

IN THE SUPREME COURT OF PENNSYLVANIA

No. 103 WM 2020

IN RE: 2,349 BALLOTS IN THE 2020 GENERAL ELECTION

Petition of Nicole Zicarelli

Seeking the exercise of extraordinary jurisdiction and review of the November 18, 2020 Memorandum and Order of the Court of Common Pleas of Allegheny County, GD 20-011654, notice of appeal to the Commonwealth Court, No. 1162 CD 2020

**RESPONSE OF RESPONDENT-INTERVENORS
THE PENNSYLVANIA DEMOCRATIC PARTY AND JAMES BREWSTER
TO APPLICATION FOR EXTRAORDINARY RELIEF BY NICOLE
ZICARELLI**

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RESPONSE TO APPLICATION FOR EXTRAORDINARY RELIEF

The Pennsylvania Democratic Party and James Brewster (collectively, the “Pennsylvania Democratic Party Respondents”) file this Response to Nicole Zicarelli’s (“Zicarelli”) Application for Invocation of King’s Bench Power (the “Application”).

INTRODUCTION

1. The Democratic Party Respondents seek a fair and free election, where eligible voters may vote and have the certainty that their votes will count.

2. For that reason, the Democratic Party Respondents participated in opposition to Zicarelli’s statutory appeal, which asked the Court of Common Pleas of Allegheny County to reverse the Allegheny County Board of Elections’ (the “Board”) decision to accept and canvass 2,349 ballots that did not contain handwritten dates below the voter declarations on the outer envelope (the “Undated Ballots”).

3. It is undisputed that the 2,349 voters who Zicarelli seeks to disenfranchise properly applied to vote by mail by the deadline, received their mail-in ballots, voted their mail-in ballots, timely returned them to the Board with their signature, and printed their name and address on the outer envelope. All of the Undated Ballots at issue here were processed in the Statewide Uniform Registry of Electors (“SURE”) system and time-stamped when they were timely

delivered to the Board on or before November 3, 2020. The only perceived “deficiency” with the 2,349 Undated Ballots is that the voter did not include a handwritten date below the voter declaration on the outer envelope.

4. As the Board recognized with its November 12, 2020 determination, which the lower court affirmed on November 18, 2020, Zicarelli can offer no compelling reason for rejecting the Undated Ballots. The relief she requests – the disenfranchisement of voters over a minor technical defect – would contravene the Pennsylvania Election Code and state and federal law.

5. Pennsylvania Democratic Party Respondents thus agree that this Court should exercise its King’s Bench powers and grant the emergency review that Zicarelli requests in light of a similar issue that is currently before this Court in *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, No. 35 EAP 2020 (Pa. 2020) (the “Philadelphia Appeals”). Prompt resolution of these disputes is central to a timely certification of the election.

6. Further, by accepting Zicarelli’s Application, this Court could provide clarity with respect to the sufficiency of mail-in ballot declarations missing handwritten names, dates or addresses for future elections in this Commonwealth.

7. To the extent that this Court grants Zicarelli’s Application, the Pennsylvania Democratic Party Respondents are prepared to submit a brief in support of the lower court’s decision on an expedited basis.

DESCRIPTION OF RESPONDENTS

8. The Pennsylvania Democratic Party Respondents were Intervenor-Respondents in *Zicarelli v. Allegheny County Board of Elections*, No. GD-20-011654 (Ct. Com. Pl. 2020), and in that capacity, they have a vested interest in Zicarelli's Application here.

9. The Pennsylvania Democratic Party Respondents include the Pennsylvania Democratic Party, which has associational standing on behalf of its members and candidates to ensure fair and free elections. *See Orloski v. Davis*, 564 F. Supp. 526 (M.D. Pa. 1983) (holding that the Pennsylvania Democratic Party has standing in matters affecting election procedure).

10. The individual Respondent is James Brewster ("Brewster"), who currently represents the 45th District in the Pennsylvania State Senate ("Senate").

11. Brewster is a registered voter in the Commonwealth and is the Democratic Party's nominee in the 2020 General Election for the seat he currently holds in the State Senate.

12. Zicarelli, the Republican candidate for the 45th District in the Senate, currently trails Brewster in the race by a small number of votes.

13. This Court's ruling as to whether the Undated Ballots should be counted could impact the result of the election in Pennsylvania's 45th Senate District.

**THE RESPONDENTS AGREE THAT INTERPRETATION OF
THE ELECTION CODE QUESTIONS PRESENTED ARE
PROPERLY BEFORE THIS COURT AND ASK THE COURT
TO AFFIRM THE DECISION OF LOWER COURT**

14. The Election Code requires the Board to certify the results of the 2020 General Election by November 23, 2020, subject to certain enumerated exceptions, *see* 25 P.S. § 2642, and to announce computation of results at least five days before final certification, 25 P.S. § 3154(f).

15. The Pennsylvania Democratic Party Respondents agree that Zicarelli's Application is ripe because of this immediately impending statutory deadline for certification of the 2020 General Election Results.

16. Zicarelli's Application is also ripe because the plaintiffs in a federal court matter, *Donald J. Trump for President, Inc. et al. v. Kathy Boockvar, et al.*, No. 4:20-cv-02078 (M.D. Pa.) ("DJTFP Plaintiffs"), have asked the federal court to enjoin certification of Pennsylvania's election results, in part because the DJTFP Plaintiffs claim that undated ballots should not have been counted in certain counties in the Commonwealth.

17. The Pennsylvania Democratic Party Respondents ask this Court to interpret and enforce the Election Code by affirming that undated ballots may be counted as the Board and the court below so held, and by further affirming that the decision to do so lies within the sound discretion of the Board pursuant to established precedent. *See Appeal of McCracken*, 370 Pa. 562, 565, 88 A.2d 787,

788 (1952) (observing that county election boards have “plenary powers in the administration of the election code”); *see also Appeal of Petrucci*, 38 Pa. D & C.2d 675, 677 (C.P. Luzerne Cty. 1965) (“The court, in reviewing the rulings of the board, may reverse the board of elections only for a mistake of law or for a clear abuse of discretion, including a capricious disregard of the testimony.”). The skirmishing over these issues must end so that Allegheny County’s election results can be certified.

18. Although the Pennsylvania Democratic Party Respondents agree that this case raises “an issue of public importance” that warrants the Court’s exercise of King’s Bench jurisdiction, *see In re Nov. 3, 2020 Gen. Election*, No. 149 MM 2020, 2020 WL 6252803, at *1 n.1 (Pa. Oct. 23, 2020), they observe that the case is not identical to the consolidated cases over which the Court exercised its King’s Bench jurisdiction yesterday, insofar as it concerns a different county election board’s exercise of its statutory discretion.

19. The Election Code delegates to the county boards of elections the obligation to “examine the declaration on each envelope” and determine that the “declaration is sufficient.” 25 P.S. § 3146.8(e). Guidance promulgated by the Secretary of State confirms that the county boards of elections are ultimately responsible for making this determination. *See* Pa. Dep’t of State, Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes at 3

(ballot should be canvassed “[i]f the Voter’s Declaration on the return envelope is signed *and the county board is satisfied that the declaration is sufficient*” (emphasis added)).

20. Each county board of elections ultimately determined how to exercise that discretion consistent with the Secretary’s guidance. For instance, the Philadelphia County Board of Elections ultimately determined that the declarations associated with 697 mail-in ballots were not “sufficient” because the declarations were either blank or unsigned. Similarly, the Bucks County Board of Elections rejected 124 mail-in ballots because the declarations were unsigned.

21. Given county election boards’ “plenary powers in the administration of the election code,” *Appeal of McCracken*, 88 A.2d at 788, and the general principle that election boards’ decisions are reviewed “for a clear abuse of discretion,” *Appeal of Petrucci*, 38 Pa. D & C.2d at 677, the question presented by this case would not be identical to the question in the consolidated cases accepted by the Court yesterday, insofar as it involves the exercise of discretion of a different county board, the Alleghany County Board of Elections.

22. In sum, the Pennsylvania Democratic Party Respondents support Zicarelli’s Application to the extent that it asks this Court to exercise its King’s Bench powers. They request, however, the opposite substantive relief.

23. The Pennsylvania Democratic Party Respondents ask this Court to **affirm** the lower court's decision and to allow the Board to canvass the 2,349 lawfully voted Undated Ballots.

For the foregoing reasons, the Respondents ask this Court to GRANT Zicarelli's Application and to issue an order AFFIRMING the decision of the Court of Common Pleas of Allegheny County, allowing the Allegheny County Board of Elections to canvass the 2,349 lawfully voted ballots.

Respectfully submitted,

By /s/ Clifford B. Levine

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Dated: November 19, 2020
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PROPOSED ORDER

AND NOW this ____ day of November, 2020, upon consideration of the Petition of Nicole Zicarelli and the responses thereto, this Court hereby GRANTS the Petition and declares as follows:

The November 18, 2020 Order of the Court of Common Pleas of Allegheny County dismissing the Petition of Nicole Zicarelli and affirming the decision of the Allegheny County Board of Elections is AFFIRMED.

BY THE COURT:

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2020, I caused the foregoing to be electronically filed and to be served on counsel of record for Plaintiffs and Defendants listed on the docket via the Court's ECF system.

/s/ Clifford B. Levine

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