

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. _____

IN RE NOVEMBER 3, 2020 GENERAL ELECTION

Petition of: Kathy Boockvar, Secretary of the
Commonwealth of Pennsylvania

**APPLICATION FOR INVOCATION OF KING'S BENCH POWER TO
DECLARE PROPER CONSTRUCTION OF ELECTION CODE**

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I. INTRODUCTION

Thousands of Pennsylvania voters will be disenfranchised in violation of the Free and Fair Elections Clause if arbitrary signature comparisons and challenges to signature variations are allowed to be used as a basis for rejecting absentee and mail-in ballots. Such procedures have no grounding whatsoever in the Election Code.

Impelled by the responsibilities of her office, Secretary of the Commonwealth Kathy Boockvar applies to this Court to resolve a first-impression statutory construction issue concerning provisions in the Election Code governing mail-in voting. The Court's September 17, 2020 rulings in *Pa. Democratic Party v. Boockvar*, --- A.3d ---, No. 133 MM 2020, 2020 WL 5554644 (Pa. Sept. 17, 2020), and *Crossey v. Boockvar*, No. 108 MM 2020, 2020 WL 5554582 (Pa. Sept. 17, 2020), resolved different statutory interpretation questions relating to, *inter alia*, use of ballot drop boxes and the validity of ballots returned without secrecy envelopes. Since those rulings, new disputes have arisen concerning proper interpretation of the statutory procedures governing ballot applications and canvassing of voted ballots and, specifically, whether the Election Code permits or requires county election officials to reject applications or refuse to count voted ballots based on a subjective signature analysis. As detailed below, the Election Code does not require or permit county election officials to reject applications or refuse to count voted ballots based on alleged signature inconsistency, nor does the Code permit third-party challenges

based on signature analysis. For this reason, Secretary Boockvar seeks a judicial declaration from this Court directing that absentee and mail-in ballots cannot be challenged or invalidated based on signature comparison or an alleged or perceived signature variance.

There can be no doubt that this statutory construction issue is of immediate public importance. Applications for absentee and mail-in ballots are being processed right now and voters will soon be returning their voted ballots. Rejection of applications for or voted mail-in or absentee ballots based on signature matching is not only not permitted by the Election Code, but also poses a grave risk of disenfranchisement on an arbitrary and wholly subjective basis and without advance warning, notice or an opportunity to be heard. A final definitive ruling from this Court is critical to fulfilling the Constitutional guarantee of a “free and equal” election and “the free exercise of the right of suffrage.” Pa. Const. Art. I, § 5.

Accordingly, Secretary Boockvar respectfully urges this Court to exercise its King’s Bench jurisdiction to quickly and conclusively resolve this statutory construction issue in advance of the general election by declaring that (1) county election officials may not reject applications or refuse to count voted ballots based on a subjective perception of signature variation and (2) absentee and mail-in ballots and the applications for those ballots may not be challenged by third-parties based on signature comparison at any time.

II. FACTUAL BACKGROUND

The introduction of mail-in voting in the Commonwealth has spawned substantial litigation in state and federal courts seeking various forms of declaratory and injunctive relief.¹ To resolve the then-extant disputes and enable election officials to properly prepare for the upcoming election, Secretary Boockvar filed an application for exercise of extraordinary jurisdiction in this Court on August 16, 2020 requesting that the Court resolve discrete issues of statutory construction relating to implementation of mail-in voting.

On September 17, 2020, this Court issued its Opinion in *Pa. Democratic Party v. Boockvar* which resolved the specific statutory construction issues that had been raised by the Secretary. In his concurrence, Justice Wecht noted that the issues presented did not involve “subjective assessments” of ballot validity, “such as signature mismatches assessed by poll workers with no training or expertise in matching signatures.” 2020 WL 5554644 at *34. Justice Wecht observed that “[s]ignature comparison is a process fraught with the risk of error and inconsistent application, especially when conducted by lay people” and that “enforcement of such

¹ Those cases include: *Michael Crossey, et al. v. Kathy Boockvar*, 108 MM 2020 (Pa.); *Pa. Democratic Party v. Kathy Boockvar*, 407 MD 2020 (Pa. Cmwlth. Ct.); *NAACP Pa. State Conference v. Boockvar, et al.*, No. 364 MD 2020 (Pa. Cmwlth. Ct.); *Donald J. Trump for President, Inc. v. Philadelphia County Bd. of Elections, et al.*, No. 200902035 (Phila. Cty. CCP); *Donald J. Trump for President, Inc., et al. v. Kathy Boockvar, et al.*, No. 2:20-cv-966 (W.D. Pa.); *League of Women Voters of Pennsylvania, et al. v. Kathy Boockvar, et al.*, No. 20-3850 (E.D. Pa.).

requirements presents risks of inconsistency and arbitrariness that may implicate constitutional guarantees . . . , including due process and equal protection principles.”

Id. Justice Wecht added that the Court’s September 17, 2020 ruling would not foreclose “the possibility of relief in a future case seeking the opportunity to address circumstances in which a subjective, lay assessment of voter requirements as to which reasonable minds might differ stands between the elector and the tabulating machine.” *Id.*

Less than a week after Justice Wecht noted the limits of this Court’s September 17, 2020 ruling, the plaintiffs in *Donald J. Trump for President, Inc., et al. v. Kathy Boockvar, et al.*, No. 2:20-cv-966 (W.D. Pa.), filed a Second Amended and Supplemental Complaint in the U.S. District Court for the Western District of Pennsylvania repudiating Justice Wecht’s analysis by alleging that the Election Code “*does* authorize County Election Boards to set aside and challenge returned absentee and mail-in ballots that contain signatures which do not match the voters’ signatures in their permanent voter registration records.” 2d Am. Compl. ¶ 182 (emphasis added). The amended federal pleading seeks a preliminary and permanent injunction requiring county election boards to “verify the identification of the registered voter of an absentee or mail-in ballot by comparing the signature information on the absentee or mail-in ballot to the information contained on the voter’s permanent registration card.” *Id.* at pp. 80-81.

Undeterred by Judge Ranjan’s announcement on September 23, 2020 that the district court would again abstain from addressing state law questions, including questions concerning verification of signatures on ballot applications,² the plaintiffs in *Trump for President* pressed ahead and filed a motion for summary judgment on October 1, 2020 in the Western District seeking an order declaring that Secretary Boockvar’s interpretation—that the Election Code does not permit county election officials to reject absentee or mail-in ballot applications or voted absentee or mail-in ballots based on signature analysis or comparison—conflicts with the Election Code. In furtherance of their campaign to suppress absentee and mail-in voting, the plaintiffs in *Trump for President* are urging the Western District to require that Secretary Boockvar “advise all . . . county boards of elections that they are permitted, authorized, and required under the Pennsylvania Election Code to both reject absentee and mail-in ballot applications and to set aside and/or challenge voted

² By Orders dated September 23, 2020, Judge Ranjan abstained from deciding the plaintiff’s claims involving unsettled issues of state law, including “claims regarding verification of in-person, mail-in ballot applications” under the *Pullman* doctrine. *See* Sept. 23, 2020 Memorandum Order (ECF No. 459) & Order (ECF No. 460). (Copies of the Orders are attached as Exhibits A and B.) Plaintiffs filed their Second Amended Complaint the same day including new claims for relief advancing their (incorrect) view that signature analysis and comparison is mandated by the Election Code. Secretary Boockvar continues to argue in the Western District that the district court should abstain from deciding the merits of any of plaintiffs’ claims relating to first-impression questions of state law concerning statutory grounds for challenging or rejecting absentee and mail-in ballots and ballot applications.

absentee or mail-in ballots based on an analysis that the signature on the application or voted ballot does not match the signature on the voter's permanent registration record.”³

Similar to the theory espoused by the plaintiffs in *Trump for President*, Speaker of the Pennsylvania House of Representatives Bryan Cutler, through a member of his staff, wrote to Secretary Boockvar on September 21, 2020 to demand that she make “100% clear to the counties” that the “Pennsylvania Election Code most certainly **does** authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections.”⁴ Further, the Committee on State Government of the Pennsylvania House of Representatives resolved on September 28, 2020 to create a new panel on “Election Integrity” to investigate, *inter alia*, guidance provided by the Department of State regarding the regulation and conduct of the 2020 general election.⁵ The resolution, which passed on party lines, claims that formal guidance to county boards

³ Copies of plaintiffs’ motion for summary judgment with proposed order (ECF No. 503) and supporting brief (ECF No. 505) are attached as Exhibits C and D, respectively.

⁴ A copy of the September 21, 2020 email is attached as Exhibit E.

⁵ *See* House Resolution No. 1032, Session of 2020 (available at <https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2019&sessInd=0&billBody=H&billTyp=R&billNbr=1032&pn=4432> (last visited October 4, 2020)).

issued by Secretary Boockvar concerning pre-canvassing and canvassing of absentee and mail-in ballots “include[s] clearly erroneous information” concerning signature analysis and resulted in “confusion among county officials.”⁶

The guidance referenced in the Committee on State Government resolution was issued by Secretary Boockvar on September 11, 2020 to further the uniform application and implementation of new procedures in the Election Code relating to mail-in voting. The Election Code includes an entirely new procedure detailing how absentee and mail-in ballots are to be processed and counted and specifically limits the grounds on which those ballots may be challenged. *See* 25 P.S. § 3146.8. That section directs that county boards shall meet no earlier than 7:00 am on election day to pre-canvass absentee and mail-in ballots in accordance with the following procedures:

- Ballots cast by persons who died prior to election day should be set aside, 25 P.S. § 3146.8(d), (g)(3);
- The voter declaration on the ballot envelope should be examined and the information on the envelope—the voter’s name and address—should be compared to the names and addresses on the lists of approved absentee and mail-in electors, 25 P.S. § 3146.8(g)(3);
- Ballots which have been challenged under 25 P.S. § 3146.2b or 25 P.S. § 3150.12b on the grounds that the voter is not qualified to vote should be set aside, 25 P.S. § 3146.8(g)(4);

⁶ *Id.* at p.3.

- All other absentee and mail-in ballots should be opened so as not to destroy the executed voter declaration, 25 P.S. § 3146.8(g)(4)(i);
- Inner envelopes with text or markings that identify the elector or the elector’s party or candidate preference should be set aside, 25 P.S. § 3146.8(g)(4)(ii); and
- All other ballots should be counted, 25 P.S. § 3146.8(g)(4)(i)-(iii).

Consistent with the responsibilities of her office, Secretary Boockvar detailed these statutory requirements in her formal guidance to county election officials dated September 11, 2020.⁷ Among other things, the September 11, 2020 guidance directs county election officials to follow these statutory steps when pre-canvassing absentee and mail-in ballots and concludes that “[t]he Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections.”

Secretary Boockvar issued additional guidance on September 28, 2020 to formally advise county election officials of this Court’s rulings in *Pa. Democratic Party v. Boockvar* and *Crossey v. Boockvar* and to update and correct prior guidance that was inconsistent with the Court’s rulings, including guidance regarding the

⁷ The document titled “Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes” is available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf> (last visited October 4, 2020).

treatment of ballots that are not enclosed within their secrecy envelopes.⁸ The September 28, 2020 guidance further advises county election boards that the Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis.

The Secretary's guidance is faithful to the letter and spirit of the Election Code which does not require or permit signature comparison or permit challenges to or rejection of voted mail-in and absentee ballots based on alleged or perceived signature variations. Although the Election Code does not require or permit any form of signature analysis or signature matching, as explained above, the Trump Campaign and Republican National Committee persist in advocating that county election officials must analyze voters' signatures and must reject ballot applications and voted ballots if a voter's signature does not match his or her signature in the voting record. Lack of a definitive ruling from this Court on the proper interpretation of the Election Code will lead to dissension and disputes when ballots are pre-canvassed beginning on November 3, 2020.

The election is now just over four weeks away. Ballots have been finalized and county election boards are in the process of reviewing absentee and mail-in

⁸ The document titled "Guidance Concerning Civilian Absentee and Mail-in Ballot Procedures" is available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/DOS%20Guidance%20Civilian%20Absentee%20and%20Mail-In%20Ballot%20Procedures.pdf> (last visited October 4, 2020).

ballot applications and sending out ballots to absentee and mail-in voters. It is expected that more than 2.5 million Pennsylvanians will cast votes by mail in the November 3, 2020 general election. To avoid confusion, to ensure transparency and, most importantly, to prevent qualified voters from being disenfranchised based on arbitrary, standardless and non-statutory grounds, Secretary Boockvar seeks a declaratory judgment under the Declaratory Judgments Act, 42 Pa. C.S. § 7531 *et seq.*, clarifying and confirming that the Election Code does not authorize or permit county election boards to reject voted absentee or mail-in ballots or ballot applications based on signature analysis and does not authorize or permit challenges to applications or voted ballots based on alleged or perceived signature variances. This application seeks final rulings from the highest court in the Commonwealth on these time-sensitive and novel questions of pure state law.

III. BASIS FOR EXERCISE OF KING’S BENCH POWERS

This Court has authority under its King’s Bench power to declare the correct interpretation of the Election Code, 42 Pa. C.S. § 502, and should exercise that authority to make clear that analysis of signatures on absentee and mail-in applications and ballots is not statutorily required and that such ballots cannot be challenged or rejected based on signature comparisons.

King’s Bench authority is properly exercised “to review an issue of public importance that requires timely intervention by the court of last resort to avoid the

deleterious effects arising from delays incident to the ordinary process of law.” *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 884 (Pa. 2020) (quoting *Commonwealth v. Williams*, 129 A.3d 1199, 1205-06 (Pa. 2015)), *petition for cert. filed*, No. 19-1265 (U.S. Apr. 27, 2020); *see also In re Bruno*, 101 A.3d 635, 670 (Pa. 2014). This authority derives from Article V, Section 2 of the Pennsylvania Constitution which provides, in relevant part, that the Supreme Court “shall be the highest court of the Commonwealth and in this court shall be reposed the supreme judicial power of the Commonwealth.” Pa. Const. Art. V, § 2(a). Article V, Section 2 further provides that the Supreme Court “shall have such jurisdiction as shall be provided by law.” *Id.* § 2(c). The General Assembly codified this authority as follows: “The Supreme Court shall have and exercise the powers vested in it by the Constitution of Pennsylvania, including the power generally to minister justice to all persons and to exercise the powers of the court, as fully and amply, to all intents and purposes, as the justice of the Court of King’s Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722.” 42 Pa. C.S. § 502.

This Court is authorized to “exercise King’s Bench powers over matters where no dispute is pending in a lower court.” *Friends of Danny DeVito*, 227 A.3d at 884; *see also Williams*, 129 A.3d at 1206; *In re Avellino*, 690 A.2d 1138, 1140 (Pa. 1997). Further, the exercise of King’s Bench authority is not limited by prescribed forms of

procedure or to actions of a particular nature, but rather the Court may employ any type of process necessary for the circumstances. *Williams*, 129 A.3d at 1206. “[T]he power of King’s Bench allow[s] the Court to innovate a swift process and remedy appropriate to the exigencies of the event.” *In re Bruno*, 101 A.3d at 672. “In exercising King’s Bench authority, [the Court’s] ‘principal obligations are to conscientiously guard the fairness and probity of the judicial process and the dignity, integrity, and authority of the judicial system, all for the protection of the citizens of this Commonwealth.’” *Williams*, 129 A.3d at 1206 (quoting *In re Bruno*, 101 A.3d at 675).

As with the issues raised in Secretary Boockvar’s previous application, this election dispute presents an issue of significant public concern and requires immediate judicial resolution. Given the immense demand for mail-in voting at the primary and the ongoing COVID-19 pandemic, more than 2.5 million registered electors are expected to cast their votes by mail-in or absentee-ballot for the general election. In the Western District litigation and elsewhere, it is now being advocated (incorrectly) that the Election Code not only allows but *requires* county election officials to compare voter signatures and permit ballots to be challenged and rejected based on layperson signature analysis. Secretary Boockvar’s contrary guidance has been attacked as “clearly erroneous information” and some counties indicated they may employ some form of signature analysis. As a result, despite Secretary

Boockvar's best efforts to ensure correct and uniform application of the Election Code, it remains very likely that ballots will be improperly and unlawfully rejected in the upcoming election based on subjective and arbitrary signature comparisons not authorized by the Election Code if this Court does not resolve this matter.

Prompt resolution of this dispute by this Court is critically necessary to clarify the law and prevent arbitrary disenfranchisement of qualified voters. As Justice Wecht acknowledged, lay signature analysis presents risk of error and inconsistent application. *Pa. Democratic Party v. Boockvar*, 2020 WL 5554644 at *34. And, because the Election Code does not include or require a procedure for comparing signatures, it also does not require that voters be afforded notice and an opportunity to cure before their absentee or mail-in ballots are rejected due to any perceived signature variations. Without a definitive ruling from this Court that the Election Code does not permit ballots to be challenged or rejected on this basis, it is very likely that voters will be arbitrarily and unlawfully disenfranchised.

Because the elective franchise is at stake, this issue goes to the heart of our democracy and necessarily implicates the public interest. The right to vote and have that vote properly counted is "the most central of democratic rights." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 (Pa. 2018). As detailed below, the Election Code itself clearly delimits the grounds on which applications and ballots may be rejected and clearly demonstrates the right to the declaratory relief

sought here. Lack of a definitive declaration from this Court as to which ballots may lawfully be challenged or rejected will lead to spurious attempts to undermine the legitimacy of the election. Accordingly, this election dispute is unquestionably of immediate public interest and falls squarely within this Court's King's Bench powers. *See, e.g., Fagan v. Smith*, 41 A.3d 816 (Pa. 2012) (per curiam) (exercising King's Bench jurisdiction and ordering Speaker of Pennsylvania House of Representatives to issue writs of election for special elections to fill vacancies in legislative districts); *Pa. Gaming Control Bd. v. City Council of Phila.*, 928 A.2d 1255, 1264 n.6 (Pa. 2007) (invoking King's Bench jurisdiction as alternative ground to review challenge to submission of ballot question).

The critically important state law election issue presented here should be finally settled by this Court in advance of the general election. The U.S. Constitution assigns to the states primary responsibility for determining the manner of selecting Presidential electors, U.S. Const. Art. II, § 1, cl. 2, and this Court is the ultimate expositor of state law, *see Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State."); *Wardius v. Oregon*, 412 U.S. 470, 477 (1973) ("It is, of course, true that the Oregon courts are the final arbiters of the State's own law"). Consequently, a final determination from this Court clarifying the grounds for challenging and rejecting

applications and voted ballots is critical to ensuring that votes cast by qualified Pennsylvanian electors are properly counted. Judge Ranjan has recognized on several occasions that state law issues should be resolved by Pennsylvania state courts and Secretary Boockvar filed a motion for summary judgment yesterday in the Western District urging that court to abstain pursuant to *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941). For the same reasons that the district court should abstain from construing statutory procedures in the Election Code in the first instance, this Court should resolve these important state law questions as soon as possible.

This important election issue merits invocation of King's Bench powers.

IV. ARGUMENTS FOR DECLARATORY RELIEF

The Election Code is clear and unambiguous with respect to the grounds on which absentee and mail-in ballot applications may be rejected and the grounds on which voted absentee and mail-in ballots may be challenged. Signature comparison is not one of those grounds. This Court should issue a declaratory judgment that absentee and mail-in ballot applications and voted ballots cannot be challenged or rejected based on perceived or alleged signature variations.

The Election Code imposes a rigorous and comprehensive application process for absentee and mail-in electors that does not include signature analysis.⁹ With respect to mail-in ballots, the Election Code directs that, to apply for a ballot, a qualified elector must fill out and return an application form with the elector's name, address, date of birth, voting district and length of time residing in the voting district. 25 P.S. § 3150.12(a), (b)(1)-(2).¹⁰ The application form includes a declaration that must be completed by the applicant verifying his or her eligibility to vote and the truthfulness of the information supplied on the application, unless the elector is unable to sign due to illness or physical disability. 25 P.S. § 3150.12(c).¹¹ The

⁹ The polestar of statutory construction is “to ascertain and effectuate the intention of the General Assembly.” 1 Pa. C.S. § 1921(a). “The best indication of legislative intent is the language used in the statute.” *Com., Office of Admin. v. Pa. Labor Rels. Bd.*, 916 A.2d 541, 547-48 (Pa. 2007). “[W]hen the words of a statute are clear and unambiguous,” that is the end of the inquiry. *Dep’t of Env’t Prot. v. Cumberland Coal Res.*, 102 A.3d 962, 975 (Pa. 2014); *see also* 1 Pa. C.S. § 1921(b).

¹⁰ The procedures for applying for and voting absentee ballots are similar and are set forth in separate provisions in the Election Code. *See* 25 P.S. § 3146.2 (Applications for official absentee ballots); 25 P.S. § 3146.2b (Approval of application for absentee ballot); 25 P.S. § 3146.6 (Voting by absentee electors). For convenience, only the mail-in ballot provisions are cited in the body of this application.

¹¹ The paper application form includes a line for the voter's signature which signifies a declaration that the applicant is “eligible to vote by mail-in ballot at the forthcoming primary or election; . . . and that all of the information which [is] listed on this mail-in ballot application is true and correct.” https://www.votespa.com/Register-to-Vote/Documents/PADOS_mailInapplication.pdf (last visited October 4, 2020)). The ballot application can also be submitted electronically on a form available at

signed declaration exposes the applicant to criminal penalties if the representations made are false. 25 P.S. § 3553.

Upon receipt of a completed application, the county board of elections must determine the qualifications of the applicant by verifying certain specifically designated “proof of identification” and by comparing “the information provided on the application with the information contained on the applicant’s permanent registration card.” 25 P.S. § 3150.12b(a). “Proof of identification” for purposes of applications to vote by absentee or mail-in ballot is defined in the Election Code as the elector’s driver’s license number, the last four digits of the elector’s Social Security number, a valid-without-photo driver’s license or identification card or other specified form of photo identification. 25 P.S. § 2602(z.5)(3). Under the plain language in the Election Code, identity for purposes of ballot applications is verified through these specified means, not analysis or comparison of signatures. And, for this reason, applications can be completed and submitted electronically. 25 P.S. § 3150.12(f), (g)(2).

If, after reviewing the application, the county election board is “satisfied that the applicant is qualified to receive an official mail-in ballot,” the Election Code

<https://www.pavoterservices.pa.gov/Pages/VoterRegistrationApplication.aspx> (last visited October 4, 2020). There is no indication on either form that an applicant’s signature may be compared to another signature on file or that an application or subsequently voted ballot may be rejected based on signature comparison.

directs that “the application shall be marked ‘approved,’” 25 P.S. § 3150.12b(a)(1), and “the approval decision shall be final and binding, except that challenges may be made *only on the grounds* that the applicant was not a qualified elector,” 25 P.S. § 3150.12b(a)(2) (emphasis added). In other words, applications may be challenged only where the applicant fails to satisfy the age, citizenship or residency requirements. 25 Pa. C.S. § 1301(a).¹² All such challenges to voter qualifications are required to be made to the county board of elections prior to 5:00 pm on the Friday before the election. 25 P.S. § 3150.12b(a)(3). The Election Code provides for no other opportunity to challenge an absentee or mail-in application or ballot.¹³

The statutory procedure for opening and counting absentee and mail-in ballots likewise makes no provision for signature analysis or for challenging ballots based

¹² An individual is eligible to vote in Pennsylvania if he or she is at least 18 years of age, has been a citizen of the United States for at least one month and has resided in the Commonwealth and the election district for at least 30 days. 25 Pa. C.S. § 1301(a).

¹³ Act 12 of 2020, Act of Mar. 27, 2020, P.L. 41, No. 12, significantly changed the challenge process by removing any opportunity to challenge voted ballots. The legislation that originally allowed mail-in voting, Act 77 of 2019, authorized candidate representatives to assert challenges during pre-canvassing and canvassing. *See* 25 P.S. § 3146.8(g)(2) (2019) (“Representatives shall be permitted to challenge any absentee elector or mail-in elector in accordance with the provisions of paragraph (3).”). The current Section 3146.8(g)(2) omits this language and Section 3146.8(g)(4) instead provides that the only available challenges are challenges to an elector’s qualifications and those challenges must be asserted before canvassing begins. 25 P.S. § 3146.8(g)(4).

on alleged signature variations. The procedures by which absentee and mail-in ballots are pre-canvassed and canvassed is detailed in 25 P.S. § 3146.8(g). Pre-canvassing, which is defined in the Code as “the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots,” begins no earlier than 7:00 am on election day. 25 P.S. § 2602(q.1); 25 P.S. § 3146.8(g)(1.1). The Election Code directs that pre-canvassing consists of examining the voter’s declaration on the ballot envelope and comparing the “information” on the envelope—*i.e.* the voter’s name and address—with the names and addresses on the lists of approved absentee and mail-in voters. 25 P.S. § 3146.8(g)(3); 25 P.S. § 3146.2c.¹⁴ These are the only required or permitted examinations.

The Election Code goes on to say that, if the county board of elections has already verified the voter’s proof of identification required by 25 P.S. § 3150.12b—*i.e.* the elector’s driver’s license number, the last four digits of the elector’s Social

¹⁴ The “information” on the ballot which is required to be compared to the approved mail-in voter list is the voter’s name and address. This is the *only* information in the approved absentee and mail-in voter list which is referenced in 25 P.S. § 3146.8(g)(3). *See* 25 P.S. § 3146.2c(c) (describing “list . . . showing the names and post office addresses of all voting residents . . . to whom official absentee or mail-in ballots have been issued”). Signatures are not provided, reproduced or otherwise included in the list.

Security number, a valid-without-photo driver's license or identification card or other specified form of photo identification—and if the voter declaration on the outer envelope is sufficient and the voter's name and address appear in the lists of approved absentee and mail-in voters, the ballots are required to be counted. 25 P.S. § 3146.8(g)(3), (4). Again, the only exception is for mail-in ballots that were challenged prior to election day and the only basis for challenge is the lack of qualifications to vote. 25 P.S. §§ 3146.8(g)(4); 25 P.S. § 3150.12b(a)(2).¹⁵

Thus, the Election Code does not require or permit signature analysis when reviewing absentee or mail-in ballot applications and does not allow challenges to or rejection of absentee or mail-in ballots based on perceived signature mismatches. The General Assembly well knows how to draft such provisions. For example, the separate provision on in-person voting directs that, when voters appear to vote, a county election official shall verify identification by “compar[ing] the elector's signature on his voter's certificate with his signature in the district register” and if, “upon such comparison, the signature upon the voter's certificate appears to be

¹⁵ To be clear, Secretary Boockvar is not advocating that signatures on applications and ballots must be ignored. If, based on examination of a voter's signed declaration, a county elections official in good faith believes the ballot was voted by someone other than the qualified elector who applied for the ballot or is fraudulent, the ballot should be set aside and investigated. But this is very different from suggesting that the Election Code requires county election employees to perform a subjective signature analysis or authorizes rejection of validly cast and voted ballots based on signature variances.

genuine, the elector who has signed the certificate shall, if otherwise qualified, be permitted to vote.” 25 P.S. § 3050(a.3)(2).¹⁶ The omission of such language in the statutory provisions relating to absentee and mail-in ballots is dispositive. “[W]here the legislature includes specific language in one section of a statute and excludes it from another section, the language may not be implied where excluded.” *Com. v. Mazzetti*, 44 A.3d 58, 67 (Pa. 2012) (citing *Fonner v. Shandon, Inc.*, 724 A.2d 903, 907 (Pa. 1999)). That Section 3146.8 does not reference genuine signatures or signature comparison, does not specify any signatures to be compared, does not include standards or guidelines for signature comparison and does not include a process to be followed in the event a signature is questioned can only mean that challenges or rejections based on signature analysis are not statutorily authorized.

The Election Code simply cannot be read as authorizing or permitting absentee or mail-in ballots to be challenged or rejected based on signature analysis. “[A]s a matter of statutory interpretation, although one is admonished to listen attentively to what a statute says; one must also listen attentively to what it does not say.” *Commonwealth v. Johnson*, 26 A.3d 1078, 1090 (Pa. 2011) (citations omitted). Section 3146.8(g) does not say that ballots can be invalidated based on perceived

¹⁶ A voter whose identity is challenged at the polls is notified immediately and is afforded an opportunity to produce a witness to verify his or her identity. 25 P.S. § 3050(d). No such notice or chance to cure is possible when absentee and mail-in voters are canvassed beginning on the morning of election day.

variances between signatures on the voter's declaration and other signatures in the voter's record and such a procedure cannot be implied. *Mohamed v. Com., Dep't of Transp.*, 40 A.3d 1186, 1194-95 (Pa. 2012) (“[W]here the language of a statute is clear and unambiguous, a court may not add matters the legislature saw fit not to include under the guise of construction.”); *Lurie v. Republican Alliance*, 192 A.2d 367, 370 (Pa. 1963) (“It is not for us to legislate or by interpretation to add to legislation matters which the legislature saw fit not to include.”) (citation omitted).¹⁷

Even if Section 3146.8(g) were ambiguous with regard to the procedures for canvassing absentee and mail-in ballots—and it is not—this Court should nonetheless declare that ballots cannot be challenged or rejected based on subjective signature variations. The “longstanding and overriding policy in this Commonwealth to protect the elective franchise” requires that the Election Code be “construed liberally in favor of the right to vote.” *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004). It would be contrary to the liberal construction in favor of the right to vote to allow candidates and parties to challenge applications and ballots based on extra-statutory and wholly subjective signature examinations.

¹⁷ It bears reiterating that all challenges are required to be made prior to 5:00 p.m. on the Friday before the election—*i.e.* prior to examination of the voter declaration during pre-canvassing which begins no earlier than 7:00 a.m. on election day. 25 P.S. § 3146.8(g)(1.1); 25 P.S. § 3150.12b(a)(3). In addition to the lack of statutory authority for such challenges, it is not possible to challenge the signature on a voted ballot before pre-canvassing begins on election day.

In addition to violating the plain language in the Election Code and the policy of liberal interpretation in favor of the right to vote, the expedited and full-throated effort by plaintiffs in the *Trump for President* litigation to obtain a federal court order allowing signature challenges gives rise to serious constitutional concerns. As other courts have recognized, signature analysis by laypersons poses significant risk of error and inconsistency. *See, e.g., Richardson v. Tex. Sec. of State*, --- F. Supp. 3d ---, 2020 WL 5367216, at *23 (W.D. Tex. Sept. 8, 2020) (finding credible expert testimony that laypersons “are more likely to reject signatures provided by same individual than are trained handwriting experts” because “layperson reviewers ‘incorrectly interpret a variation as a difference’”; declaring signature-comparison procedures in Texas statute unconstitutional), *appeal docketed*, No. 20-50774 (5th Cir. Sept. 10, 2020); *Frederick v. Lawson*, --- F. Supp. 3d ---, 2020 WL 4882696, at *14 (S.D. Ind. Aug. 20, 2020) (finding credible expert testimony concerning variations among signatures, myriad of reasons for such variations and tools that may aid in assessment of genuineness of signatures and performance of signature comparisons; declaring Indiana statutory signature verification requirement unconstitutional); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 222 (D.N.H. 2018) (entering summary judgment on procedural due process challenge to statute that conveyed “sole, unreviewable discretion to reject ballots due to a signature mismatch”).

Further, the Election Code affords no opportunity for notice to any elector whose signature is questioned and therefore rejection of ballots based on signature analysis would be unreviewable. This implicates due process. *See Richardson*, 2020 WL 5367216, at *24; *Frederick*, 2020 WL 4882696 at *15; *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, --- F. Supp. 3d ---, 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020); *Self Advocacy Sols. N.D. v. Jaeger*, --- F. Supp. 3d ---, 2020 WL 2951012 (D.N.D. June 3, 2020); *Martin v. Kemp*, 341 F. Supp. 3d 1326 (N.D. Ga. 2018). And because there are no standards or guidelines in the current Election Code for determining whether signatures match, any signature comparison would necessarily be *ad hoc* and therefore also a potential violation of the equal protection guarantee. *See Frederick*, 2020 WL 4882696 at *17; *see also Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1030-31 (N.D. Fla. 2018) (granting preliminary injunction barring enforcement of Florida signature matching procedure and explaining that “[t]he only way such a scheme can be reasonable is if there are mechanisms in place to protect against arbitrary and unreasonable decisions by canvassing boards to reject ballots based on signature mismatches”).

Beyond these serious constitutional concerns, the Election Code cannot reasonably be read as authorizing challenges to applications for or rejection of voted ballots based on perceived signature variations. To allow applications or voted ballots to be challenged or rejected for alleged variances would expose voters to

unjustified risk of disenfranchisement without fair warning, without uniform and clear standards, and without an opportunity to be heard before ballots are rejected. The right to vote is too precious to countenance such risks. The Election Code should be enforced as written and this Court should declare that applications and ballots may not be challenged or rejected based on perceived signature variations.

This Court is, and must be, the final word on this critical dispute.

V. CONCLUSION


This Court should assume jurisdiction over this matter under its King's Bench power and declare that (1) county election officials may not reject absentee or mail-in applications or refuse to count voted absentee or mail-in ballots based on a subjective perception of signature variation and (2) absentee and mail-in ballots and the applications for those ballots may not be challenged by third-parties at any time based on signature comparison.

Dated: October 4, 2020

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