

IN THE SUPREME COURT OF PENNSYLVANIA

No. 30 EAP 2020

IN RE: CANVASSING OPERATION

APPEAL OF: CITY OF PHILADELPHIA BOARD OF ELECTIONS

On Allowance of Appeal from the November 5, 2020,
Single-Judge Order of the Honorable Christine Fizzano Cannon of the
Commonwealth Court, No. 1094 CF 2020, Reversing the November 3, 2020 Order
of the Honorable Stella Tsai of the Court of Common Pleas of Philadelphia
County, November Term 2020, No. 07003

**BRIEF OF APPELLEE-INTERVENOR
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I. STATEMENT OF THE QUESTIONS ACCEPTED FOR REVIEW

1. Whether, as a matter of statutory construction pursuant to Pennsylvania law, the Commonwealth Court erred in reversing the trial court, which concluded that Petitioner City of Philadelphia Board of Elections' regulations regarding observer and representative access complied with applicable Election Code requirements.
2. Whether the issue raised in Petitioner's petition for allowance of appeal is moot.
3. If the issue raised in Petitioner's petition for allowance of appeal is moot, does there remain a substantial question that is capable of repetition yet likely to evade review, and, thus, fall within an exception to the mootness doctrine.

II. STATEMENT OF INTEREST OF THE PENNSYLVANIA DEMOCRATIC PARTY AND IMPERATIVE NEED FOR IMMEDIATE RELIEF IN THIS LIVE CONTROVERSY

Appellee-Intervenor the Pennsylvania Democratic Party ("PDP") is a "major political party" as defined in the Pennsylvania Election Code, 25 P.S. §§ 2601 *et seq.* and is the largest political party by registration in Pennsylvania. As of October 19, 2020, 4,229,163 voters, 857,041 of whom live in Philadelphia County, are registered as Democrats. In the 2020 General Election, PDP fielded candidates for all statewide elected positions and virtually all legislative seats on the 2020 General Election Ballot.

PDP fully joins the statement of the case and arguments of the Appellant, the City of Philadelphia Board of Elections (the "Board of Elections") on appeal of the November 5, 2020 decision of a single judge of the Pennsylvania Commonwealth Court. PDP submits this brief on the mootness question only to emphasize the

importance of the Court's resolution of this case to the ongoing canvassing effort, and to the resolution of the 2020 general election, generally.

This Court's resolution of this case is also critical to the resolution of the post-election action that the Appellee here, Donald J. Trump for President, Inc., (the "Trump Campaign") has filed in the United States District Court for the Middle District of Pennsylvania, *Donald J. Trump for President, Inc. v. Boockvar*, No. 20-2078 (M.D. Pa.). The Court's clarification here that the Commonwealth Court erred in its interpretation of the Pennsylvania Election Code ("Election Code"), will address the claims now pending in the federal court, as it did in the prior litigation that the Trump Campaign brought months ago in *Donald J. Trump for President, Inc. v. Boockvar*, No. 20-956 (W.D. Pa.).

III. SUPPLEMENTAL BACKGROUND

The case that the Trump Campaign filed in the U.S. District Court for the Middle District of Pennsylvania on November 9, 2020, raised the same state-law question as does this case. It argues that the Board of Elections violated state law (specifically, 25 P.S. § 3146.8) by not permitting the Trump Campaign's "watchers to be within 6 feet of 'all aspects' of the pre-canvassing process." M.D. Pa. Compl. ¶ 145). The Trump Campaign maintains that this violation of state law resulted in violations of its federal constitutional rights, specifically, rights under the Due Process Clause, Equal Protection Clause, and Electors and Elections

Clauses. (M.D. Pa. Compl. ¶¶ 176, 178-179, 186, 188-190, 200-201). The Trump Campaign asserts that, had its representatives been able to more closely observe the canvassing of the mail-in ballots in Philadelphia County (among other places), it would have been able to identify ballots that it alleges were illegally cast in numbers sufficient to challenge the results of the election. On this basis, the Trump Campaign has asked the federal court to “prohibit[] [Pennsylvania] from certifying the results of the General Election.” (M.D. Pa. Compl. ¶ 15).

Relying on the single-judge Commonwealth Court opinion at issue in this case, the Trump Campaign’s currently pending federal complaint asserts that “the [Board of Elections] would not permit the Trump Campaign’s watchers to be within 6 feet of ‘all aspects’ of the pre-canvassing process in direct contravention of Commonwealth Court Judge Christine Fizzano Cannon’s November 5, 2020 Order.” (M.D. Pa. Compl. ¶ 145). As the Board of Elections explains, however (at 35-44), unlike the decision of the Court of Common Pleas of Philadelphia County,¹ the Commonwealth Court’s decision was not based on any actual language in the Election Code or on evidence before the lower court as to how the observation of the pre-canvassing and canvassing process was conducted.²

¹ *In re Canvassing Observation Appeal of Donald J. Trump for President, Inc.*, No. 201107003, 2020 WL 6556823, at *4 (Pa.Com.Pl. Nov. 03, 2020).

² As explained to the trial court, the way observation was permitted was very much tied to this historical moment, both in terms of the scale of the mail-in vote to be canvassed and the accommodations required to be made because of the COVID-19 pandemic: “[T]he health

The Trump Campaign’s current federal claims are directly tied to the issue at the heart of the Board of Elections’ appeal to this Court: whether, as a matter of Pennsylvania law, the Commonwealth Court erred in reversing the trial court, which concluded that Board’s regulations regarding observer and representative access complied with the Election Code’s requirements.³ The Trump Campaign’s federal complaint seeks sweeping relief—“an emergency order prohibiting [the Commonwealth] from certifying the results of the General Election.” (M.D. Pa. Compl. ¶ 15). The order the Campaign now seeks would have profound consequences, including the disenfranchisement of over one million of the

department has promulgated COVID 19-related guidelines, including everyone must be masked and at least six feet apart.” (R. 19a). Assistant City Solicitor Sean McGrath further testified, “[T]he physical setup in the Convention Center was done based on a variety of complicated factors. Obviously, of paramount importance, security of 350,000 ballots that are now being processed and have been processed since 7 o’clock this morning. Not only that, but ensuring voter privacy is a part of that process. We have envelopes that are being opened, declaration envelopes that are being opened, secrecy envelopes that are being opened, ballots that are being extracted, several different stages where voter privacy needs to be taken into account. In addition, there are also legitimate paramount concerns about COVID-19. All of these things have been taken into account to set up the physical space.” (R. 54a).

³ A majority of the Trump Campaign’s grievances arise out of its erroneous interpretation of Section 3146.8 of the Election Code. *See, e.g.*, M.D. Compl. ¶¶ 3-5 (generally asserting that the Trump Campaign’s representatives were not given meaningful access observe and monitor the pre-canvassing and canvassing process); *Id.* ¶ 13 (claiming that the mail-in ballots were counted in secret with no monitoring); *Id.* ¶ 140-148 (alleging that Trump Campaign watchers and representatives were not allowed to be present when the envelope declarations were reviewed for sufficiency); *Id.* ¶ 150 (asserting that watchers in Allegheny and Philadelphia counties did not have the same right as watchers in other counties to present when the mail-in ballot envelopes were reviewed and opened and when such ballots were counted and recorded); *Id.* ¶ 178-179 (claiming that the Trump Campaign was denied credentialing of its submitted watchers and representatives); *Id.* ¶ 188-190 (alleging that the Trump Campaign’s access and ability to observe ballots being pre-canvassed and canvassed was denied or obstructed).

Commonwealth's voters.⁴ This Court's determination that the Court of Common Pleas of Philadelphia correctly interpreted Pennsylvania election law is thus necessary, both to authoritatively settle a disputed question of state law and to help bring closure to the 2020 general election.

IV. ARGUMENT

A. This Case Is Not Moot

As the Board explains (at 27-32), this case is not moot for at least three reasons. First, and most straightforwardly, the Board continues to count ballots. As long as the Board is counting ballots, "an actual controversy" remains as to the procedures it must follow in doing so. *See In re Cain*, 527 Pa. 260, 263, 590 A.2d 291, 292 (1991). Second, even if the case were moot, it would nonetheless fall into the exception for controversies "capable of repetition, yet evading review." *Public Def.'s Office of Venango Cnty. v. Venango Cnty. Court of Common Pleas*, 586 Pa. 317, 325, 893 A.2d 1275, 1279-1280 (2006). Challenges to election rules frequently fall within this exception, as this Court has observed. *See Reuther v. Delaware Cnty. Bureau of Elections*, --- Pa. ---, 205 A.3d 302, 306 n.6 (2019). This case is no different. Because it challenges only observation procedures

⁴ The Trump Campaign has clearly targeted voters based on their residency in Democrat-majority counties. *See* (M.D. Pa. Compl. ¶¶ 3, 6, 137) (limiting Defendant Boards of Election only to those of Allegheny, Centre, Chester, Delaware, Montgomery, Northampton and Philadelphia Counties).

applicable during the counting of ballots (an even more circumscribed period than the full election cycle), there is little question that – even if the case were considered to be moot – it falls within this mootness exception.

PDP files this brief primarily to emphasize the third reason: the case presents an important question of state law, with great ramifications for the certification of the election. The Trump Campaign’s federal action is pending, with oral argument scheduled for November 17, 2020 and an evidentiary hearing scheduled for November 19, 2020 and the questions of Pennsylvania law posed there are the same as the questions before this Court. As the “ultimate expositor[] of state law,” this Court is the only tribunal that can definitively determine whether the Commonwealth Court erred with its November 5, 2020 ruling and it should do so. *See Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *Spence v. ESAB Grp., Inc.*, 623 F.3d 212, 216 (3d Cir. 2010) (“When ascertaining Pennsylvania law, the decisions of the Pennsylvania Supreme Court are the authoritative source.”).

Both here and before the federal court, the Trump Campaign continues to argue that 25 P.S. § 3146.8(b) and (g) required the Board to allow the Campaign’s representatives to approach within feet of individual ballot canvassers. Indeed, the Trump Campaign expressly rests its arguments on the understanding of Pennsylvania election law, as adopted in the Commonwealth Court order on appeal here, which that court issued after Election Day, arguing that the Board of

Elections “would not permit [the Trump Campaign’s] watchers to be within 6 feet of ‘all aspects’ of the pre-canvassing process in direct contravention of Commonwealth Court Judge Christine Fizzano Cannon’s November 5, 2020 Order.” (M.D. Pa. Compl. ¶ 145).

As the Board of Elections explains, however, the Commonwealth Court erred in its post-Election Day interpretation. If this Court agrees with the Board of Elections that the Board complied with § 3146.8, the Trump Campaign’s federal constitutional claims would dissolve. The question at issue here thus has continuing—indeed, significant—effect beyond the confines of this case. As a result, the question whether the Commonwealth Court erred is a live controversy and is not moot.

B. Resolution Of This Matter Will Bring Necessary Clarity To The Federal Litigation

As the Court is aware, the same interplay between state and federal cases arose earlier this year, when the Trump Campaign brought a federal suit, challenging aspects of the Commonwealth’s administration of Act 77, the 2019 mail-in voting law. *See Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, — F. Supp. 3d —, 2020 WL 4920952 (W.D. Pa. Aug. 23, 2020). At the same time, a different group of plaintiffs sued the Commonwealth in the Commonwealth Court, and the Secretary of State asked this Court to take

jurisdiction over that case. *Id.* at *5.⁵ As a result of the case then pending in state court, the federal court decided to abstain from resolving the federal case, explaining that the claims “depend[ed] on uncertain questions of state law, arising under a recently enacted state statute, that challenge [Boards of Elections’] purported exercise of their core constitutional authority to administer elections.” *Id.* at *8. The court added: “How the state courts interpret the unsettled state-law questions will dramatically alter the nature and scope of the federal-constitutional claims before the [federal] Court.” *Id.*

On September 17, 2020, this Court issued its ruling in *Pennsylvania Democratic Party v. Boockvar*, --- Pa. ----, 238 A.3d 345 (2020) interpreting many provisions of Act 77, many of which did not align with the Trump Campaign’s interpretation. Equipped with this Court’s authoritative interpretation of the provisions of Act 77 under review, the federal district court was able to address the remaining constitutional issues. *Donald J. Trump for President, Inc. v. Boockvar*, Case No. 2:20-cv-966, 2020 WL 5997680 (W. D. Pa. Oct. 10, 2020). In fact, the federal district court denied all of the constitutional relief that the Trump Campaign sought, holding that: 1) the uneven use of drop boxes between counties

⁵ Jeremy Mercer, the canvassing representative who testified before the Court of Common Pleas here, was also counsel of record for the Trump Campaign in this previous federal matter, where he sought declaratory relief that turned on his own interpretation of Act 77. The Campaign’s failure to seek clarification on the rights of canvassing representatives *prior* to Election Day is noteworthy.

does not violate federal equal protection or due process; 2) neither the Election Code nor substantive due process nor equal protection requires signature comparison for mail-in and absentee ballots; 3) the differential treatment between in-person and mail in ballots does not violate equal protection rights; and 4) the county-residency requirement for poll-watchers does not implicate constitutional rights. *Id.* This Court’s resolution of the state-law questions at issue here should likewise help resolve the federal case currently pending.

As the U.S. Supreme Court recently explained, where a dispute “presents novel issues of state law peculiarly calling for the exercise of judgment by the state courts,” and the resolution of such a question will conclusively determine the viability of federal constitutional claims, a state court, not a federal court, should authoritatively resolve the question of state law in the first instance. *McKesson v. Doe*, No. 19-1108, 2020 WL 6385692, at *3 (U.S. Nov. 2, 2020) (per curiam); *see Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997); *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941) (“If there was no warrant in state law for the Commission’s assumption of authority there is an end of the litigation; the constitutional issue does not arise.”). This Court should therefore exercise jurisdiction, reach the merits and issue an authoritative opinion on this important question of Pennsylvania law.

V. CONCLUSION

This Court's ability to bring clarity to the Election Code's requirements for the accommodation of canvassing representatives will address many of the issues pending in the current federal matter. Because of the rapidly approaching deadlines for the certification of election results, the selection of electors and the resolution of any disputes relating to those electors, *see* 25 P.S. §§ 2642(k), 3166; 3 U.S.C. §§ 5, 6, PDP respectfully requests that the Court issue its opinion as promptly as is possible under the circumstances.

Respectfully submitted,

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Dated: November 13, 2020
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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 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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