

IN THE SUPREME COURT OF PENNSYLVANIA

No. 30 EAP 2020

IN RE: CANVASSING OPERATION

APPEAL OF: CITY OF PHILADELPHIA BOARD OF ELECTIONS

**INITIAL BRIEF OF
APPELLEE DONALD J. TRUMP FOR PRESIDENT, INC.**

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SCOPE AND STANDARD OF REVIEW

The matter under review is an Order of the Commonwealth Court reversing a decision of the Court of Common Pleas. The Commonwealth Court, as a matter of statutory construction, found that the Court of Common Pleas improperly denied the oral petition of Appellee Donald J. Trump for President, Inc. (the “Campaign”) to allow closer observation of the canvassing of ballots based on an improper interpretation of the Election Code. Accordingly, this appeal “requires this Court to engage in statutory interpretation of the Election Code, which, as a question of law, is subject to a de novo standard of review and a plenary scope of review.” *Banfield v. Cortés*, 110 A.3d 155, 166 (Pa. 2015) (citing *Sch. Dist. of Philadelphia v. Dep’t of Educ.*, 92 A.3d 746, 751 (Pa. 2014)).

QUESTIONS PRESENTED

The questions involved, as stated in this Court's November 9, 2020 Order granting allowance of appeal, are¹:

1. Whether the issue raised in Appellants' petition for allowance of appeal is moot.

Answered Below: Not addressed below. Suggested Answer: No.

2. If the issue raised in Appellants' petition for allowance of appeal is moot, does there remain a substantial question that is capable of repetition yet likely to evade review.

Answered Below: Not addressed below. Suggested Answer: Yes.

3. Whether, as a matter of statutory construction pursuant to Pennsylvania law, the Commonwealth Court erred in reversing the trial court, which concluded that Appellant City of Philadelphia Board of Elections' regulations regarding observer and representative access complied with applicable Election Code requirements.

Answered Below: No. Suggested Answer: No.

¹ The Campaign has re-ordered the questions to reflect the sequence in which they are analyzed in this Brief.

STATEMENT OF THE CASE

The Appellee-Plaintiff Campaign asks this Court to affirm the Commonwealth Court's decision. The Pennsylvania Election Code authorizes candidates to have watchers and representatives at the canvass and tabulation of the vote. However, the Philadelphia Board of Elections (the "Board") configured the Hall F of the Pennsylvania Convention Center in such a way as to preclude any actual observation of the canvassing process, and thereby interfering in the watchers' and representatives' ability to observe the process and casting a cloud over the ballots and the integrity of the tabulation.

This Court is asked to interpret unambiguous statutes pertaining to an election matter. The statutes at issue provide that representatives and watchers "shall be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and records." Section 310(b) to the Election Code, 25 P.S. § 2650(b); *see* Section 1308(b) to the Election Code, 25 P.S. § 310(b); *see also* Section 1308(g)(1.1) to the Election Code, 25 P.S. § 3146.8(g)(1.1) ("One authorized representative of each candidate . . . and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed.")

Despite the plain meaning of the statute when the statutes are taken as a whole, Appellants direct the Court to a hyper-technical focus on individual words. That approach does not change the plain meaning of the statute as a whole, but at best, creates ambiguity. When interpreting an Election Code ambiguity, in this case where one interpretation would act to shroud fraud in secrecy and the other interpretation would shine light on illegality, the Court liberally construes statutes in favor of the right to vote and to enfranchise, not to disenfranchise, the electorate by shrouding potential illegality and its diluting effect.

As the Commonwealth Court found, “Viewing the language of the Election Code sections in questions with an eye toward maintain the integrity of the elective process in the Commonwealth, . . . we find the language of these sections imports upon candidates, watchers, or candidates’ representative at least a modicum of observational leeway” (Appellant Brief, App’x at 5 (*In re Canvassing Observation*, Case No. 1094 C.D. 2020, Nov. 5, 2020).) In other words County Boards of Elections may not stick watchers and representatives in the corner of a convention center hall, such that canvassing occurs far from view. To hold otherwise leaves candidates, political parties, and the general public wondering whether any election,

including the November 3, 2020 General Election, was free, fair, transparent, and verifiable.

I. Procedural History

This is an appeal from the November 5, 2020 Order of the Commonwealth Court of Pennsylvania reversing the Order of the Court of Common Pleas for Philadelphia County. The Court of Common Pleas denied Appellant's Oral Petition and Argument for appropriate access to the canvass of ballots such that Campaign's watchers and representatives can meaningfully observe the process.

Appellee-Plaintiff, Donald J. Trump for President, Inc., initiated this action on November 3, 2020 with an oral petition and argument at Philadelphia Election Court, a courtroom set up in Philadelphia County, and staffed from the opening until the close of the polls with an assigned judge and staff so that candidates, voters and other interested parties can have issues regarding Election Day matters timely heard. The court heard argument from and testimony on behalf of the Appellee, but only argument from City of Philadelphia and the PA Dems, a political body. The trial court held an in-person hearing while allowing the one witness presented to testify virtually by Zoom. A short while after the proceeding, the trial court issued

an order, denying the requested relief. Appellants filed a Notice of Appeal to Commonwealth Court on November 4, 2020.

On November 5, 2020, the Commonwealth Court reversed the Court of Common Pleas decision and ordered that all candidates, watchers, or candidate representatives be permitted to be present for the canvassing process pursuant to 25 P.S. § 2650 and/or 25 P.S. § 3146.8.

II. Statement of Facts

On November 3, 2020, watchers and representatives appeared at the Pennsylvania Convention Center—on behalf of the Campaign, other Republican Candidates on the ballot, and the Republican National Committee—at approximately 7:00 a.m. to observe the pre-canvass of the absentee and mail-in ballots receive by the Board prior to the finalization of the poll books. (R.56a–57a [20: 22-23, 21:4-6]). During the hearing of the Trial Court, a witness (“Witness”) who was a Representative of the Campaign testified by Zoom regarding the set-up inside the Pennsylvania Convention Center.

At the beginning of the hearing, the Witness advised the Court that he would “be happy to turn the phone around if that would be easier or more descriptive so that you could see.” (R.57a [22: 17-20]). However, the City Solicitor objected to “any sort of video tour of the room in that fashion.”

(R.57a [23: 2-4]). The Court noted that it would “rather just hear a description at this point,” preventing Appellee from developing a full record.² (R.57a [23: 11-13]). The Court asked the Witness to use “feet, meters, whatever you want to use.” (R.57a [23: 18-19]). Accordingly, the hearing proceeded with the Witness only describing the facility and he did not use any video or photographic aids.

The room is a very large hall, divided into four discrete sections. (R.57a [21:25, 22:1-5]). There is also a space for storage, sorting, processing

² Even though the Solicitor objected to allowing the Witness to provide video evidence of the mail-in and absentee ballot processing areas on privacy grounds, a simple internet search demonstrates that media organization were allowed to take videos and photographs of the processing on-going in the Pennsylvania Convention Center and a live feed camera was setup. The expanse of the space and the distance between the watchers and representative and the ballot processing areas is apparent from those publicly available videos and photographs. See https://www.cnn.com/politics/live-news/trump-biden-election-results-11-07-20/h_512dfb9b046c499a572519af50e26f5a; <https://www.phillymag.com/news/2020/11/05/election-watchers-philadelphia-vote-count/>; <https://philadelphia.cbslocal.com/2020/11/06/philadelphia-enters-day-four-of-counting-mail-in-ballots-roughly-50000-more-votes-to-go/>. “An appellate court may take judicial notice of a fact to the same extent as a trial court.” *Goff v. Armbecht Motor Truck Sales, Inc.*, 426 A.2d 628, 630 n. 4 (Pa. Super. Ct. 1980). See *York County Tax Claim Bureau Donalynn Props. v. York County Tax Claim (In re Appeal of Luciani)*, 3 A.3d 769 n. 10 (Pa. Commw. Ct. 2010), *overruled in part on other grounds Horton v. Wash. County Tax Claim Bureau*, 81 A.3d 883, 889 (Pa. 2013) (taking judicial notice of information on a website).

and receiving ballots. (R.57a [22:1-4]). There are many tables set up in a variety of ways, depending on the section. (R.57a [22:10-11]). In the first section alone, there are about 35 tables. (R.57a [22:13-15]).

He stated that “the closest we can get to the first table in each row is approximately . . . 15 to 18 feet. The one row is more like from the [sic] 25 to 30 feet. And that’s the first in each of those three rows of 15. So . . . then each table is set off further back from the other. I would say roughly 5, maybe 6 feet from each of them. So they just keep adding depth distance-wise.” (R.57a[23:21-24:5]). The Witness went on to describe that the closest table to him is about fifteen feet from him and the table that is the furthest away is about 105 feet away. (R.57a [22:15- 25:2]). A fence that is approximately waist high separates the representatives from the tables and the Election Board workers. (R.58a [25:5-10]). As there are no floor coverings, the room is very loud with an echo so that representatives cannot hear anything that is going on at the tables. (R.58a [28:3-7]).

The Witness went on to describe the activities he was observing, including extraction, which is where workers feed the ballot envelopes through a machine to slice them open and remove the materials inside. (R.58a [28:12-21]). Again, while the Witness was approximately 20 feet from the first desk, there were at least two other desks behind it that were

much farther away. (R.58a [28:23-29:6]). He specifically noted, representatives were able to see some activity taking place at the tables in the first four rows, including opening envelopes and pulling out materials from the opened envelope. (R.59a [29:22-30:9]). “[I]f you're watching closely, you can discern if it is what's referred to here as the “naked ballot,” meaning not in a secrecy envelope, sometimes.” (*Id.*) But importantly, even at those closest rows, “We're not able to discern whether, if there is a secrecy envelope, whether the secrecy envelope has any markings on it because we're simply not close enough to be able to see that.” (*Id.*) In contrast to the first four rows, at “[t]he tables -- the desks that are further back, you're simply able to see people pulling things out of an envelope but not really able to discern what, if anything, is being pulled out.” (R.59a [29:22-30:9]).

The Witness also noted that he was “unable to see what is on the backs of the envelope.” (R.61a [37:13-18]). He was also unable to see whether or not a name or a date is missing or wrong and he was unable to ensure that the declaration on the envelope “had been completed as we understand the statute to require it to be completed.” (R.61a [37:22-38:11]). He also could not tell if the secrecy envelope has markings on it in violation of the Election Code. (R.61a [38:16-22]).

The Witness went onto explain that a worker then transports the ballots to a table behind all of the desks and that the election board workers “do something with [the ballots]. We can’t see what they do.” (R.59a [30:21-24]). Notably, the Witness testified that he could not report much information back to the candidate he was representing:

Question: And you said that you’re there on behalf of a candidate, Candidate Trump. What, if anything, are you able to report back to him about whether the Board of Elections’ workers are adhering to the procedures as laid out in the statute?

The Witness: Little. We’re not able to report -- I’m not able to report back anything as it relates to the review for sufficiency of the declaration on the outside of the ballot, or the envelopes. As it relates to whether naked ballots or marked secrecy envelopes are being pulled, **we can report only what we’re able to see on the first row of desks, essentially.** We have attempted to get a better view by using binoculars. But the process is – the extraction process is moving so fast that it’s really impossible to see even using binoculars the desks that are behind the first one in each row. So there’s very little that we’re able to report back as to whether there’s any ability to object for failure to comply with the requirements as we understand.

(R.59a [31:18 -32:14]).

Upon cross examination, the Witness reiterated many of the same points. When the City Solicitor asked if the Witness could change his vantage point, he replied that after the ballots have been opened a gentlemen moved the ballots, “and I – you **cannot see what’s happening just because of distance.** You just – you know something’s going on because the ballot

trays go back there and other ballot trays come back out. But we don't know – we can't see what's going on back there.” (R.60a [34:14-23]). The Witness also repeated that while he could stand 15 feet from the first two rows of the envelope review, “[e]verything else is probably closer to the 20 or longer more distant.” (R.60a [36:10-13]). Despite these repeated statements that the Witness could not adequately observe, the Trial Court denied the petition.

The Commonwealth Court reversed. The Commonwealth Court did not ignore the facts presented at the Trial Court, but instead credited them. [Appellant Brief, App’x A at 6-7.] The Commonwealth Court noted that while Appellee presented evidence, Appellants did not. (*Id.* at 7.) Nonetheless, as the Commonwealth Court noted, the trial court made findings of fact, “contrary to the uncontradicted testimony of the Witness,” regarding the layout of the Pennsylvania Convention Center for the canvassing process. (*Id.* at 7.) Based on the evidence actually presented at the trial court, the Commonwealth Court concluded, “while he was technically in the room where the canvassing was occurring in strict compliance with the text of the Election Code, [the Witness’s] inability to actually observe the canvassing processes in a meaningful way completely frustrates the intent of the Election Code.” (*Id.* at 8.) Accordingly, the Commonwealth Court reversed the trial court’s order. (*Id.* at 8.)

SUMMARY OF THE ARGUMENT

This Court should affirm the Commonwealth Court's decision.

This matter is not moot because the order had not expired as of the date of the appeal because absentee and mail-in ballots were still being processed by the Philadelphia Elections Board. Both parties agree that the matter is not moot.

Even if the matter was moot, exceptions to the mootness doctrine apply and counsel this Court to decide the matter on the merits. This harm is likely to repeat in future elections, and due to the very nature of elections and the time the appellate process takes, will likely avoid appellate review again in the future. Moreover, as a matter addressing rules pertaining to an election's tabulation, this matter is of great public importance.

The statutes at issue, 25 P.S. § 2650, 25 P.S. § 3146.8(b), and 25 P.S. § 3146.8(g)(2), are plain and unambiguous in their language and purpose, and provide for candidates and political parties to be in the room and present when pre-canvassing, tabulation, and canvassing of absentee and mail-in ballots occurs. County Board of Elections may not engage in semantics with these requirements, which are intended to confer upon the process integrity and transparency. Even if the statutes at issue are ambiguous, canons of statutory interpretation applicable to the Election Code require this Court to

interpret the statute in a way that promotes the right to vote, and does not promote potential fraud, which disenfranchises lawful voters, and distrust.

The Philadelphia Board of Elections configured Pennsylvania Convention Center Hall F in way that did not provide the Campaign or any candidate or political party with the ability to be “present” and “in the room” during the Board’s absentee and mail-in ballot activities, casting a cloud over the ballots processed and the integrity of the vote.

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ARGUMENT

I. The issue raised in Appellants' petition is not moot.

As the Appellants correctly recognize, “[t]he mootness doctrine requires that ‘an actual controversy must be extant at all stages of review.’” Appellant Brief at 27 (citing *In re Cain*, 590 A.2d 291, 292 (Pa. 1991)). Under that standard, a case might be rendered moot if an order expired upon its own terms prior to the appeal concerning the legitimacy of the order, because “no purpose is...served by passing upon the legitimacy of orders that at this point have no legal force and effect.” *Pa. Coal Mining Assn v. Commonwealth*, 498 Pa. 1, 4, 444 A.2d 637, 638 (1982) (citing *Epstein v. Pincus*, 449 Pa. 191, 296 A.2d 763 (1972)). On the other hand, if, as is the case here, an order has not expired as of the date of the appeal concerning the legitimacy of the order, then the case must be decided. Here, the issue of the legitimacy of the Commonwealth Court Order is not moot because the order has not expired and should still be applied to the Board’s ballot counting efforts.

The text of the Commonwealth Court Order required the trial court to enter an order requiring that “all candidates, watchers, or candidate representatives be permitted to be present for the canvassing process pursuant to 25 P.S. § 2650 and/or 25 P.S. § 3146.8 and be permitted to

observe all aspects of the canvassing process within 6 feet, while adhering to all COVID-19 protocols. . . .” Appellant Brief at 1. As the Board recognizes, “even though Election Day is over . . . the Board has counted most of the ballots, and the election results appear to be resolved[,]” the Board nonetheless “still must count *some* ballots. . . .” Appellant Brief at 27. The Board should be required to comply with the Commonwealth Court Order as it counts *all* ballots, not just the ballots that seemingly decided the election.

II. Even if the issue was moot, the issue raised in Appellants’ petition is of public importance and capable of repetition and likely to avoid review.

Even if this Court were to decide that the observer placement issue is moot (for the reasons outlined above, it is not), this Court has nonetheless “repeatedly recognized two exceptions to the mootness doctrine: (1) for matters of great public importance and (2) for matters capable of repetition, which are likely to elude review.” *Pilchesky v. Lackawanna Cty.*, 624 Pa. 633, 650, 88 A.3d 954, 964–65 (2014) (citing *Rendell v. State Ethics Com’n*, 603 Pa. 292, 983 A.2d 708, 719 (Pa. 2009)). “Given the abbreviated time frame applicable to elections and the amount of time that it takes for litigation to reach this Court, [the capable of repetition yet evading review] exception is particularly applicable when the question presented relates to an

election dispute.” *Reuther v. Del. Cty. Bureau of Elections*, 205 A.3d 302, 306 n.6 (Pa. 2019) (citing *Nutter v. Dougherty*, 595 Pa. 340, 938 A.2d 401, 405 n.8 (Pa. 2007)).

Ballot issues, canvassing issues, and other election-related issues are important issues that are capable of repetition yet likely to evade review because “[t]he time constraints inherent in election matters often leave little time for deliberation upon challenges relevant thereto such that courts may not always be able to render an appropriate decision.” *Pilchesky*, 88 A.3d at 964; *see also In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 577 Pa. 231, 235 n.3, 843 A.2d 1223, 1226 (2004) (citing *Legal Capital, LLC, v. Medical Professional Liability Catastrophe Loss Fund*, 561 Pa. 336, 750 A.2d 299 (Pa. 2000)) (finding an “issue regarding third-party deliveries of absentee ballots not to be moot since it is an important issue, of general concern beyond this election, which is capable of repetition and of escaping review”); *W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co.*, 512 Pa. 23, 27, 515 A.2d 1331, 1333 (1986) (addressing the appellants’ rights to collect signatures for a gubernatorial candidate’s nominating petition and noting that “[t]hese issues are highly unlikely to reach the appellate courts during the relatively brief campaign season”).

Here, like the many election-related issues that have been before the Court in the past, this Court is presented with an important issue (regarding the integrity of our electoral process) that would be likely to continue to evade review if dismissed on mootness grounds given the time constraints inherent to ballot canvassing. Issues relating to the placement of observers will continue to arise twice a year on Election Day, and such issues are likely to continue to evade this Court's review given the compressed twenty-day timeline for the ballot-counting process. *See* Appellant Brief at 31 (citing 25 P.S. § 3146.8(g)(1.1); 25 P.S. § 2642(k)). Accordingly, this Court should hear this matter on the merits.

III. The Commonwealth Court's decision should be affirmed.

A. Taken as a Whole, The Plain Language of the Election Code Confers Upon the Candidates and Watchers the Right to Observe and Vet the Tabulation.

The plain meaning and purpose of the statutes at issue is to provide the public the opportunity to observe and vet the canvassing and tabulation of the vote. In 1937, the Pennsylvania General Assembly included the concept of “watchers” in the then newly enacted Pennsylvania Election Code, a statutory scheme addressing the administration of elections in the Commonwealth. *See* 25 P.S. §§ 2600, et. seq. Years later, the United States Supreme Court noted: “[S]unlight,” as has so often been observed, “is the

most powerful of all disinfectants.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 305 (1964).

The Pennsylvania General Assembly understood that sentiment long ago and intertwined the concept of watching with the voting process, enshrining transparency and accountability into the system in which Pennsylvanians choose elected officials. After all, reasonable people cannot dispute that “openness of the voting process helps prevent election fraud . . . and various other kinds of electoral evils.” *PG Publishing Co. v. Aichele*, 705 F.3d 91, 111 (3d Cir. 2013).

The issue here involves two sections of the Pennsylvania Election Code, involving a candidate’s right to have watchers and representatives at the canvass and tabulation of votes:

- (1) Section 2650(b) states: Every candidate shall be entitled to be *present* in person or by attorney in fact duly authorized, and to participate in any proceeding before any county board whenever any matters which may affect his candidacy are being heard, including any computation and canvassing of returns of any primary or election or recount of ballots or recanvass of voting machine affecting his candidacy. 25 P.S. § 2650 (italics added).

(2) Section 3146.8 provides the right of a candidate to observe the canvassing of absentee ballots and mail-in ballots. The statute states, in pertinent part: “Watchers shall be permitted to be *present* when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded. 25 P.S. § 3146.8(b) (italics added). That section of the Election Code also states: “One authorized representative of each candidate in an election and one representative from each political party shall be permitted to *remain in the room* in which the absentee ballots and mail-in ballots are canvassed. 25 P.S. § 3146.8 (g)(2) (italics added).

Thus, this case turns on what it means to be “present” and “remain in the room” in the context of a candidate’s rights. The two work together. The Board asks this Court to read these unambiguous statutes with a hyper-technical focus on the words themselves without taking account of the statute as a whole and subverting the very purpose of the statutes: public observation of the vote and tabulation. In the Trial Court, the Board of Elections argued: “We have ensured not only that they’re able to remain in the room, but that all of these activities are occurring in a row along this designated area so that there’s a clear line of sight to all of them. Every

single part of the process, every single stage of the process is fully visible.” (R.54a [11:13-25]). The Appellants ignore the intent to achieve election transparency that the legislature integrated into the text of its voting scheme. *See* 1 Pa. C.S. § 1921(a) & (c) (“The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly” and “[w]hen the words of a statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters: . . . (4) The object to be attained. . .”).

The Board seems to be indicating that as long as the watchers and representatives are in the room (whether the room is the size of an office or the size of a football field) that the requirements of the Election Code are met. However, allowing such a narrow interpretation defies logic and reasonableness. Standing at one end of a room the size of a football field, which coincidentally is about the size of the Pennsylvania Convention Center, is a lot different than standing at one end of a room the size of an office. If two people are having a conversation in one end zone of a football field and another person is standing in the opposite end zone, no one would claim that person was “present” during the conversation of the other two. But that is the interpretation the Appellants seek.

Mandating a distance that prevents a candidate or his watchers or representative to be truly *present* actually shrouds the election process in a veil, denying transparency and accountability. In this case, the Witness testified that the activity in the Convention Center takes place at rows and rows of tables, some at least 100 feet from where he was permitted to stand. By erecting a fence around multiple rows of tables where activity is occurring and mandating a twelve foot distance from the closest table, the Board of Elections has set up a scheme that effectively eliminates the role of a watcher or representative. This casts a cloud over these ballots counted in secrecy.

B. Challenging is not the issue in the within litigation.

The concept of when challenges are made in the context of the canvass of votes is not an issue in the within matter and is not part of the relief that the Campaign seeks. The Campaign does not dispute that the Supreme Court addressed the issue of authorized representatives observing the canvass and pre-canvass but not challenging ballots. See *In re November 3, 2020 General Election*, No. 149 MM 2020, slip op. at 16-17, 28-29 (Pa. Oct. 23, 2020). The right to challenge ballots and the right to observe are distinct, and 25 P.S. 3146.8 allows authorized representatives to observe.

The Campaign is not seeking to change the law and have the ability to challenge mail-in ballots during the canvass.

The Campaign simply wants the right to observe in a meaningful way that would allow the Campaign to determine whether the Board was following legal processing procedures, and if not, to challenge that *process* through appropriate litigation. Despite the Campaign never indicating in the proceeding below that it wanted to audit the votes, the Trial Court ruled against Appellee, seemingly partially relying on some mistaken notion that the Campaign seeks to audit. It does not. It simply seeks to be “present” and “in the room” where ballots are being inspected, opened, counted, and tabulated, concepts which any reasonable person would interpret as the ability to meaningfully observe.

Additionally and perhaps most importantly, when the General Assembly allowed for watchers and representatives, it acknowledged the humanity of the entire process. As described the Witness, the process occurring at the Convention Center involves many different people performing many different activities. Providing candidates with watchers or representatives incorporates oversight into the process so that in the event that mistakes occur, the candidate can consider his options. However, without the meaningful observation, watchers and representatives cannot

properly report information to their candidate and therefore cannot perform their role.

In federal court litigation leading up to the November 3, 2020 General Election, the issue of watchers came up in a completely different context. In *Trump v. Boockvar*, Judge Nicholas Ranjan of the U.S. District Court for the Western District of Pennsylvania held that Pennsylvania's county residency requirement for poll watchers was constitutional and abstained from opining on whether poll watchers were permitted at county election offices, satellite offices, and ballot return locations. *See Trump v. Boockvar*, No. 2:20-cv-966, slip op. at 43- 50, 116-36 (W.D. Pa. Oct. 10, 2020). This decision is irrelevant to the relief sought by the Campaign, and the rules governing authorized representatives who observe the pre-canvass and canvass of absentee ballots were only mentioned to contrast them with the rules governing poll watchers. Indeed, Judge Ranjan noted that Secretary of State Kathy Boockvar's guidance on the scope of duties for an authorized representative during canvassing of mail-in ballots had "minimal relevance to the current disputes at issue here." *Id.* at 133, n.23.

C. Watching and elections go hand in hand.

Any interpretation of the Election Code's definition of the term "present" or the term "room" to preclude meaningful observation by

watchers and representatives fails the common sense test, and possibly stems from some motive that does not include transparency and accountability. The Statutory Construction Act's mandate that statutes must be "liberally construed to effect their objects and to promote justice." 1 Pa. C.S. § 1928(c). The statutes at issue are clear: the voting process and watching go hand in hand. To dislodge one from the other perverts the Election Code's pattern of assuring that candidates and their representatives can observe and vet the process should an election contest arise or be necessitated.

The trial court's rejection of the Campaign's request for transparency undermines the policy reasons supporting the right of watching at any session of the Board of Elections. Simply put, the watchers and representatives are the eyes and ears of the candidate and if that is the case, that includes the ability to actually see what is happening. Being told to stand so far away that even binoculars were not useful does not encompass the meaning of the word, "present." (R.59a [32:6-14]) The handling of the ballots that occurs in the opening, processing, and tabulation of the votes, as occurred inside the Pennsylvania Convention Center, all involve a great deal of human contact, and therefore, room for human error. It is that uncertainty that a candidate has the right to guard against by having watchers and

representatives in his stead. A candidate's right to be present via a watcher or representative and observe the tabulation and canvassing of the ballots that determine whether she will be elected to the office she is seeking underscores both the seriousness of the issue and the commitment to fairness and transparency enshrined in the Election Code.

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CONCLUSION

From the inception of the Pennsylvania Election Code in 1937, the General Assembly prioritized sunshine in the voting process by enshrining in the Code the candidates and political parties right to have watchers, intertwining the concept into the framework of the statute. The Philadelphia County Board of Elections seeks to block that sunshine. When watchers and representatives cannot see the tabulation and canvassing of votes, those actions happen in secrecy, opening questions about the legitimacy of the process. To interpret the Election Code to allow such secrecy casts a black cloud on whether future elections will be free, fair, and transparent.

For the foregoing reasons, this Court should affirm the decision of the Commonwealth Court below and enter judgment for the Campaign.

November 13, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 2135

I hereby certify that the foregoing Brief of Appellee complies with the length requirements of Pa R.A.P. 2135. According to the word count of the word processing system used to prepare this Brief (Microsoft Word), the Brief contains 5,298 words, not including the supplementary matter as described in Pa. R.A.P. 2135(b).

Date: November 13, 2020

/s/Linda A. Kerns

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief for Appellee upon counsel of record by electronic filing and by first class mail, postage prepaid.

Date: November 13, 2020

/s/Linda A. Kerns

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