

No. 20-3371

**In the United States Court of Appeals
for the Third Circuit**

DONALD J. TRUMP FOR PRESIDENT, INC.; LAWRENCE ROBERTS; and
DAVID JOHN HENRY,

Plaintiffs-Appellants,

v.

KATHY BOOCKVAR, IN HER CAPACITY AS SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA; ALLEGHENY COUNTY BOARD OF ELECTIONS; CENTRE COUNTY BOARD OF ELECTIONS; CHESTER COUNTY BOARD OF ELECTIONS; DELAWARE COUNTY BOARD OF ELECTIONS; MONTGOMERY COUNTY BOARD OF ELECTIONS; NORTHAMPTON COUNTY BOARD OF ELECTIONS; and PHILADELPHIA COUNTY BOARD OF ELECTIONS.

Defendants-Appellees.

DEMOCRATIC NATIONAL COMMITTEE; NAACP PENNSYLVANIA STATE CONFERENCE; COMMON CAUSE PENNSYLVANIA; LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA; BLACK POLITICAL EMPOWERMENT PROJECT; LUCIA GAJDA; STEPHANIE HIGGINS; MERIE LARA; RICHARDO MORALES; NATALIE PRICE; TAYLOR STOVER; JOSEPH AYENI; TIM STEVENS;

Intervenor Defendants-Appellees,

On Appeal from the United States District Court for the Middle District of Pennsylvania in Case No. 20-cv-2078, Judge Matthew W. Brann

MOTION FOR CLARIFICATION

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Appellees the Allegheny County Board of Elections, Chester County Board of Elections, Montgomery County Board of Elections, and Philadelphia County Board of Elections (the “Appellee Counties”), seek clarification of the Court’s November 23, 2020 Order (Dkt. No. 9), granting the Appellants’ Amended Motion for Emergency Expedited Review to make clear that, under well-established appellate rules, Appellants’ brief must address any bases for their appeal and cannot split appellate issues in sequential briefing or engage in piecemeal litigation. Appellee Secretary Boockvar consents to this Motion for Clarification.

In particular, Appellants’ Amended Motion for Expedited Review states that Appellants seek *only* to brief issues relating to the denial of Appellant’s Motion for Leave to File a Second Amendment Complaint. *See* Dkt. No. 6, p. 3 ¶ 7 (Nov. 23, 2020). Appellants further contend that they believe *no* “case or controversy” exists over the Order dated November 21, 2020 dismissing Appellants’ Amended Complaint (No. 4:20-cv-2078, Dkt. No. 203). *Id.* at p.2 ¶ 5. Yet, Appellants’ Notice of Appeal *only* appeals from the District Court’s November 21, 2020 Order. *See* Notice of Appeal, No. 4:20-cv-2078, Dkt. No. 205. At the same time, Appellants claim they “do not intend to waive any claim that any part of the District Court’s decision may have been wrongly decided” and seek to leave open the opportunity to “provide supplemental briefing” on such issues. *Id.* at p.3. ¶ 6.

This is an untenable proposal. The partial-appeal procedure proposed by Appellants is contrary to “the historic federal policy against piecemeal appeals.” *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 438 (1956). This proposed procedure further runs counter to the final judgment rule, codified by 28 U.S.C. § 1291, which requires “that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits.” *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). Moreover, it is well established that “arguments not raised in an appellant’s opening brief are deemed waived.” *United States v. Quillen*, 335 F.3d 219, 224 (3d Cir. 2003) (citing *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 316 n.2 (3d Cir. 2001) (en banc)); see also Fed. R. App. P. 28 (a)(8) (requirements for Appellants’ brief).

This is not to ignore other flaws in the piecemeal process proposed by Appellants, including the inefficiency of the proposal in light of Appellants’ claimed exigencies, the apparent gamesmanship in attempting to either avoid or somehow defer review of the merits of the District Court’s November 21, 2020 order—which are intimately bound in the denial of leave to amend—and bedrock preclusion principles. See *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981) (Friendly, J.) (Driven by considerations of fairness to the parties, judicial economy, and the societal interest in finality, the law-of-the-case doctrine “applies . . . to everything decided by necessary implication in the first appeal.”).

* * *

In light of these well-established principles, Appellee Counties ask this Court to clarify its November 23, 2020 Order granting the amended motion to expedite to make clear that Appellants' brief must cover all issues relevant to this appeal and that the normal waiver and preclusion doctrines and prohibitions on piecemeal litigation will apply.

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Dated: November 23, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the motion, as provided in Fed. R. App. P. 32(f), the motion contains 534 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Mark A. Aronchick

Mark A. Aronchick

November 23, 2020

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CERTIFICATE OF CONSENT

Pursuant to Local R. 113.9(c), I hereby certify that I have obtained the consent of non-filing party Kathy Boockvar, in her capacity as Secretary of the Commonwealth of Pennsylvania, who has consented to this Motion.

/s/ Mark A. Aronchick

Mark A. Aronchick

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CERTIFICATE OF SERVICE

I certify that, on November 23, 2020, I caused a copy of the foregoing Motion for Clarification to be served via CM/ECF on all counsel of record who have entered an appearance.

/s/ Mark A. Aronchick

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