

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nicole Zicarelli

No. _____

v.

Westmoreland County Bd. Of Elections

**PETITIONER NICOLE ZICcarelli'S EMERGENCY APPLICATION FOR WRIT
OF PROHIBITION**

Petitioner Nicole Zicarelli, hereby requests a writ prohibition to prevent Respondent Westmoreland County Board of Elections from unlawfully canvassing mail-in ballots previously set aside because of identifying marks.

FACTS AND PROCEDURAL BACKGROUND

1. Petitioner Nicole Zicarelli, is the Republican candidate for Senate from the 45th Senatorial District, which encompasses parts of Allegheny and Westmoreland Counties.
2. The Westmoreland County Board of Elections (the "Board") is a local governmental agency generally responsible for overseeing the conduct of all elections in Allegheny County, including, *inter alia*, the pre-canvass and canvass of absentee and mail-in votes. *See id.* at § 2642 (detailing the powers and duties of the county boards of elections).
3. In addition to its various administrative duties, the Board also performs a quasi-judicial function.
4. Late on November 20, 2020, the Board began to canvass mail-in ballots that had been set aside because they contained markings.

5. Despite opposition from certain candidates' representatives, the Board continued to canvass those ballots in contravention of Section 3146.8 of the Election Code, *see* 25 P.S. 3146.8 *which* prohibits the Board from counting mail-in ballots if the envelope contains a distinct marking.

6. This Court should issue a writ directing the Board to cease all canvassing activities involving the Disputed Ballots pursuant to its common law authority to issue a writ of prohibition.

7. As developed below, the Board's attempt to canvass the Disputed Ballots is an *ultra vires* exercise of its quasi-judicial jurisdiction.

8. This Court should issue a writ of prohibition prohibiting the canvassing the Disputed Ballots because doing so would result in an excess of the Board's quasi-judicial authority.

9. To begin, it is well settled that this Court has jurisdiction to issue writs of prohibition to prevent quasi-judicial bodies over whose decisions it has appellate authority from exceeding the scope of their authority and exercising powers not granted to them. *Lower Merion School Dist. v. Montgomery County Bd. of Assessment Appeals*, 642 A.2d 1142, 1146 (Pa. Cmwlth. 1994).

10. This court has appellate jurisdiction over matters decisions of the Board.

11. Although "[a] writ of prohibition is to be used as an extraordinary remedy[,]" *Petition of Yellow Cab Owners and Drivers Ass'n*, 488 A.2d 369, 371 (Pa. Cmwlth. 1985), such relief is appropriate where there is "no adequate remedy at law, and the requested relief . . . is necessary to secure order and regularity in judicial proceedings." *Mayer v. Garman*, 590 Pa. 268, 275 (2006).

12. Given the time-sensitive nature of this matter and the absence of any available legal remedy, this Court should exercise its authority and issue a writ prohibiting the Board from attempting to exceed the scope of the quasi-judicial jurisdiction which it has been granted.

13. To begin, the relief requested is an appropriate remedy and proper vehicle because the Board is clothed with “quasi-judicial” authority. *Boord v. Maurer*, 22 A.2d 902, 904 (Pa. 1941) (“The Election Code makes the County Board of Election more than a mere ministerial body. It clothes it with quasi-judicial functions[.]”).

14. As such, when the Board, in an exercise of its quasi-judicial powers, exceeds the scope of its powers, it is subject to the writ of prohibition. *Pennsylvania Cable Television Ass’n v. Pennsylvania Public Utility Com’n*, 462 A.2d 667, 668 (Pa 1983) (“In examining the law governing the writ of prohibition, it is clear that the writ is intended for use against an administrative agency when it is acting in a Quasi-Judicial capacity.”).

15. The State Supreme Court has previously held that, where the election computation board proceeds to take actions which it is not authorized to take relative to canvassing, it exceeded the scope of its jurisdiction and, thus, a writ of prohibition would lie to prevent its actions. *See In re First Congressional District Election*, 144 A. 735, 736 (Pa. 1928).

16. Here, while the Board generally has jurisdiction over the canvassing of mail-in ballots, under the Election Code, the County Board is prohibited from counting any of mail-in ballots with identifying marks.

17. The Board’s insistence on proceeding with the canvassing of ballots that are subject to appeal is plainly the type of “abuse of jurisdiction” the writ is designed to prevent. *Mayer v. Garman*, 912 A.2d 762, 766 (Pa. 2006) (explaining that “[t]he scope of the writ has been extended to ‘encompass situations in which an inferior court, which has jurisdiction, exceeds its authority,’ which, it explained, is ‘termed an ‘abuse of jurisdiction’”).

18. Furthermore, the circumstances above firmly establish the extreme circumstances necessitating an immediate writ of prohibition.

19. As explained above, Zicarelli's challenge involves a time-sensitive issue involving the present counting of ballots in the County.

20. If the counting of ballots and/or public reporting of the results is not stayed, the Disputed Ballots will be canvassed and counted before Zicarelli has had an opportunity to be heard in any judicial formu regarding the legality of the Board's actions.

21. To the extent this Court deems a balancing of the equities necessary, the broader considerations surrounding the Board's proposed actions also weigh in favor of a writ of prohibition. While Zicarelli would suffer substantial harm if the stay is not granted, the Board would not be substantially harmed.

22. Finally, because it is of the utmost importance to the electoral process be carried out fairly and equally, the writ of prohibition here "is necessary to secure order and regularity in judicial proceedings." *Mayer v. Garman*, 590 Pa. 268, 275 (2006).

23. As our Supreme Court has explained, Article I, Section 5 of the Pennsylvania Constitution, Pa. Const. art. I, § 5, requires elections to be free and equal, which is "indicative of the framers' intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018).

24. In other words "Section 5 mandates that all voters have an equal opportunity to translate their votes into representation." *Id.* Therefore, the issuance of a stay is critical to

ensuring the equality and fairness of the election, which is not remotely adverse to the public interest, but rather squarely within the public interest.

25. Accordingly, there will be no adverse effect to the public interest by the issuance of a stay in the present matter.

WHEREFORE, Petitioner Nicole Zicarelli respectfully requests that this Court issue a writ directing the Board to cease any canvassing activity related to mail-in ballots with markings on them.

Respectfully submitted,

Dated: November 20, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Application to be served on the solicitor for the Board via hand-delivery.

Dated: November 20, 2020

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