

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 CD 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

**PETITION TO INTERVENE BY SPEAKER OF THE PENNSYLVANIA
HOUSE OF REPRESENTATIVES BRYAN CUTLER AND
MAJORITY LEADER OF THE PENNSYLVANIA
HOUSE OF REPRESENTATIVES KERRY BENNINGHOFF**

CHALMERS & ADAMS LLC

Zachary M. Wallen

Pa. ID No. 309176

301 South Hills Village Drive

No. LL200-420

Pittsburgh, PA 15241

*Counsel for Proposed-Intervenor Appellees
Speaker of the Pennsylvania House of
Representatives Bryan Cutler and Majority
Leader of the Pennsylvania House of
Representatives Kerry Benninghoff*

Proposed Intervenors, Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives (collectively, “House Leaders”), by and through their undersigned counsel, hereby move to intervene as appellees in the above-captioned proceeding under Rule 2328 of the Pennsylvania Rules of Civil Procedure.

In support of this Petition, the House Leaders submit a:

- (1) Memorandum of Law in Support of Petition to Intervene by Speaker of the Pennsylvania House of Representatives Bryan Cutler and Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff, which is filed contemporaneously herewith;
- (2) Proposed Brief, which the House Leaders will file in this action if permitted to intervene, are attached as **Exhibit “A”**;
- (3) Proposed Order, granting this Petition, is attached as **Exhibit “B”**;
- (4) Verifications, affirming the truth of the factual statements set forth in this Petition, are attached as **Exhibit “C”**.

WHEREFORE, the House Leaders respectfully request that the Court **GRANT** this Petition to Intervene and allow the House Leaders to intervene as respondents in this action.

Dated: November 13, 2020

Respectfully submitted,

/s/ Zachary M. Wallen

Zachary M. Wallen

Pa. ID No. 309176
CHALMERS & ADAMS LLC
301 South Hills Village Drive
No. LL200-420
Pittsburgh, PA 15241

*Counsel for Proposed-Intervenor Appellees
Speaker of the Pennsylvania House of
Representatives Bryan Cutler and Majority
Leader of the Pennsylvania House of
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EXHIBIT A

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BRIEF OF PROPOSED-INTERVENOR APPELLEES SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES BRYAN CUTLER AND MAJORITY LEADER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES KERRY BENNINGHOFF

CHALMERS & ADAMS LLC

Zachary M. Wallen

Pa. ID No. 309176

301 South Hills Village Drive

No. LL200-420

Pittsburgh, PA 15241

*Counsel for Proposed-Intervenor Appellees
Speaker of the Pennsylvania House of
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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Per this Court's November 9, 2020 Order, Appellant's Petition for Allowance of Appeal was granted on the following issues:

- 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.

Suggested answer: No.

The Commonwealth Court answered the question in the negative.

- 2) Whether the issue raised in Petitioner's petition for allowance of appeal is moot.

Suggested answer: No.

The Commonwealth Court did not consider this question.

- 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.

Suggested answer: Based on the answer to Question 2, Question 3 is not ripe for review.

The Commonwealth Court did not consider this question

COUNTER-STATEMENT OF THE CASE

This case was originally brought by Appellee, Donald J. Trump for President, Inc. (the “Trump Campaign”), the official campaign committee of President Donald J. Trump. In fulfillment of the statutory provisions permitting candidate and political party representatives to be present at the prec canvass and canvass, the Trump Campaign appointed, *inter alia*, Jeremy Mercer to be its representative in Philadelphia County.

While Mr. Mercer was granted admission to the Philadelphia Convention Center where prec canvassing and canvassing operations were taking place:

Mercer explained that he was not able to get within 15 feet of the tables where the ballots were being processed. *See* [N.T.] at 24. Mercer explained the very large hall where the ballots were being processed had four areas with dozens of tables that spread out away from him at roughly 6-foot intervals behind the closest table, with the farthest one being located over 100 feet from Mercer. *See* N.T. at 23-24. Mercer also testified that a waist-high metal fence prevented him from getting any closer to the tables where the ballots were being processed. *See id.* at 25. As a result of these distances and barriers, Mercer explained that he was unable to observe the ballots being processed, the envelopes that contained them, whether the secrecy envelopes were present, or any markings on those envelopes. *See id.* at 27-30. Mercer explained that he even used binoculars to attempt to get a better view of the proceedings and ballots, but to no avail.

In Re: Canvassing Observation Appeal of: Donald J. Trump for President, Inc., No. 1094 C.D. 2020, 2020 WL 6551316, at *3 (Pa. Commw. Ct. Nov. 5, 2020).

The Trump Campaign sought relief from the order of the Philadelphia County Election Court, which denied the Trump Campaign’s oral motion on November 3,

2020. The Trump Campaign then appealed to the Commonwealth Court, and after briefing, Judge Fizzano Cannon reversed the Election Court and directed the Election Court to order closer access to the canvassing of ballots. The Appellants appealed, and this Court granted review on November 9, 2020. Canvassing remains underway in Philadelphia County as of the time of this filing.

SUMMARY OF THE ARGUMENT

Judge Fizzano Cannon’s Opinion below correctly applies the Pennsylvania Election Code, and accordingly, should be affirmed in its entirety.

Certainly, the County Boards of Elections have a difficult job to do in verifying, sorting, and tabulating the ballots of their respective counties—and that job is not made easier by the social distancing requirements imposed in the wake of the COVID-19 pandemic.

That being said, the volume of the ballots to be tabulated and the environment in which they must be tabulated does not permit a Board to ignore provisions of the Commonwealth’s Election Code concerning the rights of candidate and party representatives to observe that prec canvassing and canvassing.

The Philadelphia County Board of Elections imposed procedures that were completely violative of the spirit of the Election Code, by keeping candidate representatives at least 15 feet away from *any* canvassing of ballots, and spacing

additional canvassing tables further and further away, so that the farthest table was approximately 105 feet from the candidate representatives.

And while it is true that such representatives were *present* the same way a football fan sitting high up in Lincoln Financial Field is *present* at a Philadelphia Eagles game, the candidate representatives are not trying to observe 22 large football players running plays on a Sunday afternoon. The candidate representatives are more analogously trying to make sure the lettering on the football is correct from that distance—while knowing that any misstep could have a grave impact on this nation.

The canvassing process of absentee and mail-in ballots involves examining minute rows of text and is not something that can be meaningfully observed from over 100 feet away.

Therefore, should this Court be swayed by Appellant's arguments, this Court would be removing the ability of watchers, candidates, or candidates' representatives to meaningfully observe the canvassing process, in clear violation of the intent of the Election Code.

The General Assembly plainly did not craft detailed watcher and candidate access provisions only for those representatives to be shuttled so far away from the operations of the canvassing process that they have no meaningful opportunity to

observe the process. Such an absurd result would be in clear violation of the Election Code and the Pennsylvania Rules of Statutory Construction.

Judge Fizzano Cannon’s Opinion successfully strikes a balance between granting access to the canvassing process, while permitting social distancing to protect the safety of all concerned, and protecting the efficiency of the operations of the board of elections. As such, Judge Fizzano Cannon’s well-reasoned Opinion should be upheld in its entirety.

The Court’s consideration of this question is not moot, as canvassing is still occurring in Philadelphia, so the presence of candidate representatives is still a live issue. Any further consideration of the mootness issue is not ripe for review, given that it is undisputedly a live issue at this juncture.

ARGUMENT

I. The Commonwealth Court Correctly Applied Statutory Construction Principles to Effectuate the Intent of the General Assembly

“The cardinal rule of all statutory construction is to ascertain the intent of the Legislature. To accomplish that goal, we should not interpret statutory words in isolation, but must read them with reference to the context in which they appear.” *O’Rourke v. Commonwealth*, 778 A.2d 1194, 1201 (Pa. 2001). The Statutory Construction Act of 1972, Pa.C.S. § 1501 *et seq.*, directs that the object of all interpretation and construction of statutes is to ascertain and effectuate the Legislature’s intent. 1 Pa.C.S. § 1921(a); *Chanceford Aviation Properties, LLP v.*

Chanceford Twp. Bd. of Supervisors, 923 A.2d 1099, 1104 (Pa. 2007). Generally, the best indicator of legislative intent is the plain language of the statute. *Walker v. Eleby*, 842 A.2d 389, 400 (Pa. 2004). In construing statutory language, “[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage[.]” 1 Pa.C.S. § 1903(a).

When the words of a statute are clear and unambiguous, there is no need to look beyond the plain meaning of the statute “under the pretext of pursuing its spirit.” 1 Pa.C.S. § 1921(b); *Commonwealth v. Conklin*, 897 A.2d 1168, 1175 (Pa. 2006). Only “[w]hen the words of the statute are not explicit” may a court resort to the rules of statutory construction including those provided in 1 Pa.C.S. § 1921(c); *Chanceford*, 923 A.2d at 1104. The statute must “be construed, if possible, to give effect to all its provisions,” so that no provision is reduced to mere surplusage. 1 Pa.C.S. § 1921(a); *Walker*, 842 A.2d at 400. Finally, it is presumed “[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.” 1 Pa.C.S. § 1922(1).

As Judge Fizzano Cannon correctly identified, “[t]his matter concerns the following Election Code provisions. First, Section 310(b) in pertinent part, that

[e]very 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 machines affecting his candidacy.

25 P.S. § 2650(b) (emphasis provided). Next, Section 1308(b) provides that

[w]atchers 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 provided). Lastly, Section 1308(g)(1.1) provides, in pertinent part, that

[o]ne 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 pre-canvassed.

25 P.S. § 3146.8(g)(1.1) (emphasis provided).

In Re: Canvassing Observation Appeal of: Donald J. Trump for President, Inc., No. 1094 C.D. 2020, 2020 WL 6551316, at *4 (Pa. Commw. Ct. Nov. 5, 2020).

There are two competing interpretations of the Election Code before this Court: whether a county board of elections satisfies the Election Code by allowing a candidate or the candidate's representative *anywhere* in the room—regardless of its size—during canvassing; or whether the candidate or candidate's representative must be permitted to be present in such a way they can actually observe the proceedings.

Here, Appellant is expressly arguing for a *de facto* rewriting of the Election Code that would in turn create an absurd result that completely ignores the intent of the General Assembly, which has provided for watchers in the Election Code for nearly a century. *See* 25 P.S. §§ 2600, *et seq.*; *see also Whitmoyer v. Workers' Comp. Appeal Bd. (Mountain Country Meats)*, 186 A.3d 947, 954 (Pa 2018) (“In determining whether language is clear and unambiguous, we must assess it in the context of the overall statutory scheme, construing all sections with reference to each other, not simply examining language in isolation.”).

The record is unambiguous that the representatives in question were forced to stand approximately 105 feet away from some of the canvassing operations. RR 57a-58a. At that distance, it is simply not possible to read small writing on an envelope.

Any discussion of whether any physical objects separate the representatives from the canvassing is simply a red herring. Here, it is the substantial distance *itself* that is serving as the barrier between the representatives and the canvassing process. The idea that candidate and party representatives can meaningfully observe small writing on an envelope from 35 yards away is simply absurd.

The purpose of watchers and representatives being present at precanvassing and canvassing is not merely a Potemkin village of alleged oversight and candidate participation, where county boards can abide by the letter but not the spirit of the Election Code. These statutes were enacted into law by the political branches to

allow oversight and transparency into the voting process, and to prevent fraud—or any possible appearance thereof—in the process.

“Election laws will be strictly enforced to prevent fraud” *Appeal of James*, 105 A.2d 64, 65 (Pa. 1954). A court “cannot simply ignore substantive provisions of the Election Code. . . . [S]o-called technicalities of the Election Code are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed—particularly where, as here, they are designed to reduce fraud.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1234 (Pa. 2004).

Pennsylvania courts have long held that “the Election Code provides that all candidates have a right to be present in person or by counsel at the canvass of the votes by the county return board. Although this is not mandatory, it is incumbent upon an officer seeker to be diligent and not dilatory.” *Hazle Twp. Election*, 71 Pa. D. & C. 516, 520 (Luzerne Co. Com. Pl. 1950). This statutory provision serves as a “safeguard provided by the legislature.” *Id.*

“Because election officials have significant authority over the conduct of elections, well-trained poll watchers can provide a ‘check and balance’ . . . where there are concerns about official partisan bias. Poll watchers can also be helpful in preventing more than intentional fraud, by identifying and bringing to the election officials’ attention mistakes in registration or eligibility, which election officials may

inadvertently overlook.” Heather S. Heidelbaugh et. al., *Protecting the Integrity of the Polling Place: A Constitutional Defense of Poll Watcher Statutes*, 46 Harv. J. on Legis. 217, 229 (2009). “Political parties and candidates have important interests at stake in elections, and poll watchers serve to protect those interests by preventing fraud, misconduct, and technical discrepancies that could alter the valid results of an election.” *Id.* at 234.

Here, Mr. Mercer, along with the other candidate and party representatives in Philadelphia, was merely seeking to uphold his obligation to be a diligent representative of the candidate. To stand over a hundred feet away from the proceedings that he was to observe, well outside his ability to do so “even with binoculars”, would hardly be diligent. Moreover, to allege that the Election Code somehow permits this absurd result would be a tortured attempt to remove candidate and party representatives from the canvassing process, notwithstanding the textual requirements of the Election Code.

Judge Fizzano Cannon’s decision wisely corrects this error and provided concrete guidance on statutory compliance to the Philadelphia Board of Elections. As such, it should be upheld.

II. As Canvassing Continues in Philadelphia County, the Issues Before This Court Are Not Moot

The standard of review in Pennsylvania on the issue of mootness is *de novo*. “Whether a case is moot presents a ‘pure question . . . of law,’ and therefore, the

standard of review is *de novo*” *Total Resolution, LLC v. Total Landscaping, Inc.*, 237 A.3d 1044 (Pa. Super. Ct. 2020) (non-precedential decision) citing *Newman Development Group of Pottstown, LLC v. Genuardi’s Family Markets, Inc.*, 52 A.3d 1233 (Pa. 2012).

Appellant acknowledges that “[t]he mootness doctrine requires that ‘an actual controversy be extant at all stages of review’” Appellant Brief p. 27 (citing *In re Cain*, 590 A.2d 291, 292 (Pa. 1991). Appellant, however, leaves out much of the law of mootness. This Court has stated, “[a]n issue can become moot during the pendency of an appeal due to an intervening change in the applicable law.” *Cain*, at 292.

Further, “It is a well-established principle of law that this Court will not decide moot questions.” *Id.* And, “It is well settled that the courts ‘do not render decisions in the abstract or offer purely advisory opinions’” *Harris v. Rendell*, 982 A.2d 1030, 1035 (Pa. Commw. Ct. 2009), citing *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 659 (Pa. 2003) (emphasis added).

As Appellant readily acknowledges, however, “because the Board still must count ballots, the representative-access issue is still a live controversy.” Appellant’s Brief p. 27. Given that the canvass remains underway, it is without question that a live controversy continues to exist, and therefore there is no substantive question

concerning mootness for this Court to consider at this time, as this issue is not ripe for review.

CONCLUSION

For the foregoing reasons, Proposed-Intervenor Appellees Speaker of the Pennsylvania House of Representatives Bryan Cutler and Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff respectfully request that this Court affirm the decision of the Court below.

Dated: November 13, 2020

Respectfully submitted,

/s/ Zachary M. Wallen

Zachary Wallen

Pa. ID No. 309176

CHALMERS & ADAMS LLC

301 South Hills Village Drive

No. LL200-420

Pittsburgh, PA 15241

*Counsel for Proposed-Intervenor Appellees
Speaker of the Pennsylvania House of
Representatives Bryan Cutler and Majority
Leader of the Pennsylvania House of
Representatives Kerry Benninghoff*

CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Memorandum of Law contains 2,553 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

/s/ Zachary M. Wallen

*Counsel for Proposed-Intervenor Appellees
Speaker of the Pennsylvania House of
Representatives Bryan Cutler and Majority
Leader of the Pennsylvania House of
Representatives Kerry Benninghoff*

Dated: November 13, 2020

CERTIFICATE OF COMPLIANCE

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

/s/ Zachary M. Wallen

*Counsel for Proposed-Intervenor Appellees
Speaker of the Pennsylvania House of
Representatives Bryan Cutler and Majority
Leader of the Pennsylvania House of
Representatives Kerry Benninghoff*

Dated: November 13, 2020

EXHIBIT B

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No. 30 EAP 2020

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[PROPOSED] ORDER

Now, this ____ day of _____, 2020, upon consideration of the Petition to Intervene filed by Speaker of the Pennsylvania House of Representatives Bryan Cutler and Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff, it is hereby **ORDERED, ADJUDGED, and DECREED** that the Petition is **GRANTED**.

SO ORDERED BY THE COURT:

EXHIBIT C

VERIFICATION

I, Bryan Cutler, Speaker of the Pennsylvania House of Representatives, depose and say, subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities, that the allegations set forth in the foregoing *Petition to Intervene* are true and correct to the best of my knowledge, information, and belief.



BRYAN CUTLER


Speaker

PA House of Representatives

Date: November 13, 2020

VERIFICATION

I, Kerry Benninghoff, Majority Leader, Pennsylvania House of Representatives, depose and say, subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities, that the allegations set forth in the foregoing *Petition to Intervene* are true and correct to the best of my knowledge, information, and belief.


KERRY BENNINGHOFF
Majority Leader
PA House of Representatives

Date: November 13, 2020