

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: CANVASS OF ABSENTEE :
AND MAIL-IN COURT BALLOTS : **1138 CD 2020**
OF NOVEMBER 3, 2020 :
GENERAL ELECTION :
:
Appeal of: Donald J. Trump :
for President, Inc. :

**Appellee City of Philadelphia Board of Elections’ Motion To Transfer
To The Pennsylvania Supreme Court’s Exclusive Jurisdiction**

On November 10, 2020, Petitioner Donald J. Trump for President, Inc. (the Campaign) challenged the technical validity of 8,329 ballots in Philadelphia. The Campaign challenged these ballots across five different cases in the Philadelphia Court of Common Pleas (before the Honorable James Crumlish). The five different Philadelphia cases are Common Pleas Numbers 201100874, 201100875, 201100876, 201100877, 201100878, corresponding to Commonwealth Court Numbers 1140 CD 2020, 1139 CD 2020, 1138 CD 2020, 1137 CD 2020, and 1136 CD 2020. The Campaign brought similar challenges in other counties as well.

The Campaign does *not* allege fraud; that the ballots in question were not filled out by the elector in whose name the ballots were issued; that the ballots were untimely; or that the voter failed to sign the ballot-return envelope. Instead, the Campaign claims a violation of the Election Code (25 P.S. § 3146.6(a) and 25

P.S. § 3150.16(a)), and seeks to disqualify the ballots because in each case the voter neglected to include certain handwritten information on the ballot-return envelope, namely the date, the address, or the printed name, or some combination thereof.

On November 13, 2020, the Philadelphia Court of Common Pleas ruled in favor of Appellees-Defendants – the City of Philadelphia Board of Elections, Commissioner Lisa M. Deeley, Commissioner Al Schmidt, and Commissioner Omar Sabir (collectively, the Board), who determined that the ballots at issue should be counted. The Campaign appealed to Commonwealth Court the next day. Because the Pennsylvania Supreme Court has exclusive appellate jurisdiction over the Campaign’s ballot challenge under the Election Code, this Court should transfer to the Supreme Court.

There are two independent bases for exclusive Supreme Court jurisdiction.

First, “[t]he Supreme Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following classes of cases: ... (2) The right to public office.” 42 Pa. C.S. § 722(2). In Appeal of Bowers, 269 A.2d 712, 716 (Pa. 1970), the Court explained that the phrase “right to public office” “undoubtedly includes questions of qualification, eligibility, regularity of the electoral or appointive process and other preconditions to the holding of a particular office.”

Furthermore, in Commonwealth v. Spano, 701 A.2d 566, 567 (Pa. 1997), the Court distinguished between “prequalification actions” (or, put differently, challenges to election results like the current case that occur before the individual is in office) and “removal actions.”

The Court explained why the former warrant immediate Supreme Court review: “[w]hen the results of an election are challenged, the occupancy of a key public office is left uncertain until the legal contest is decided by the courts. For as long as the contest goes on, there is uncertainty over who is the rightful occupant of that office and no policy can be made.” Id.

This reasoning applies here too, where time is of the essence. The Board must receive the computation of ballots by November 18, 2023, see 25 P.S. § 3154(f), the Board must certify the results to the Commonwealth by November 23, 2020, see 25 P.S. § 2642(k), and the federal “safe harbor” date is December 8, 2020, see 3 U.S.C. § 5. Therefore, immediate Supreme Court review is paramount.

Not surprisingly, then, there are cases where the Supreme Court has taken direct review of Common Pleas elections decisions. Egan v. Mele, 634 A.2d 1074, 1075 n.2 (Pa. 1993) (vacating Commonwealth Court opinion under the Election Code because the Supreme Court had exclusive jurisdiction).

And there are cases where the Commonwealth Court has transferred election decisions to the Supreme Court. In re Nomination Petition of Rizzo, 20 A.3d 546

(Pa. Commw.), aff'd per curiam, 18 A.3d 1139 (Pa. 2011) (Commonwealth Court concluded it lacked jurisdiction to hear appeal because this was a matter of right to run for office and therefore the Supreme Court had jurisdiction under section 722(2)); Rastall v. DeBouse, 736 A.2d 756 (Pa. Commw. 1999), aff'd per curiam 742 A.2d 1080 (Pa.) (citing Appeal of Bowers); In re Mancuso, 657 A.2d 136 (Pa. Commw. 1995) (after a panel heard expedited argument, the court concluded it lacked jurisdiction and transferred the appeal to the Supreme Court), aff'd per curiam by an evenly divided court, 657 A.2d 937 (Pa.).

Therefore, this Court should transfer this case to the Supreme Court under section 722(2).

Second, there is an entirely alternative basis for transfer that derives from the Election Code. The Code provides that appeals from Board decisions “must be made to the court of common pleas.” 25 P.S. § 3157(a). Importantly, the Code then provides that “no appeal shall be allowed or granted from any order or decree of the court of common pleas made in pursuance of this section.” 25 P.S. § 3157(b). Thus, the language of the Code itself permits no appeal at all.

The Supreme Court has nonetheless interpreted this language to allow for appeal, but on a certiorari review to the Supreme Court itself. In re Gen. Election, Nov. 3, 1964, 224 A.2d 197, 201 (Pa. 1966); see also In re Reading Sch. Bd. Election, 634 A.2d 170, 171 (Pa. 1993).

We understand that, in 1976, the General Assembly vested the Commonwealth Court with “exclusive jurisdiction of appeals from final orders of the courts of common pleas” in “[a]ll matters ... where is drawn in question the application, interpretation or enforcement of any[] ... statute relating to elections, campaign financing or other election procedures.” 42 Pa. C.S.A. § 762(a)(4)(i)(C). Based on this statute, the Commonwealth Court has opined that section 3157(b) “no longer has force,” and that the Commonwealth Court now has “jurisdiction over appeals in Election Code cases.” Dayhoff v. Weaver, 808 A.2d 1002, 1006 n.7 (Pa. Commw. 2002).

Nonetheless, the Supreme Court has continued after 1976 to hear direct appeals from Common Pleas in section 3157 cases: “appeals which emanate from orders of the Court of Common Pleas which, in turn, are reviewing orders of the county Board of Elections under Section 3157 are accepted by this Court in the nature of certiorari review.” In re Reading Sch. Bd. Election, 634 A.2d 170, 171 (Pa. 1993); see also In re Contest of 1979 Gen. Election for Office of Dist. Atty. of Washington Cty., 414 A.2d 310 (Pa. 1980); Petition of Jones, 346 A.2d 260 (Pa. 1975).¹

¹ There are conflicting Supreme Court decisions regarding the standard of review in such appeals. Compare In re Gen. Election, Nov. 3, 1964, 224 A.2d 197, 201 (Pa. 1966) (narrow certiorari review) with In re Reading Sch. Bd. Election, 634 A.2d 170, 171 (Pa. 1993) (broad certiorari review).

Particularly given the timing of this case, the Supreme Court should exercise appellate jurisdiction here too. Accordingly, we respectfully seek transfer.²

² Given this matter's urgency, we will also shortly be filing a petition for extraordinary relief in the Pennsylvania Supreme Court.

November 15, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I 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.

Date: November 15, 2020

/s/ Craig Gottlieb
Craig Gottlieb

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Transfer Motion upon counsel of record by electronic filing.

Date: November 15, 2020

/s/ Craig Gottlieb
Craig Gottlieb