

IN THE SUPREME COURT OF PENNSYLVANIA

IN RE NOVEMBER 3, 2020
GENERAL ELECTION

ELECTION MATTER

No. 149 MM 2020

**RESPONSE BY INTERVENORS NAACP PENNSYLVANIA STATE CONFERENCE;
COMMON CAUSE PENNSYLVANIA; LEAGUE OF WOMEN VOTERS OF
PENNSYLVANIA; PATRICIA M. DEMARCO; DANIELLE GRAHAM ROBINSON;
AND KATHLEEN WISE TO THE APPLICATION OF SECRETARY BOOCKVAR'S
APPLICATION FOR THE COURT TO EXERCISE EXTRAORDINARY
JURISDICTION OVER THE PROPER CONSTRUCTION OF ELECTION CODE**

INTRODUCTION

In response to the Office of the Prothonotary's request, dated October 5, 2020, NAACP Pennsylvania State Conference; Common Cause Pennsylvania; the League of Women Voters of Pennsylvania; Patricia M. DeMarco; Danielle Graham Robinson; and Kathleen Wise (together, "Voter-Intervenors"), submit this response in support of Secretary Boockvar's application and request that the Court exercise extraordinary jurisdiction over this action of immediate public importance.

STATEMENT IN SUPPORT OF APPLICATION

The November General Election is less than a month away. County election boards are processing absentee and mail-in ballot applications and sending out ballots. Pennsylvanians have already begun to vote, and absentee ballots are being returned. Despite the proximity of the election, a clear ruling from the Federal Court rightly declining to address questions of state law, and expert opinion in the Federal Court from Amber McReynolds to the contrary, the plaintiffs in *Donald J. Trump for President, Inc. v. Boockvar*, No 2:20-cv-966 (W.D. Pa. 2020), have continued to press forward with claims that rest on pure questions of state law. *See* Memorandum Order, *Trump for President, Inc. v. Boockvar*, 20-cv-966 (W.D. Pa. Sept. 3, 2020) (Dkt. 459). As it did less than a month ago, the Supreme Court of Pennsylvania should exercise extraordinary jurisdiction to resolve this matter of immediate public importance affecting the integrity of the state's democratic institutions. *See, e.g., Pa. Democratic Party*, 2020 WL 5554644 (Sept. 17, 2020); *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

After this Court issued its thorough opinion on September 17, 2020, U.S. District Judge Ranjan of the Western District of Pennsylvania ordered that the parties provide their positions as to what claims remained at issue in that case. In their response to Judge Ranjan's order, the federal plaintiffs (the Trump Campaign, Republican National Committee, and several

individuals) (the “Plaintiffs”) raised entirely new issues. For example, in relevant part, the Plaintiffs asserted that the Secretary’s September 11, 2020 guidance regarding verification of absentee and mail-in ballots was wrong. Notice Of Remaining Viable Claims And Proposed Disposition Plan, *Trump for President*, 20-cv-966 (Dkt. 448). The Secretary’s guidance instructed counties that “[t]he Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections.” *Id.* at 12. The Plaintiffs argue the Secretary’s guidance was improper because they “believe”—though the statute says no such thing—that Section 3146.8(g)(3)-(7) of the Election Code “implements a signature comparison and challenge procedure for absentee and mail-in ballots.” *Id.* at 12-13. Judge Ranjan allowed Plaintiffs to file a Second Amended Complaint advancing this claim. Dkt. 459 at 4. The Plaintiffs subsequently moved for summary judgment on that issue, seeking an order that the Secretary’s guidance conflicts with the Election Code. Dkt. 505.

This Court’s exercise of extraordinary jurisdiction is necessary to make a final determination of what the Election Code requires. The outcome will directly affect what actions county boards of elections must take when reviewing absentee and mail-in ballots. This is especially true, as, although the Election Code allows for a notice and cure procedure at the application stage, *see* 25 P.S. §§ 3146.2b(d), 3150.12b(c), any such similar procedures are far more limited during the canvass. *See* 25 P.S. § 3146.8(g)(5) (notice of hearing for challenged ballots), (h) (failure to provide proof of identification). As this Court declined to expand notice and cure procedures during ballot canvassing, *see Pa. Democratic Party*, 2020 WL 5554644, at *19-20, allowing for ballot rejection based on unscientific signature matching jeopardizes free and fair elections under the Pennsylvania Constitution. Pa. Const. art I, § 5.

Due in part to the COVID-19 pandemic, a record number of voters will vote by mail,¹ amplifying the importance of this Court’s intervention. Mail-in ballots in Pennsylvania are already being sent out and some have already been returned. Clear guidance from this Court, the highest authority on Pennsylvania law, is necessary to definitively settle what the Election Code requires of county boards of elections. The improper rejection of ballots based on Plaintiffs’ unsupported interpretation of the Election Code related to signature matching could disenfranchise countless voters this upcoming election.

The Voter-Intervenors agree with Secretary Boockvar that a prompt resolution of this state law issue by the Court would eliminate (1) any of plaintiffs’ supposed constitutional claims; and (2) the potential for inconsistent rulings as between the state and federal courts regarding the interpretation of Pennsylvania state law. *See Trump for President v. Boockvar*, 2020 WL 4920952, at *2 (W.D. Pa. Aug. 23, 2020) (“[T]he state court’s resolution of the uncertain questions could narrow even these claims, or at least cause Plaintiffs to present them in a different posture.”); *Samuel-Bassett v. KIA Motors America, Inc.*, 357 F.3d 392, 401 (3d Cir. 2004) (“District court rulings on Pennsylvania law are not authoritative and must yield to rulings of the state Supreme Court.”).

The Secretary’s September 11, 2020 Guidance accords with the Election Code. Nowhere in the Election Code is there the slightest suggestion—even implicit—that signature analysis should be used by the county boards of elections with respect to mail-in or absentee ballots. The Secretary’s Guidance is an accurate statement of Pennsylvania law. The Election Code provides that absentee and mail-in ballots shall be canvassed once the “county board has verified the proof

¹ Bill Whitaker, *Pennsylvania Prepares for Unprecedented Surge in Mail-in Voting*, CBS 60 Minutes (Sept. 20, 2020), <https://www.cbsnews.com/news/mail-in-voting-rules-pennsylvania-2020-election-60-minutes-2020-09-20>.

of identification as required under this act.” 25 P.S. § 3146.8(g)(ii)(3). The Election Code’s definition of “proof of identification” does not include signature-matching for mail-in voters. *See* 25 P.S. § 2602(z.5).² During the process of verifying the “proof of identification” those present may challenge only the *qualifications* of the voter, which is expressly limited to age, citizenship, and residency. 25 P.S. § 1301(a). This makes sense because determining whether the voter is qualified to vote a mail-in or absentee ballot does not occur when the ballots are being canvassed (the statutory provision that Plaintiffs point to) but rather occurs during the absentee and mail-in ballot application process. *See* 25 P.S. § 3146.2b(c) (requiring county boards of elections to compare “the information set forth on such application with the information contained on the applicant’s permanent registration card”).

The Secretary’s Guidance is not only a straightforward application of the plain language of the Election Code but is a commonsense approach to verifying mail-in ballots. Amber McReynolds, an expert on election administration procedures, explains why signature-matching alone is not well suited for verification of a mail-in ballots authenticity. Ex. 6 to Intervenors Cross-Mot. for Summary Judgment, *Trump for President, Inc.*, 20-cv-966 (Dkt. 545-6). Ms. McReynolds analyzed the Secretary’s September 11th Guidance and opined that the Secretary’s “approach [was] consistent with signature-match practices in many other states.” Dkt. 545-6 ¶ 64. Further, she explained that “due to its inherent subjectivity, as well as the inherent

² The Election Code defines “proof of identification” with respect to qualified mail-in and absentee voters as “(i) in the case of an elector who has been issued a current and valid driver’s license, the elector’s driver’s license number; (ii) in the case of an elector who has not been issued a current and valid driver’s license, the last four digits of the elector’s Social Security number; (iii) in the case of an elector who has a religious objection to being photographed, a copy of a document that satisfies paragraph (1); or (iv) in the case of an elector who has not been issued a current and valid driver’s license or Social Security number, a copy of a document that satisfies paragraph (2).” 25 P.S. § 2602(z.5)(3).

variability of individuals' signatures over time, [signature analysis] is fair and effective only when conducted with consistent training and practices in a bi-partisan way.” *Id.*; *see also Pa. Democratic Party v. Boockvar*, 2020 WL 5554644, at *34 (Sept. 17, 2020) (Wecht, J., concurring) (“Signature comparison is a process fraught with the risk of error and inconsistent application, especially when conducted by lay people.”). Further, Ms. McReynolds emphasizes that signature matching is an effective mechanism during the mail-in ballot canvass only when “combined with appropriate notice-and-cure processes.” Dkt. 545-6 ¶ 64, *but see Pa. Democratic Party v. Boockvar*, 2020 WL 5554644, at *20.

Ms. McReynolds's opinion exposes the grave effect Plaintiffs' proposed signature-match interpretation will have, and therefore accentuates the need for this Court's intervention. With mere days until county boards of elections will begin to receive ballots (if they have not already), there is scant time to properly train elections officials on signature matching best-practices to ensure that the surge in Pennsylvania mail-in voters are not discriminated against and then improperly disenfranchised. Without an appropriate notice-and-cure process during the canvass, Pennsylvania voters are likely to have their votes improperly cancelled through no fault of their own. *Pa. Democratic Party*, 2020 WL 5554644, at *32 (Wecht, J., concurring). Having ones' vote properly counted is “the most central of democratic rights.” *League of Women Voters*, 178 A.3d at 741. The Plaintiffs seek to undermine this fundamental tenet of democracy. The Pennsylvania Supreme Court must exercise its extraordinary jurisdiction to set the record straight once and for all and well in advance of the upcoming General Election.

CONCLUSION

For the foregoing reasons, the Voter-Intervenors support the Secretary's application for Extraordinary Relief. The Court should take jurisdiction of the matter to ensure that county

boards of elections have clear guidance well in advance of any mail-in ballots being cast and counted so that Pennsylvania's voters are not disenfranchised by an incorrect interpretation of Pennsylvania law.

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++ Not admitted in DC; DC practice limited to federal court only.

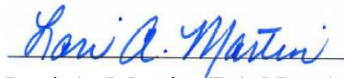
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PUBLIC ACCESS POLICY CERTIFICATE OF COMPLIANCE

It is hereby certified by the undersigned 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.

Respectfully submitted,



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