

IN THE SUPREME COURT OF PENNSYLVANIA

425 EAL 2020

IN RE: CANVASSING OPERATION

APPEAL OF: DONALD J. TRUMP for PRESIDENT, INC.,

**ANSWER TO EMERGENCY PETITION FOR ALLOWANCE OF APPEAL
BY DEFENDANT THE CITY OF PHILADELPHIA BOARD OF
ELECTIONS**

Emergency Petition for Allowance of Appeal from the Order of the
Commonwealth Court entered November 5, 2020, at No. 1094 CD 2020,
Reversing The Order Of The Honorable Judge Stella Tsai, In The Court Of
Common Pleas Of Philadelphia County,
Dated November 3, 2020, at November Term, 2020 No. 07003

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I. INTRODUCTION

Appellant's request for this Court to grant this appeal should be denied. The Commonwealth Court's decision was in compliance with Pennsylvania's Election Code and there was nothing erroneous in that decision. The City of Philadelphia Board of Elections ignores the spirit of the words contained in United States Supreme Court decision, *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 305 (1964), when they stated "[S]unlight," as has so often been observed, "is the most powerful of all disinfectants."

Under Pennsylvania's Election Code, the status given to political bodies grants them standing regarding watchers "including the right to be **present** when envelopes containing the official absentee ballots are opened, counted and recorded." *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223 (Pa. 2004) (emphasis added); *In re General Election-1985*, 531 A.2d 836, 838 (Pa. Commw. Ct. 1987) (panel decision) (finding that a candidate for office in the election at issue suffers a direct and substantial harm sufficient for standing to contest the manner in which an election will be conducted).

Pennsylvania Election Code, involving a candidate's absolute right to have watchers and representatives at the canvass and computation of votes states:

(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 (Emphasis 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) (Emphasis added).

This is a participatory process that requires the “observer” to be able to see the same thing the election worker is observing. Any other interpretation of the statute would essentially eviscerate its intent. Candidates have the absolute right to observe the process being undertaken by the City of Philadelphia Board of Elections. Contrary to the legal mandate imposed upon them, they now act in a manner that essentially frustrates the letter and spirit of the law. It is beyond cavil, that the statutory and plain language meaning of being “present”, “watching”, and “observing” means just that; to wit, to be able to actually observe that which the election employee is doing and thus observe the actual ballot. As stated in the brief below, standing at one end of a room the size of a football field, which coincidentally is about the size of the Philadelphia Convention Center, does not

provide the ability to be “present” or “watching” the canvassing process, which takes place between the hands of the board of election employees.

II. THE PHILADELPHIA BOARD OF ELECTIONS ACCESS REGULATIONS AND PATTERN OF MALFEASANCE IN CONDUCTING THE ELECTION VIOLATES THE ELECTORS CLAUSE OF THE CONSTITUTION AND THE EQUAL PROTECTION AND DUE PROCESS GUARANTEES OF THE FOURTEENTH AMENDMENT.

The Electors Clause of Article II, Section 1 of the U.S. Constitution, in plain terms, vests the exclusive power for determining the manner of selecting electors in the “Legislature” of each state. U.S. Const. art. II § 1, cl. 2; *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (“The constitution Leaves it to the legislature exclusively[.]”). Unlike a state’s authority to enact statutes pursuant to its own state constitutions, laws enacted to regulate the conduct of presidential elections operate “‘by virtue of a direct grant of authority’ under the United States Constitution.” *Lucero v. Simon*, 8th Cir. No. 20-3139 (Oct. 29, 2020) (quoting *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000)). Neither state constitutions, nor an executive official’s enforcement of these laws can modify or override this authority. *See McPherson*, 146 U.S. at 35; *see also Palm Beach*, 531 U.S. at 76-77. As a result, election laws enacted by the Pennsylvania legislature must be adhered to as closely as possible in form and effect. Enforcement of election laws contrary to the legislature’s direction and intent would override the Pennsylvania constitution.

III. APPELLANT SEEKS TO VIOLATE APPELLE'S EQUAL PROTECTION RIGHTS BY PREVENTING ACCESS TO THE CANVASS.

The Fourteenth Amendment protects “the right of all qualified citizens to vote, in state as well as in federal elections.” *Reynolds v. Sims*, 77 U.S. 533, 554 (1964); *Pierce v. Allegheny County Bd. Of Elections*, 324 F. Supp. 2d 684, 695 (W.D. Pa 2003); *Haakenson v. Parkhouse*, 312 F. Supp. 929, 931(E.D. Pa 1970). “Obviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted.” *United States v. Classic*, 313 U.S. 299, 315 (1941). Moreover, “the right to have the vote counted” requires that each such vote “at full value without dilution or discount.” *Reynolds*, 77 U.S. at 555 n.29. “Every voter in a federal . . . election . . . has the right under the Constitution to have his voted fairly counted, without its being distorted by fraudulently cast votes.” *Anderson v. United States*, 417 U.S. 211, 227 (1974). The Equal Protection Clause requires state actors to avoid arbitrary or disparate treatment of the members of its electorate, see *Bush v. Gore*, 531 U.S. 98, 105 (2000), because “a citizen has a constitutionally protected right to participate in “elections on an equal basis with other citizens in the jurisdiction,” *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). “The [equal protection] problem inheres in the absence of specific standards to ensure . . . equal application” of state election laws. *Bush*, 531 U.S. at 106. Thus, the Equal

Protection Clause mandates that county election officials be “confined by specific rules designed to ensure uniform treatment.” *Id.* Significant burdens on the right to vote are subject to a form of heightened scrutiny, with the burden on the government. *See Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992).

Pennsylvania law provides that each campaign and each party is entitled to have one representation in the room where pre-canvassing and canvassing occur. 25 P.S. § 3146.8(g)(1.1). In previous years, this included the ability for observers to interact with canvassing officials in a manner that did not interfere with their vote, observing their actions with sufficient detail to ensure that canvassing was being conducted in a manner that upholds state law, and able to raise objections if violations occur.

Here, the Philadelphia County canvass room is set up in a cavernous room, with the closest canvass table at least 15 feet away, and the farthest table approximately 100 feet away, with no ability to approach. The county says that these measures are necessitated by COVID-19. The Biden Campaign and Philadelphia also argue that Section 3146.8(g)(1.1) provides merely the right to be physically present in the canvass room, not the right to meaningfully observe whether election law is being violated.

Assuming certain facts can be discovered and entered into evidence, Philadelphia County’s process violates the Equal Protection Clause. The campaign

should confirm that the way Section 3146.8(g)(1.1) is being administered in other counties in Pennsylvania is analogous with how it has been administered in previous cycles in Philadelphia. If so, then this disparate treatment violates equal protection. No one required Pennsylvania to adopt these specific voter-integrity protections. But once adopted, they must be equally applied.

Moreover, since the burden is on the government under this heightened scrutiny, Philadelphia County must produce bone fide healthcare guidelines that justify the 18–100 feet of distance. CDC Guidelines require only six feet. The campaign should survey other counties and confirm that their procedures are consistent with CDC or other objective deadlines, proving that Philadelphia’s disparate treatment is arbitrary and capricious, in violation of the Equal Protection Clause.

Separately, under 28 U.S.C. § 1367 supplemental jurisdiction, we should also argue that Philadelphia’s reading of the statute meets the high bar of the doctrine of absurdity. Under its reading, the county currently could erect a large black curtain in front of the barrier restricting the representatives. Although they could see literally nothing and could not detect a truckload of false ballots being carted into the canvass room, they would nonetheless be physically within the room, so such a curtain would not violate the statute. Similarly, if a football field-sized convention area were used for the canvass, with observers kept over 500 feet

away from the canvassers such that the observers cannot even see if the canvassers are outright stuffing some ballots and destroying others, that too would not violate the statute. Instead, the statute should be read in a manner that allows reasonable observation to detect violations.

Date: November 5, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Date: November 5, 2020

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PROOF OF SERVICE

I hereby certify that on the 5th day of November, 2020, a true and correct copy of the foregoing ANSWER TO EMERGENCY PETITION FOR ALLOWANCE OF APPEAL was served upon the persons and in the manner indicated below which service satisfies the requirements of Pa.R.A.P. 121:

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