that actually
12 have the ballots in their possession. Okay. Is there
13 anything more you wish to add?

14 MR. GOLDSTEIN: No, Your Honor. We're
15 just so grateful for the opportunity to be here with
16 everyone today to discuss this important issue. Thank
17 you.

18 THE COURT: Well, thanks so much.

19 Mr. McGarry.

20 MR. MCGARRY: Thank you.

21 THE COURT: Before you begin, let me
22 just start off with my questions. So there are
23 subsets. There are 592 ballots which have been
24 identified and segregated. You've identified, of that,
25 509 that have the voter's address preprinted on the

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2 outer envelope, to the right of the voter's
3 declaration. There is a subset: 266 of those people
4 put their addresses on the front of the envelope, not
5 on the back, where probably it was indicated.

6 Does that mean that for the other 243 of
7 the 509 there's no written address by the elector,
8 there is just the printed address that the County put
9 on the envelope?

10 MR. MCGARRY: Your Honor, for that
11 number that you just said, the answer to your question
12 is that in addition to having the printed address,
13 there also is the bar code, Your Honor. And the bar
14 code scans to the SURE system with a specific
15 identification of the voter involved, which would
16 include their address. But in terms of handwriting the
17 address on the outer envelope, you are correct.

18 THE COURT: Thank you. All right. Why
19 don't you begin? I have several questions for you as
20 well. Why don't you begin with your argument?

21 MR. MCGARRY: Okay. Thank you, Your
22 Honor.

23 First, as to the scope of the issue
24 before the Court. Your Honor, we believe that the only
25 issue involved in this appeal relates to the 592

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2 ballots for which electors did not print some or all of
3 the address information in the spaces provided below
4 the declaration. This lack of complete address
5 information from this group of ballots was identified
6 to the Montgomery County Republican Committee by Joshua
7 Stein. Upon presentation of that issue to
8 Mr. Goldstein, counsel for the Republican party raised
9 an objection as to that issue only, as to the address
10 issue only.

11 That objection was overruled. No
12 objection has ever been raised to the Board with regard
13 to the date or, rather, any other aspect of the
14 declaration; thus, this Court, we believe, lacks
15 jurisdiction to hear any issue related to any other
16 aspect of the declaration other than the issue related
17 to the address.

18 THE COURT: May I ask you just a
19 question for a moment? All 592 bear the signatures of
20 the electors; is that correct?

21 MR. McGARRY: That's my understanding,
22 Your Honor. Yes.

23 THE COURT: Okay.

24 MR. McGARRY: Now, we've just discussed
25 some of the facts. And, Your Honor, from our

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2 perspective, this is an issue of statutory
3 construction. We believe that the statutory analysis
4 doesn't end with 3150.16. It starts there, but it
5 doesn't end there. And so we believe that you start
6 there. And we would agree that the language of the
7 statute says, "The elector shall then fill out, date,
8 and sign the declaration, print it on the outer
9 envelope." There is no statutory requirement in this
10 section for the filling out or the printing of the
11 address. It is just not there.

12 So then the question becomes -- by the
13 way, Your Honor, if the Legislature wanted to require
14 the address, they could have, as is present in that
15 same very section, in Subsection (a)(1), where they do
16 require the printing of an address of a witness who is
17 signing for an elector who is unable to sign the
18 declaration. So we know the Legislature, if they
19 wanted to require the address, could have required the
20 address.

21 THE COURT: How do you interpret the
22 language "fill in"?

23 MR. McGARRY: So that language, Your
24 Honor -- at the time that was developed by the
25 Legislature, there had been no declaration prepared.

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2 They left to the Legislature -- I was just about to get
3 to that 3150.14(b). They left to the Secretary of the
4 Commonwealth the obligation and the right to create the
5 form of the declaration. And they only require two
6 things, Your Honor, in that form of declaration:

7 One, a statement of elector's
8 qualification;

9 Two, a statement the elector has not
10 already voted at the election.

11 Those are the two mandatory requirements
12 of the section of the statute as to what has to be in
13 this declaration. Both of those things are in the
14 declaration. And for every one of these 592 ballots,
15 the elector has signed the declaration and dated the
16 declaration.

17 THE COURT: May I just stop you for a
18 second? What is meant by the qualifications of the
19 elector?

20 MR. MCGARRY: Well, Your Honor, that
21 they are registered to vote. And as you can see, if
22 you want to take a look at -- we will look at Exhibit B
23 to the stipulation. There is a statement, an
24 independent statement in the declaration, the second
25 sentence, I believe, Your Honor, that starts, "I am

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2 qualified to vote the enclosed ballot." So there is an
3 independent statement in this declaration that the
4 elector is qualified to vote the enclosed ballot. So
5 that is in compliance with the statute, that there be a
6 statement of qualification of the voter.

7 THE COURT: What are those qualifications?

8 MR. McGARRY: That they be registered to
9 vote.

10 THE COURT: Registered to vote at a
11 specific location?

12 MR. McGARRY: Well, when you register to
13 vote, you do register at a specific location, but the
14 requirement under the act is that you be registered to
15 vote.

16 THE COURT: Anywhere?

17 MR. McGARRY: That you be qualified as
18 registered to vote.

19 THE COURT: The question is whether the
20 address of the elector makes a difference and affects
21 their qualifications to vote. Does it mean qualified
22 to vote anywhere or qualified to vote in that
23 particular voting district or county?

24 MR. McGARRY: Well, in this case, Your
25 Honor, the specific county and voting district of the

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2 elector is contained -- that information is contained
3 within the bar code. So if you will look at the bar
4 code, there is a number --

5 Look at this, the example we're looking
6 at for Christopher.

7 THE COURT: Which exhibit are you
8 referencing?

9 MR. MCGARRY: This is Exhibit B to the
10 stipulation.

11 THE COURT: B.

12 MR. MCGARRY: B, as in boy.

13 THE COURT: Right. Okay. I am with
14 you.

15 MR. MCGARRY: So the first nine digits
16 that you see on this bar code correspond to a unique
17 number assigned to each elector. Next, there is a dash
18 and then 46. 46 is the number specified for the
19 county, Montgomery County.

20 The next digits that correspond on this
21 bar code correspond to the election precinct for that
22 voter. So all of that information is contained within
23 the outer envelope so that, from a fraud perspective --
24 if we're worried about fraud, there is no possibility
25 of fraud because we have a verification of the voter,

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2 the precinct, and the name all on this ballot. And
3 when it's scanned into the system, all of that is
4 verified, and the voter's ballot is then crossed off as
5 being voted.

6 There is no issue of fraud here, Your
7 Honor, and all of that information, including the
8 precinct, is included within the outer envelope. Okay?

9 THE COURT: So that is a safeguard so
10 the person has not voted twice.

11 MR. McGARRY: Has not voted twice,
12 exactly. That's exactly right, Your Honor.

13 THE COURT: My only issue -- actually, I
14 think the best argument for Mr. Goldstein, which he did
15 not make, was how do we know that person still resides
16 in the County? If that person moved somewhere else,
17 outside the county, outside the state, has comes back,
18 picked up the mail, saw and this, filled it in and sent
19 it back, would they still be a qualified voter in
20 Montgomery County under those circumstances where
21 they're not affixing their signature and/or consent or
22 affirmation that the information is correct at least as
23 to where they exist?

24 In other words, in that set of
25 circumstance, they would not have voted twice, and they

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2 would not be an ineligible voter from your perspective,
3 but you wouldn't know where they currently live and, in
4 terms of their residential address, if they're a
5 qualified voter in Montgomery County.

6 MR. MCGARRY: Well, Your Honor, the
7 prevention to that is these ballots were mailed to the
8 address.

9 THE COURT: Okay.

10 MR. MCGARRY: So once again, Your Honor,
11 as I was starting to talk about, in 3150.14(b), there
12 is no requirement that the declaration itself include a
13 statement of the address.

14 So then the question becomes what
15 ballots may be counted? And under 25 P.S.
16 3146.8(g)(3), which governs the canvassing of both
17 absentee and mail-in ballots, the statute says that if
18 the County Board is satisfied that that the declaration
19 is sufficient, the votes should be counted. So it is
20 up to the Board to determine that they are satisfied
21 that the declaration is sufficient.

22 THE COURT: And what criteria does the
23 Board utilize to make that determination?

24 MR. MCGARRY: Your Honor, the criteria
25 is to look at the ballot. It is a criteria set forth

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2 in the statute, which is to look at the ballot, compare
3 the signature with the name that's in the roll of the
4 voters, and to use the scanning system to verify that
5 the vote is of that person and that, in fact, that vote
6 has been counted.

7 THE COURT: You know, I am just curious,
8 when a person goes and votes in person, as we all do,
9 you go to your local voting/polling station. And then
10 you identify yourself and you sign. And they have
11 already your signature on record. But I am trying to
12 think back to my own experience. Is it required that
13 the poll workers and/or the election judge locally say
14 to you, "Do you still reside at this address?"

15 MR. MCGARRY: No, Your Honor, there is
16 no such requirement. And as Your Honor is well aware,
17 there is no requirement that any ID be shown unless it
18 is your first time voting at a particular polling
19 location.

20 THE COURT: Okay.

21 MR. MCGARRY: So under this statute, the
22 Board has given the full discretion to decide if the
23 declaration is sufficient. And that's an interesting
24 use of the word "sufficient," Your Honor.
25 Because "sufficient," if you look at the Cambridge

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2 English Dictionary, is defined as "enough for a
3 particular purpose." The Legislature used that word
4 specifically, sufficient. And I think that any
5 argument that something that not in the statute, such
6 as an address, is mandatory simply goes against the
7 entire concept of the Board of Elections making a
8 determination that a declaration is sufficient.

9 Next, Your Honor, since the form of
10 declaration is that of the Secretary of State, we
11 believe that it is important to understand the guidance
12 from the Secretary of State in terms of whether ballots
13 should not be counted. And the September 11th, 2020,
14 guidance of the Secretary of State specifically states
15 that "Only where the declaration is blank," meaning no
16 signature, no date, nothing, "should that vote not be
17 counted."

18 Finally, as Your Honor pointed out to
19 Mr. Goldstein, the instructions, which are Exhibit A to
20 the stipulation, Your Honor, specifically tell the
21 elector that your ballot cannot be counted without a
22 signature on the return envelope. There is nothing on
23 there that tells the elector that if their address is
24 not filled out that their ballot cannot be counted.

25 And I would disagree with Mr. Goldstein

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2 about the significance of that. There is case law that
3 we cited, In Re.: Count of Ballots Cast in the General
4 Election of November 6, 1973, in which the Supreme
5 Court states, "The innocent voter should not be
6 punished by a nullification of her vote where her
7 reliance on instructions given by" the Board in that
8 case, "were entirely reasonable." We would say the
9 instructions given here were entirely reasonable,
10 because they comport with the statute and they comport
11 with the guidance provided by the Secretary of State.

12 So that's all I have on this issue, Your
13 Honor, unless you have any other questions.

14 THE COURT: I actually have a couple
15 questions about the instruction. What was the process
16 that led to the instructions of the outer envelope?
17 Was that done locally, or in every county in
18 Pennsylvania, are those instructions the same?

19 MR. MCGARRY: I don't know if they're
20 all the same. But I know that this form of instruction
21 was created locally by the Board of Elections.

22 THE COURT: And what role, if any, did
23 the local political parties have in preparing and
24 reviewing that language used in the instructions?

25 MR. MCGARRY: Your Honor, that I am not

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2 sure of the answer to that question. Mr. Goldstein
3 might be better to answer that question.

4 But I will say, Your Honor, that these
5 instructions have been out for months, and there have
6 been no objections to these instructions by any of the
7 parties.

8 MR. GOLDSTEIN: I don't know that we
9 ever had substantial input into those instructions. I
10 think that was essentially an administrative task on the
11 part of the Board.

12 THE COURT: So I will ask you the same
13 question I asked him: Should all 592 ballots be
14 treated the same?

15 MR. MCGARRY: Your Honor, we believe
16 they all should be counted. The reason we included
17 some subcategories of information was to advise the
18 Court that not all the ballots were exactly the same;
19 that, in fact, some of them were partially filled out,
20 some not filled out at all. And we wanted to be
21 totally transparent with the Board about the state of
22 these ballots. So we do believe they all should be
23 counted.

24 However, if Your Honor was inclined to
25 strike any of them, the only ones we think there should

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2 be even the thought -- and we don't think they should
3 be stricken at all -- is the 36 ballots where the
4 address is nowhere on the envelope.

5 THE COURT: Let's just talk about them
6 for a second. So there's 36 ballots of 592 that don't
7 have any identifying information regarding the address
8 of the elector; is that correct?

9 MR. McGARRY: Well, they do have the bar
10 code, Your Honor.

11 THE COURT: They have the bar code,
12 correct.

13 MR. McGARRY: The web scan does bring up
14 the address and the voter information of the individual
15 elector.

16 THE COURT: And so your position would
17 be that even if any elector, these 36 and even all 592,
18 had no information by the elector -- setting aside the
19 bar code, but by the elector -- with respect to the
20 address, they would still be valid?

21 MR. McGARRY: Yes, Your Honor that's our
22 position.

23 THE COURT: There is another subset in
24 which the addresses were blacked out or blanked out.
25 It had something to do with -- to help facilitate UPS

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2 to deliver something? I am not sure, who blacked them
3 out or blanked them out or blacked them out? Was that
4 done by the County?

5 MR. MCGARRY: My understanding of that
6 issue was that after a large number of ballots had
7 already been mailed out, the Postal Service was
8 complaining about the fact the address shown was
9 confusing to some of the mail carriers. So the County,
10 through the use of a printer, blacked out the address
11 at the request of the Postal Service.

12 THE COURT: All right. That's all I
13 have for you then. Have you finished your argument?

14 MR. MCGARRY: I have, Your Honor. Thank
15 you very much.

16 THE COURT: Okay. You are very welcome,
17 of course.

18 For the DNC, Mr. Nkwonta, you're an
19 intervenor here. Would you like to offer your
20 thoughts?

21 MR. NKWONTA: Yes, Your Honor. There's
22 just a few things, and I will try not to overly
23 replicate what prior counsel have already discussed.

24 I did want to talk about the procedural
25 posture at this proceeding. And I wanted to explain

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2 why it is improper that Petitioners have filed this
3 appeal despite the fact that the Legislature expressly
4 removed the right to challenge a mail-in or absentee
5 ballot during a canvassing process. This expressed
6 removal of the right to challenge, it is not an
7 empty reading of the statute.

8 Prior to March 2020, which is when the
9 Legislature passed Act 12 of 25 P.S. 3146.8(g)(2) to
10 (3), expressly provided for challenges or expressly
11 permitted challenges to any absentee elector or mail-in
12 elector in accordance with the provisions of that
13 statute [sic].

14 In Act 12, the Legislature expressly
15 removed those provisions and removed those references
16 to challenges to mail-in and absentee ballots during
17 the canvassing process. And, instead, what that
18 provision now states is that ballots that are not
19 challenged or applications that are not challenged by
20 5:00 p.m., the Friday before an election, if there is
21 no challenge to the application, then those ballots
22 shall be counted and canvassed.

23 And the reason for that, Your Honor, is
24 clear: The Legislature was concerned about the delay
25 that could be caused by challenges to mail-in absentee

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2 ballots. And when you look at the procedure that
3 follows such challenges -- procedures that were avoided
4 here, which is related to the issues that we've had
5 with the stipulations. But when you look at the
6 procedures, you know, there must be a formal notice
7 provided to the voters and challengers, then there must
8 be a formal hearing. And then at the hearing, the
9 challengers or the voters may call witnesses, and the
10 Board must hear testimony. That is not what the
11 Legislature intended. That's not what the Legislature
12 contemplated, especially given the large number of mail
13 ballots that have been cast in this election, which was
14 on the Legislature's mind.

15 So when you look at now 25 P.S. 3146.8,
16 it simply says that all mail ballot applications that
17 are not challenged -- applications that are not
18 challenged -- those ballots shall be counted and
19 included with the returns of the applicable election
20 district. This appeal was an end-around from what the
21 Legislature expressly forbade for a good reason. And I
22 think it is also notable that Mr. Goldstein, counsel
23 for the petitioners, was not able to point to any
24 specific provision in the election code that permitted
25 or contemplated challenges to mail-in or absentee

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2 ballots during the canvassing process.

3 Now, there may be some references to
4 challenges of mail ballots and absentee ballots as
5 prior vestiges of the pre-existing scheme because not
6 every related provision was altered. But when you look
7 at the provisions that most directly confront the
8 challenge process for a mail-in/absentee ballot, it is
9 clear the Legislature removed that process, and the
10 Supreme Court recognized as much; the Pennsylvania
11 Supreme Court, that is, recognized as much.

12 So for that reason, this appeal proceeds
13 from a procedure before the County Board that does not
14 exist. And there is no process here to challenge these
15 ballots or to appeal from the County Board's
16 determination. That's not to say that the petitioners
17 have no recourse. There are a number of recount
18 petitions that they can file. And if they believe that
19 there has been some fraudulent conduct, then they can
20 lay out their case and they can provide whatever
21 evidence that they have of that. And that's set forth
22 in 25 P.S. 3261, 3262, and 3263. And there are
23 procedures for the challenges that they seek to bring
24 now. There are procedures for the arguments they seek
25 to assert now. This is not one of them. This was

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2 specifically contemplated and removed by the
3 Legislature.

4 THE COURT: Let me just stop you there
5 for a moment. Would you agree if an elector who --
6 first of all, when you use the expression "mail-in or
7 absentee," why are you using that expression? Wouldn't
8 absentee votes be a subset of mail-in votes?

9 MR. NKWONTA: Not necessarily, based on
10 my understanding. And I am sure that there are others
11 who are more experienced that can jump in. My
12 understanding is there is a distinction between mail-in
13 and absentee ballots.

14 THE COURT: Would someone tell me what
15 it is? I don't quite get it.

16 MR. NKWONTA: Absentee voting is
17 actually set forth in the Pennsylvania Constitution. I
18 think there is a Constitutional provision that sets
19 forth requirements, broad requirements, for absentee --

20 THE COURT: Yes, you have that clause:
21 you're disabled, out of the country, et cetera.

22 But now that we have mail-in, why is
23 there even a need for that category any longer?
24 Mr. McGarry, do you know the answer to that?

25 MR. MCGARRY: Your Honor, in terms of

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2 canvassing, they're treated the same.

3 THE COURT: They're treated the same.
4 And they should be treated the same in this case,
5 right?

6 MR. MCGARRY: In terms of how they're
7 counted, yes. The process is different, Your Honor.
8 But in terms of how you count the ballots, the process
9 is the same.

10 THE COURT: Okay. I am sorry. Back to
11 you, Mr. Nkwonta.

12 MR. NKWONTA: I would defer to both.

13 THE COURT: Would you agree with me
14 then, if an elector failed to affix their signature to
15 the mail-in ballot, that would be a fatal defect, and
16 that would invalidate that ballot?

17 MR. NKWONTA: I would agree with that,
18 Your Honor.

19 THE COURT: Okay. Let's assume the
20 County Board of Elections gets a mail-in ballot and the
21 outer envelope contains no signature but they count it.
22 Are you saying there is no standing or remedy available
23 to a political party to challenge what seems like a
24 clear error of law?

25 MR. NKWONTA: No. What I am saying is

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2 that that avenue is not through a challenge of the
3 canvassing board.

4 THE COURT: What would they then do?
5 What is available to them for a remedy?

6 MR. NKWONTA: Well, Your Honor, one of
7 the things they can do if they learn of an absentee or
8 mail-in ballot that was cast without a signature, they
9 may pursue relief through the recount procedures or
10 through an election contest.

11 THE COURT: A recount of the entire
12 county?

13 MR. NKWONTA: A Petition for Recount,
14 where if they receive evidence -- or they may file an
15 election contest. I think that the key here is that
16 when the Legislature eliminated the challenge process,
17 the Legislature was well aware that the County Boards
18 would be making these decisions. And the County Boards
19 have been expressly granted discretion to make these
20 decisions.

21 So the fact they may make a mistake
22 every now and then is no reason to discard the
23 procedures that have been set forth by the State
24 Legislature.

25 THE COURT: Okay.

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2 MR. NKWONTA: And in making this
3 argument, we're relying on the text and the language of
4 the statute. And if the Court were to follow the text
5 and language of the statute, it is clear this challenge
6 or quasi challenge or whatever happened in the County
7 Board proceeding below was improper and the subsequent
8 appeal of that is not procedurally correct.

9 And I also would like to address the
10 discussion of the missing address and the address
11 requirement. And starting off from the premise that
12 the election code is to be liberally construed, which
13 means construed in a way not to disenfranchise voters,
14 I think it is notable that the provision the
15 Petitioners identified do not at any point make any
16 reference to a voter's requirement to include his or
17 her address on the declaration. There's no such
18 requirement. However, notably, in a companion
19 provision that allows third parties to assist voters or
20 allows third parties to sign declarations for voters,
21 that companion provision, 25 P.S. 3150.16(a)(1), that
22 companion provision expressly contemplates that the
23 third-party assistant must include his or her address.

24 THE COURT: It more than contemplates
25 it; it requires it.

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2 MR. NKWONTA: It requires that the third
3 party include his or her address.

4 Now, not only are we required to take
5 instruction from that expressed omission when it comes
6 to voters and expressed inclusion when it comes to
7 third-party assisters, it also makes good sense when
8 you think about the fact that when a voter receives an
9 absentee ballot -- I am sorry. When a voter receives a
10 mail ballot, that mail ballot is sent to the voter
11 based on information on that voter that the County
12 already has. And there's the bar code that Mr. McGarry
13 just discussed, the bar code that provides information,
14 including address information, for that voter.

15 Montgomery County had already preprinted
16 addresses for the voter on some of these mail ballot
17 envelopes. The voter is a known entity, as is the
18 voter's address. But the third party, the third party
19 in some instances and in many instances, is an unknown
20 entity.

21 So the statute clearly provides,
22 expressly provides, an address requirement for
23 third-party assisters whose information is not
24 reflected in the SURE system but does not do so for
25 voters. And there is a clear rationale for that that

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2 follows the language of the statute; it also follows
3 common sense.

4 And then I also want to point out that
5 the Secretary's guidance takes on more significance
6 here than just a directive that one may ignore or
7 accept, because the Legislature has granted the
8 Secretary the authority to prescribe the form of the
9 declaration.

10 If the Secretary has authority to
11 provide a form of the declaration, that means the
12 Secretary similarly has the authority to alter the
13 declaration and has the authority to clarify what the
14 terms on the declaration mean and what is required to
15 count a vote and what is required to nullify a vote and
16 what does not nullify a vote.

17 And the Secretary had made clear that an
18 incorrect date, for instance, or a missing address is
19 not necessarily grounds to nullify a ballot.

20 THE COURT: What is the basis for that
21 comment?

22 MR. NKWONTA: And I was actually about
23 to get to that, to explain how to get there.

24 The September 11th, 2020, guidelines
25 specifically set forth that the declaration can be

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2 rejected if it is blank. And the Secretary then makes
3 clear that the County Board has the discretion as to
4 the sufficiency of the declaration. So if the
5 declaration is blank, then the declaration cannot be
6 accepted.

7 THE COURT: Let me stop you for a
8 moment, because I am looking at that September 11th
9 guideline by the Secretary.

10 And the sentence before the sentence
11 about there being a blank return, which would obviously
12 be disqualified, it says as follows: To promote
13 consistency across the 67 counties, the County Boards
14 of Elections should follow the following steps when
15 processing returned absentee and mail-in ballots.
16 After setting aside ballots of electors who died prior
17 to the opening of polls, the County Board of Elections
18 shall examine the voter's declaration on the outer
19 envelope of each returned ballot and compare the
20 information on the outer envelope, i.e., the voter's
21 name and address, with the information contained in the
22 registered absentee mail-in voter's file, the absentee
23 voter's list and/or the military veterans, and
24 emergency civilian's absentee voters' file, end quote.
25 If the voter's declaration on the return envelope is

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2 blank, that ballot return envelope must be set aside
3 and not counted.

4 So we have if it is blank, obviously, it
5 shouldn't be counted. Because, to me, the biggest
6 issue is the signature -- the big issue before the
7 Court now is what is the significance of incomplete or
8 the absence of the address? So obviously if it is
9 blank, that's the easy one. But in the sentence that
10 precedes the one that you referenced, it does suggest
11 that the voter's name and address should be on the
12 outer envelope. So I am sure you noticed that. So
13 what is the significance of that?

14 But then it goes on to say: If the
15 voter's declaration on the returned envelope is signed
16 and the County Board is satisfied that the declaration
17 is sufficient, the mail-in or absentee ballot should be
18 approved for canvassing unless challenged in accordance
19 with the Pennsylvania Election Code.

20 So there, now, it seems to suggest that
21 really the signature is really the paramount sort of
22 matter to be affixed to the outer envelope by the
23 elector. So it is not exactly clear as to the
24 significance of the address to be included or not
25 included.

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2 MR. NKWONTA: Two responses to that,
3 Your Honor. First, I think the first paragraph you
4 read, the paragraph to follow should inform our
5 interpretation of that first paragraph. I am talking
6 specifically with reference to that sentence in which
7 the Secretary's guidance says the County Board shall
8 compare the information on the outer envelope; i.e.,
9 the voter's name and address.

10 So while the guidance does make
11 reference to the address, the sentences that follow
12 make clear that the Secretary, in his guidance, has
13 singled out blank declarations and potentially
14 declarations missing a signature but has not singled
15 out declarations missing an address, which is, again,
16 consistent with the statute. Neither the Secretary's
17 guidance nor the statute anywhere singles out
18 declarations with a missing address as a improper
19 declaration or one that is subject to rejection. And I
20 would also --

21 THE COURT: Wait. Before you
22 continue -- I am sorry to interrupt you, but these
23 thoughts come in my mind and out of my mind so quickly,
24 I have to address them.

25 It talks about the County Board must be

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2 satisfied the declaration is sufficient. Mr. McGarry
3 also commented on that. In that determination, that
4 the declaration is sufficient, is it only that this
5 person is still living? Is a registered voter? Is
6 there any other qualification or condition that the
7 County Board is looking for to be satisfied that the
8 declaration is sufficient? That there is a signature
9 on the outer envelope? Is that the criteria, just
10 that?

11 MR. NKWONTA: I think the criteria is in
12 the part set forth in 25 P.S. 3146.8(g)(3). In that
13 section, it discusses that sometimes, in some
14 instances, proof of identification is required. In
15 other instances, the County Board just needs to satisfy
16 itself that the information contained in the registered
17 and absentee mail-in voter file entitled the individual
18 to vote and verify that individual's ability to vote.

19 So that is the standard. That is a
20 standard that has been set forth, you know, by the
21 Legislature, and that is the standard that the
22 Secretary has echoed. And County Board's discretion is
23 something that is contemplated as a part of this
24 electoral process.

25 THE COURT: Why are we even looking at

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2 the Secretary's guidance? Isn't it the statute that
3 governs here? In other words, even if the Secretary
4 says, If the voter's declaration on the return envelope
5 is signed, it's good -- suppose that is her
6 interpretation. Does that control my decision? Isn't
7 the interpretation of the code itself what is the most
8 important consideration?

9 MR. NKWONTA: The interpretation of the
10 code, indeed, is the most important consideration.

11 THE COURT: Okay.

12 MR. NKWONTA: I think the Secretary's
13 interpretation is helpful and instructive in some
14 instances because of the Secretary's role, because of
15 the Secretary's delegated role to prescribe the form of
16 this declaration. And if the Secretary has not taken
17 the position advanced here that a missing address
18 requires the invalidation of a declaration but has
19 identified other deficiencies that require the
20 invalidation of a declaration, I think that is also
21 instructive as well.

22 THE COURT: Well, I think it is
23 instructive to your argument that instructions, whether
24 they come from the Secretary to the local county boards
25 or whatever the local county boards do on their own in

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2 terms of their interpretation of their obligations,
3 that those instructions, if incomplete or faulty,
4 should not disenfranchise a voter that relied upon
5 them. Is that ultimately your argument?

6 MR. NKWONTA: Yes, Your Honor. We would
7 agree with that wholeheartedly.

8 THE COURT: Go ahead.

9 MR. NKWONTA: And, lastly, I wanted to
10 highlight the statutory interpretation argument
11 advanced here. Not only is it inconsistent with the
12 text of the statute, but it is also inconsistent with
13 the way Pennsylvania Courts interpret and distinguish
14 between mandatory and directory [sic] provisions. Not
15 every requirement or every statement in the statute is
16 a mandatory requirement, and not every technicality or
17 failure to follow every technicality shall result in
18 the rejection or invalidation of a ballot. And there
19 are ways to determine what the difference is and where
20 to draw that line between a provision that requires
21 outright invalidation and a provision -- whether the
22 failure to meet a certain provision is something that
23 the Board can take into its discretion.

24 And here, as the Pennsylvania Supreme
25 Court laid out in Pennsylvania Democratic Party v.

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2 Boockvar, the Court should look to the specific
3 language and also the legislative intent. And the
4 specific language here does not foreclose counting
5 ballots with missing addresses. It doesn't foreclose
6 counting ballots with any of the missing -- with any of
7 the information missing from 3150.16(a) or 3146.6(a).
8 But we have seen other instances and other statutes,
9 other provisions that expressly require the County
10 Board to reject mail ballots for certain omissions.

11 So, for instance, 25 P.S. 3146.8(g)(4)
12 states that it expressly invalidates ballots that
13 contain any text, mark, or symbol revealing the
14 elector's identity, political affiliation, or
15 candidate's preference. That is an expressed rejection
16 in the statute of ballots that violate that provision.

17 There is no analog in 3150.16. There is
18 no analog in 3146.6. Those provisions then should be
19 construed as directive, especially when considering the
20 purpose of those provisions.

21 If the purpose of the address on the
22 declaration is to verify the elector's address, well,
23 there are multiple ways of doing that. That has
24 already been done, not only with the bar code that
25 allows the County Board to look up the voter's

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2 information in the SURE system, but also of the fact
3 that many of these voters have actually entered their
4 address elsewhere on the outside of the envelope. And
5 some of those envelopes are preprinted. And even if we
6 delve into the date, which is not before this Court or
7 properly before the Court -- but even if we delve into
8 issues with the date on these declarations, there is no
9 question these declarations and these ballots were
10 received timely, because they were pre canvassing. And
11 pre canvassing occurs on Election Day.

12 So if these ballots were pre canvassed,
13 then there is no question these were timely received.
14 There can be no legitimate purpose or intent to
15 disenfranchise voters simply because they did not write
16 down the date where there is no question over the
17 timeliness of the receipt of these ballots. Because
18 these omissions or purported omissions are immaterial,
19 they are not mandatory under Pennsylvania law. And to
20 treat them as such would actually potentially implicate
21 violations of the Voting Rights Act and the Civil
22 Rights Act, which foreclose the denial of the right to
23 vote based on immaterial omissions.

24 That is not a claim necessarily before
25 this Court, but that should guide the Court's statutory

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2 interpretation. Both state law and federal law
3 prohibit the denial of the right to vote based on
4 immaterial omissions that are not mandatory as set
5 forth in the statute.

6 So for those reasons, Your Honor, we ask
7 the petition be denied.

8 THE COURT: Thank you.

9 Mr. Goldstein, there were two of them
10 and one of you. So I am going to give you one last
11 opportunity, if you would like, to rebut or reply to
12 any of the arguments made against you.

13 MR. GOLDSTEIN: I understand. My screen
14 is filled with Democrats. I have a lot of Democratic
15 lawyers. I am grateful for the opportunity.

16 THE COURT: May I ask you a question
17 first, because I sense you have experience in election
18 law and in these matters. Is there a requirement for a
19 local County Board to do that which they did in this
20 case, as opposed to simply processing them, to actually
21 alert political parties that there is at least an
22 arguable claim as to the validity of these ballots?

23 MR. GOLDSTEIN: There is not, Your
24 Honor, and not in a sort of formal way. That is part
25 of why at the beginning of my comments I praised

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2 Mr. Stein and Mr. McGarry. They have been
3 exceptionally equanimical in the way they have
4 approached this.

5 And spoiler alert, gentlemen: After the
6 election, I am going to call on you both to help me
7 propose statutory changes to eliminate a lot of what we
8 had to go through this time.

9 Your Honor is correct that I have some
10 experience with the election code. I have actually, in
11 the past, been involved in the writing and rewriting of
12 substantial portions of Pennsylvania's code.

13 THE COURT: So are you to blame if there
14 is any ambiguity that I may find?

15 MR. GOLDSTEIN: Not in this section,
16 Your Honor. That wasn't my fault. I was involved in
17 some of the writing of the statute to enable
18 provisional voting after HAVA was enacted, when I was a
19 brand new, baby lawyer.

20 THE COURT: In those circumstances where
21 other local county boards are not as gracious and fair
22 in terms of how they treat the parties, what happens?

23 MR. GOLDSTEIN: That's really one of the
24 big problems under our current election code.
25 Basically the boards are afforded a lot of discretion.

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2 For example, if Mr. Stein had not been
3 equanimical, and just said, "You know, we're going to
4 count these," and they sliced them open, sliced open
5 the outer envelope and pulled out the secrecy envelope,
6 now we have a problem. You can't unring that bell.

7 One of things we really have to do
8 statutorily in Pennsylvania is get to a place where we
9 can mount timely, narrow challenges, have those
10 envelopes set aside, not sliced opened discretionarily
11 and counted, and then do what Mr. Nkwonta proposes,
12 which is pick it up way, way, way, way, way on the back
13 end with recount petitions. That's not good for me in
14 blue counties; that's not good for them in red
15 counties. And it doesn't give the polity a sense that
16 the election was conducted in a fair and transparent
17 manner. So we have work to do on the legislative side.

18 If I may pivot to some of the
19 substantive arguments that were raised by my colleagues
20 or counterparts, the argument that we can't be here
21 with this appeal fails. You know, if you look at 25
22 P.S. 3157, it is very broad. A, Section A, allows any
23 person aggrieved by any order or decision of any county
24 board regarding -- and it goes on in that manner -- may
25 appeal therefrom. Yes, mail-in ballots should be

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2 accepted as cast, as Mr. Nkwonta indicated, subject to
3 the challenge provisions of 3157.

4 Challenges like the one we lodged are
5 entirely consistent with the changes the General
6 Assembly made when it enabled mail-in balloting earlier
7 this year; otherwise, we would have absurd results. We
8 couldn't challenge ballots cast by known, dead felons
9 until way down the road. That's not what they
10 intended. Also, the Secretary, on the guidance sheet
11 provided that you read out loud, contemplates
12 challenges to mail-in ballots. So we can be here.

13 The second point, there has been much
14 said how "fill out" doesn't mean the address. No one
15 has said -- other than me has said what is self
16 evident: "Fill out" means fill out. What are you
17 filling out if you don't fill out the blanks placed on
18 the form by the Commonwealth?

19 The Board-printed address on the ballot
20 doesn't really matter for purposes of the declaration.
21 It is there for the Board's purpose. Mr. McGarry talks
22 about what it does. It is there to help them do their
23 work. The General Assembly wanted the elector to write
24 it, and it is not a minor requirement. They wanted the
25 elector to write it as a part of the elector's swearing

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2 that the address where the voter resides is the address
3 from which he is entitled to vote, and he is
4 reconfirming it.

5 Adopting and expanding the Court's anti-
6 fraud argument, attributed as my best argument, the
7 fact a voter has to write the address he is using to
8 vote has an anti-fraud purpose. A voter has to write
9 his own address in his hand. And it helps the Board
10 and the Postal Service and everyone else, as we heard,
11 resolve where the voter lives.

12 I mean, the fact that we print it on the
13 ballot and they have to black it out because it was
14 messing up the Postal Service is immaterial for our
15 purpose, right?

16 THE COURT: But I asked Mr. McGarry, and
17 I'll ask you the same question: Do you agree when an
18 elector goes and votes in person, the election code
19 does not require that person to provide some sort of
20 affirmation they still reside at the address that is
21 registered with the election officials with the County?

22 MR. GOLDSTEIN: So they do when they
23 sign the voter book, right? You come into the polling
24 place and you sign that book. What you're signing is,
25 I still live here and I can vote here and I'm me; those

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2 are the functions that take place when you sign that
3 voter book.

4 THE COURT: Actually, does it say that?
5 That's my question. When you are signing your name,
6 are you also affirming substantive content? I am not
7 sure. I am using me own past experience. I am not
8 looking at the code. Is that true?

9 Let me try to establish if that is a
10 true fact, because that makes a difference to me.
11 Because I've written notes to myself throughout these
12 arguments. One is: What is the purpose of the address
13 on the outer envelope? Does it serve any legitimate
14 purpose? Is it material or immaterial? Is it a
15 technical defect, et cetera.

16 So do you have an answer to that,
17 Mr. McGarry, or anyone from the County? When an
18 elector goes and votes in person, are they required by
19 law -- they are required by law to sign their name.
20 But are they actually making an affirmation as to a
21 sentence or two that is factually correct underneath or
22 above or below their signature?

23 MR. MCGARRY: Your Honor, there is no
24 such declaration on the poll books. You are simply
25 signing in that you voted.

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2 THE COURT: No, no, no, no. You haven't
3 voted yet. You have to sign in you're allowed to vote.

4 MR. MCGARRY: Right. You're signing to
5 show as evidence that you're there, now voting, and
6 that you are who you say you are. But there is no
7 affirmation. There is no declaration on those poll
8 books whatsoever.

9 MR. GOLDSTEIN: Voting from a location
10 where you're not entitled to vote is not permitted.

11 THE COURT: Both statements can be true
12 at the same time. The statement you said just can be
13 true as a statement. But is the statement Mr. McGarry
14 just stated, is that true?

15 MR. GOLDSTEIN: I don't have a poll
16 book, a sample poll book in front of me. I am going,
17 like the Court is, off my recollection. I would
18 certainly say affixing your signature in a register is
19 an unsworn falsification if you're not entitled to vote
20 at that location.

21 THE COURT: This is actually an
22 important point to me. I am wondering if in the next
23 hour or two someone can provide me with that
24 information.

25 MR. GOLDSTEIN: Perhaps someone from

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2 County Board can provide us with a copy of a page from
3 a book?

4 THE COURT: And the reason it is,
5 because it answers my question that ultimately you all
6 are presenting different perspectives on the same
7 issue. How important really is it that the person
8 write their address, the elector, on the outer
9 envelope? Does it have to be in a specific place? Is
10 it of any significance that it is preprinted in a
11 different place?

12 So the purpose of it is important to me.
13 And I will be quite frank with you in my thinking. It
14 seems to have some significance if it is a declaration
15 by an elector that they still live in that residence
16 and it is proper and legal for them to vote in that
17 voting district or county. But if there is no such
18 requirement for an in-person voter, then it seems much
19 less material.

20 MR. GOLDSTEIN: So, Your Honor, there
21 actually is more material in the mail-in context, and
22 here is why: The mail and absentee context have much
23 heightened what I will say -- "suspicion" is the wrong
24 word, right? Meaning, when we have an opportunity to
25 confront a voter in a polling place, there are locally

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2 elected polling officials who presumably know their
3 neighbors. Somebody walks in --

4 THE COURT: I don't -- yes and no. Yes
5 and no. Yes, they certainly will know some of their
6 neighbors, but there will be a great swath of people
7 whom they don't know. And these people working the
8 polling stations, they could be new, so they may not
9 know many people.

10 MR. GOLDSTEIN: True. But what we do
11 know, the corollary of the topic we just discussed
12 briefly there, is that in a mail-in context, there is
13 no scrutiny. No one is going to see that person. The
14 only thing we're going to have is the writing they
15 submit, which is why it is much more important in that
16 context that that declaration be completely filled out;
17 that the elector in his own hand attest to the fact
18 that he lives at the address from which he is voting;
19 That's why that "fill out" phrase is in there, in that
20 statute.

21 THE COURT: But if it is not required
22 for in person, then why should it be required for the
23 mail-in?

24 MR. GOLDSTEIN: Because the scrutiny is
25 heightened for mail-in because that declaration is the

1 TRUMP v. MONTGOMERY COUNTY BOARD OF ELECTIONS
2 only thing we've got to know whether that elector is
3 who he says he is.

4 THE COURT: It's the same thing with
5 mail-in -- it's the same thing with in-person; it's the
6 only thing you have to work with.

7 MR. WILLIAMS: Your Honor, if I may? I
8 know I didn't present argument, but --

9 THE COURT: For the record, would you
10 identify yourself for the court reporter.

11 MR. WILLIAMS: Oh, I'm sorry. I am
12 Kahlil Williams. I am also representing the DNC,
13 Interveners. And I just make the simple point that for
14 the purposes -- there is a prospect, to which
15 Mr. Nkwonta mentioned, which you can challenge an
16 application of a mail-in, of a mail-in voter. And,
17 certainly, if you had some suspicion that a person did
18 not live where they say they live, you can challenge
19 the application at the point we all described.

20 So the idea that the only way you can
21 determine whether or not someone lives where they say
22 they live is at the time a ballot is canvassed and
23 about to be counted is just not true. You can
24 certainly get people at the application process, people
25 that you think are not voting where their address said

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2 they should.

3 THE COURT: Well, I do appreciate that.
4 I think it is only fair to Mr. Goldstein to only fend
5 off one person per party. But thank you for that.

6 But that raises a different issue: In
7 some jurisdictions around the country, every single
8 elector is mailed a mail-in ballot. Am I correct that
9 in Pennsylvania, if one applied in the primary, it got
10 automatically mailed to that elector if they applied
11 for the primary; that's correct? Or they applied for
12 the general election? But they had to apply, as
13 opposed to it being automatically sent to them?

14 MR. GOLDSTEIN: One must apply for a
15 mail-in ballot in Pennsylvania.

16 THE COURT: In Pennsylvania, okay.

17 MR. NKWONTA: Your Honor, may I offer an
18 example, an analogy here, to demonstrate the lack of
19 relevance of an address requirement.

20 The address that is listed here, we're
21 assuming that every absentee voter or mail-in voter
22 lives in Pennsylvania. Now, there are voters who live
23 overseas; there are voters who live in other states.
24 What would their declaration or their current address
25 reveal about their eligibility to vote in any

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2 particular location?

3 MR. GOLDSTEIN: So I can answer that,
4 which is that they have to put the address from which
5 they are voting, right? If they live overseas -- maybe
6 even Mr. McGarry or Mr. Stein can shed some light --
7 you have to put the Pennsylvania address at which you
8 last resided and from which you vote. In fact, in that
9 case, it becomes quite important to know what entitled
10 that overseas voter to vote from that location.

11 So the address, again, as Mr. Nkwonta
12 points out, is vital for ascertaining who that voter is
13 and why they vote from that place.

14 MR. MCGARRY: Your Honor, if I may, I
15 know that Mr. Goldstein has a lot of passion for
16 wanting to rewrite the election code, as he has already
17 said. And he is trying to do that today, actually, by
18 importing into the election code this requirement that
19 the address be filled out. He said that "fill out"
20 means fill out the full address. Well, it doesn't say
21 that. He may want it to say that, he may be pleading
22 for it to say that, he may want to change the law to
23 say that, but it doesn't say that.

24 And as Mr. Williams pointed out, there
25 is an application process. And when you fill out your

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2 application for a ballot, you do need to fill out your
3 name, your address. And you need to sign the
4 application.

5 And so there is a process in place
6 whereby if somebody believed that somebody was not a
7 valid elector because they moved, because they died,
8 what have you, there is a process by which by the
9 Friday before the election an objection could be raised
10 by the parties, by the candidate, whatever. It could
11 have been raised.

12 There was no objections to any of these
13 ballots on that basis.

14 THE COURT: Let me just stop you for a
15 second though. I mean, that's very important, what you
16 just said.

17 If someone applies in the primary, in
18 May, for an a mail-in ballot, they get it, they vote.
19 Now let's turn our attention to the November election.
20 Automatically they would be mailed --

21 MR. WILLIAMS: No.

22 THE COURT: They don't have to reply, or
23 do they have to reply?

24 MR. WILLIAMS: Yes, Your Honor. So if I
25 may, the way it works is: A person can choose one of

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2 two options. They can choose to vote -- they can
3 choose to just get a ballot for the primary, or they
4 can choose to get ballots for the entire year, right?
5 So in February you can fill something out that says, "I
6 want all of my ballots mailed for all of 2020." You
7 can also say, "I want a primary ballot, but I want to
8 vote in person for the general," or "I want to reserve
9 my rights."

10 THE COURT: So back to my
11 hypothetical -- which I am sure is not so hypothetical.
12 I am sure it happened to maybe thousands of people.
13 They apply for all of 2020, they attest to what their
14 address is at that moment, they make their application
15 in February-ish, March. So the general election ballot
16 is mailed to them in, you know, probably October. And
17 I guess, they don't have to re-attest where they live
18 in that intervening, you know, five months or so. So
19 that's the potential. Okay.

20 All right. So I got it. It is very
21 interesting.

22 All right. Mr. Goldstein, you're going
23 to get the last word. But I still would be interested
24 for counsel -- I am interested in what type of
25 attestation does an in-person voter have to make when

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2 they sign the roll book.

3 MR. GOLDSTEIN: I will find that for you
4 in conjunction with Mr. McGarry after the call. We
5 will maybe get you a page out of the book.

6 THE COURT: Okay. Fine. Anyway, you
7 have the last word here.

8 MR. GOLDSTEIN: Just a handful of points
9 so I don't overstay my welcome.

10 So we talked about the anti-fraud stuff.
11 I am not going to beat that horse anymore.

12 Let me move to the instructions on the
13 form governing, right. If the Board issued an
14 instruction saying, "Don't sign the ballot. Just send
15 it back," the instructions can't override the statute,
16 right?

17 So, you know, the instructions are
18 interesting, but they can't override a statute. No one
19 has yet said, with all the talking we've done,
20 what "fill out" means. They said it certainly doesn't
21 mean fill out the address; that much is clear. But no
22 one has said what it means.

23 It is in the statute. It is an
24 independent clause in the statute: Shall fill out,
25 date, and sign. So I think I am the only one that has

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2 come up with something plausible for "fill out," which
3 means completely fill out all the information the
4 General Assembly says is vital to ascertain whether
5 that ballot was validly cast.

6 THE COURT: Well, let's stay with that
7 for one moment. We know it was not dated or signed,
8 because it is separate. So what's left?

9 MR. GOLDSTEIN: The address; that's it.

10 THE COURT: And they didn't do it. So
11 the question is: How significant of an omission is
12 that? Is that going to be fatal or not, is that going
13 to invalidate a ballot or not? Your analogy earlier in
14 your argument about a doctor's office when filling in
15 is not going to -- I don't think that is going to be
16 helpful for you if you're arguing other cases, because,
17 A, we all know that the nurse will help the person who
18 is in medical need, and that's appropriate. I think
19 you have to be careful with that analogy.

20 And, secondly, would it invalidate the
21 person's right to see the doctor and get medical care
22 because there is an omission in the form they're
23 filling out in the waiting room, and we all know the
24 answer is no.

25 MR. GOLDSTEIN: Now we're on the thin

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2 branches of my terrible analogy. But in this context,
3 if I may have my analogy forgotten for present
4 purposes, the statute provides for three things: fill
5 out, date, and sign.

6 If you date it and sign it, the only
7 thing left to fill out is the address. The General
8 Assembly has said it is vital. It is an error of law
9 for the Board to say that a declaration is sufficient
10 in violation of the statute. To use the Court's
11 example, if the Board had reviewed and accepted a
12 ballot where no signature was, quote, sufficient, this
13 Court could correct that error of law. The Court can
14 do the same here.

15 The Board committed an error of law by
16 accepting ballots where the voter did not, quote, fill
17 out, date, and sign the declaration and violation at 25
18 P.S. 3150.16(a). And this Court should overturn the
19 Board's decision and order those ballots not counted
20 for failure to fill out the declaration.

21 Thank you, Your Honor.

22 THE COURT: Okay. Thank you, all. It
23 is very interesting. I will have a decision to you --
24 today is Tuesday. Certainly this week and probably
25 Thursday, because I think timing is very, very

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2 important. I would be grateful if you would send me
3 what we talked about earlier, when an in-person voter
4 signs, what is it precisely they're signing, and are
5 they attesting to any substantive content?

6 Thank you, all. It was a very wonderful
7 argument. And I will have an order out to you shortly
8 then. Thank you all.

9 (At 10:22 a.m., the proceedings were
10 concluded.)

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C E R T I F I C A T E

I HEREBY CERTIFY that the proceedings and evidence are contained fully and accurately in the notes taken by me in the above cause and that this copy is a correct transcript of the same.

BERNADETTE BLACK BERARDINELLI,
RDR, CRR, CRC
Official Court Reporter
November 10, 2020, 6:15 p.m.

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