

IN THE SUPREME COURT OF PENNSYLVANIA

No. 338 WAL 2020

IN RE: ALLEGHENY COUNTY PROVISIONAL BALLOTS IN THE 2020
GENERAL ELECTION

Petition for Allowance of Emergency Appeal from the November 20, 2020
Memorandum and Order of the Commonwealth Court, No. 1161 CD 2020,
reversing the November 18, 2020 Memorandum and Order of the Court of
Common Pleas of Allegheny County, GD 20-011793

**ANSWER OF RESPONDENTS
THE PENNSYLVANIA DEMOCRATIC PARTY AND JAMES BREWSTER
TO PETITION FOR ALLOWANCE OF EMERGENCY APPEAL**

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TABLE OF CONTENTS

INTRODUCTION.....	1
DESCRIPTION OF RESPONDENTS.....	3
ARGUMENT.....	4
CONCLUSION.....	9

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Appeal of James</i> , 377 Pa. 405, 105 A.2d 64 (1954).....	8
<i>Appeal of McCracken</i> , 370 Pa. 562, 88 A.2d 787 (1952).....	8
<i>Appeal of Petrucci</i> , 38 Pa. D & C.2d 675 (C.P. Luzerne Cty. 1965)	8
<i>In re Nov. 3, 2020 Gen. Election, No.</i> , 149 MM 2020, 2020 WL 6252803 (Pa. Oct. 23, 2020)	7
<i>Pa. Democratic Party v. Boockvar</i> , --- Pa. ----, 238 A.3d 345 (2020)	8
<i>Perles v. Hoffman</i> , 419 Pa. 400, 213 A.2d 781 (1965).....	8
<i>Shambach v. Bickhart</i> , 577 Pa. 384, 845 A.2d 793 (2004).....	8
<i>Weiskerger Appeal</i> , 447 Pa. 418, 290 A.2d 108 (1972).....	8
STATUTES	
25 P.S. § 2642.....	4
25 P.S. § 3050.....	passim
25 P.S. 3154.....	4
Rules	
Pa.R.A.P. 1114(b)(4).....	5

**ANSWER TO PETITION
FOR ALLOWANCE OF EMERGENCY APPEAL**

The Pennsylvania Democratic Party and James Brewster (collectively, the “Pennsylvania Democratic Party Respondents”) file this Answer to the Allegheny County Board of Elections’ (the “Board”) Petition for Allowance of Emergency Appeal (the “Petition”).¹

INTRODUCTION

The Pennsylvania Democratic Party Respondents seek a fair and free election, where eligible voters may vote and have the certainty that their votes will count. For that reason, the Pennsylvania Democratic Party Respondents participated in opposition to Nicole Zicarelli’s (“Zicarelli”) statutory appeal, which challenged the decision of the Board to canvass the 250 provisional ballots of voters who affixed one, but not two signatures on their provisional ballot, while voting with the guidance of an election judge, and the 20 ballots of voters who voted a provisional ballot after the Board rejected their mail-in ballots due to a defect, in this case, the failure of the voter to enclose the ballot in a secrecy envelope (“Naked Ballots”). (collectively, the “270 Ballots”).

With her challenge to the 270 Ballots, Zicarelli seeks to disenfranchise 270 Allegheny County voters. Zicarelli did not and could not allege fraud with respect

¹ Pennsylvania Democratic Party Respondents further agree to all of the Questions Presented as articulated by the Board.

to any of the 270 Ballots. Further, the Board was able to confirm that each of the voters was registered to vote and that the 270 Ballots would be the only vote of these voters that the Board would accept and count.

On Saturday, November 14, 2020, the Board met to consider whether approximately 270 Ballots should be canvassed in accordance with Section 1210 of the Election Code, 25 P.S. § 3050. By a 2-1 vote, the Board determined that the 270 Ballots should be canvassed in accordance with that section. The Board directed the Manager of the County's Elections Division to proceed with the canvassing of these provisional ballots.

With respect to provisional ballots, the Election Code states that "prior to voting the provisional ballot," the voter must sign an affidavit affirming, inter alia, that the provisional ballot is the only one cast by the elector in that election. 25 P.S. § 3050(a.4)(2). The Election Code further states that "after the provisional ballot has been cast," the voter must place the provisional ballot in a secrecy envelope and "shall place his signature on the front of the provisional ballot envelope." 25 P.S. § 3050(a.4)(3).

The Board voted separately on three categories of ballots: (i) ballots that contained voter's affidavit signature under 25 P.S. § 3050(a.4)(2), but not a signature under 25 P.S. § 3050 (a.4)(3); (ii) ballots that contained the signature under 25 P.S. § 3050(a.4)(3), but not the affidavit signature under 25 P.S. § 3050(a.4)(2); and (iii)

ballots for which the voter voted a provisional ballot that corresponded to a previously submitted mail-in or absentee ballot, which the Board rejected for lack of a secrecy envelope and did not count. The Board voted, by a vote of 2-1 with respect to each category, to canvass the ballots.

As the Board recognized with its November 14, 2020 determination, which the Court of Common Pleas affirmed on November 18, 2020, Ziccarelli can offer no compelling reason for rejecting the 270 Ballots. The relief she requests—the disenfranchisement of voters over a minor technical defect—would contravene the Pennsylvania Election Code and state and federal law.

Pennsylvania Democratic Party Respondents thus agree that this Court should grant the Petition that the Board has requested. Further, by accepting the Board’s Petition, this Court could provide clarity with respect to the sufficiency of provisional ballots for future elections in this Commonwealth.

DESCRIPTION OF RESPONDENTS

The Pennsylvania Democratic Party Respondents were Intervenor-Respondents in *Ziccarelli v. Allegheny County Board of Elections*, No. GD-20-011793 (C.P. Allegheny Cty. 2020), and in that capacity, they have a vested interest in the Board’s Petition here. The Pennsylvania Democratic Party Respondents include the Pennsylvania Democratic Party and James Brewster (“Brewster”), who currently represents the 45th District in the Pennsylvania State Senate (“Senate”). On

November 20, 2020, the Commonwealth Court, in a 2-1 decision, reversed the decision of the Court of Common Pleas. *See In re Allegheny County Provisional Ballots in the 2020 General Election*, No. 1161 2020 (Commw. Ct. 2020).

Brewster is a registered voter in the Commonwealth and is the Democratic Party's nominee in the 2020 General Election for the seat he currently holds in the State Senate. The race between Brewster and Ziccarelli—the Republican candidate for the 45th District in the Senate—is a virtual tie. This Court's ruling as to whether the 270 Ballots should be counted could impact the result of the election in Pennsylvania's 45th Senate District.

**THE RESPONDENTS AGREE THAT INTERPRETATION OF
THE ELECTION CODE QUESTIONS PRESENTED ARE
APPROPRIATELY BEFORE THIS COURT AND ASK THE COURT TO
REVERSE THE DECISION OF THE COMMONWEALTH COURT**

The Election Code requires the Board to certify the results of the 2020 General Election by November 23, 2020, subject to certain enumerated exceptions, *see* 25 P.S. § 2642, and to announce computation of results at least five days before final certification, 25 P.S. § 3154(f). The Pennsylvania Democratic Party Respondents agree that the Board's Petition should be granted because of the importance of resolving these issues concerning provisional ballots, and the need for expedited consideration given this impending statutory deadline for certification of the 2020 General Election Results on November 23, 2020.

This Court should grant the Board’s Petition because it raises questions “of such substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court.” Pa.R.A.P. 1114(b)(4). The Commonwealth Court’s decision puts 270 voters in Allegheny County at risk of having their timely-cast, timely-received mail ballots rejected simply because they relied on the advice of election workers or attempted to cast a valid provisional ballot after realizing that they had made a mistake which caused the Board to reject their mail-in ballot. That court’s reasoning that the “receipt” of a ballot includes even a rejected ballot, makes no sense in that it would deprive a registered voter of being able to cast even one vote in this election.

The Commonwealth Court, in its 2-1 decision, acknowledged that the 270 qualified voters in Allegheny County substantially complied with 25 P.S. § 3050 of the Election Code. However, the court simply concluded that strict compliance with the Election Code is required, even if the noncompliance that occurred, such as filling out the provisional ballot, resulted from the erroneous advice of an election worker. *See Op.* at 9 (“When the legislature has attached specific consequences to particular actions or omissions, Pennsylvania courts may not mitigate the legislatively prescribed outcome through recourse to equity’ and this holds true even where, as here, election officials allegedly provide erroneous advice and the recipient relies on that advice.”)

In reaching this strained conclusion, the court ignored the fact that the 250 voters who signed the provisional ballot envelope once, but not twice, were qualified, registered electors who did not vote more than once.

The Commonwealth Court adopted a draconian interpretation of Section 1204(a.4)(5)(ii)(F) of the Election Code, which provides that a provisional ballot shall not be counted if “the elector’s absentee ballot or mail-in ballot is timely received by a county board of elections.” 25 P.S. § 3050(a.4)(5)(ii)(F). The Court interpreted “received” as including even a ballot that the County ultimately rejected.

In these 20 cases, a registered voter attempted to vote by mail, and due to a technical deficiency, went on Election Day to vote in person. Because there was a record of these voters having submitted mail in ballots, those voters cast provisional ballots. With its restrictive interpretation of the Election Code, those voters simply were ineligible to cast a single ballot once they learned that their mail-in ballots had been rejected.

This Court should review the Commonwealth Court’s decision because it raises questions of immediate and significant importance that directly affects hundreds of individual Allegheny County voters, and, potentially, other voters throughout the Commonwealth. Those voters should have an opportunity to have a voice in our democracy, including a very close state senate race in the 45th District.

If not corrected, the Commonwealth Court's decision would cause 270 Allegheny County voters to lose their vote. This situation is of crucial importance to these voters, Allegheny County, and the Commonwealth as a whole. This Court should accept jurisdiction over this case because it presents a question of such substantial public importance that it requires this Court's prompt and definitive resolution. Jurisdiction is appropriate because the intermediate appellate court has so far departed from accepted judicial practices as to call for the exercise of this Court's review.

The Commonwealth Court's order of November 20, 2020, if left to stand, would disenfranchise 270 voters in Allegheny County and would have adverse implications for Pennsylvania's voters for years to come. Because Allegheny County, and other counties, are still in the process of completing their vote counts, the situation is urgent and immediate.

Further, this opportunity to clarify these Election Code provisions for future elections will enable greater clarity to the various Boards of Elections as to how to treat these various issues. This Court's review is needed on an emergency basis to correct this injustice.

Quite simply, the Commonwealth Court has departed from accepted judicial practices in its interpretation of this Court's rulings, in the recent *In re Nov. 3, 2020 Gen. Election*, No. 149 MM 2020, 2020 WL 6252803 (Pa. Oct. 23, 2020); *Pa.*

Democratic Party v. Boockvar, --- Pa. ----, 238 A.3d 345 (2020) and the decisions of this Court that uphold the long-standing principle that in the absence of fraud, the Election Code must be interpreted to enfranchise electors and to excuse technical errors. *See e.g., Appeal of James*, 377 Pa. 405, 105 A.2d 64 (1954); *Perles v. Hoffman*, 419 Pa. 400, 213 A.2d 781 (1965); *Weiskerger Appeal*, 447 Pa. 418, 290 A.2d 108 (1972); *Shambach v. Bickhart*, 577 Pa. 384, 845 A.2d 793 (2004).

The Pennsylvania Democratic Party Respondents ask this Court to interpret and enforce the Election Code by affirming that the provisional ballots may be counted as the Board and the court below so held, and by further affirming that the decision to do so lies within the sound discretion of the Board pursuant to established precedent. *See Appeal of McCracken*, 370 Pa. 562, 565, 88 A.2d 787, 788 (1952) (observing that county election boards have “plenary powers in the administration of the election code”); *see also Appeal of Petrucci*, 38 Pa. D & C.2d 675, 677 (C.P. Luzerne Cty. 1965) (“The court, in reviewing the rulings of the board, may reverse the board of elections only for a mistake of law or for a clear abuse of discretion, including a capricious disregard of the testimony.”). The skirmishing over these issues must end so that Allegheny County’s election results can be certified.

In sum, the Pennsylvania Democratic Party Respondents support the Board’s Petition and ask this Court to reverse the Commonwealth Court’s decision and to allow the Board to canvass the 270 lawfully voted provisional ballots.

CONCLUSION

For the foregoing reasons, the Respondents ask this Court to GRANT the Board's Petition and to issue an order REVERSING the decision of the Commonwealth Court, allowing the Allegheny County Board of Elections to canvass the 270 lawfully voted provisional ballots.

Respectfully submitted,

By /s/ Clifford B. Levine

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Dated: November 21, 2020

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PROPOSED ORDER

AND NOW this ___ day of November, 2020, upon consideration of the Petition of the Allegheny County Board of Elections and the responses thereto, this Court hereby GRANTS the Petition and declares as follows:

The November 20, 2020 Order of the Commonwealth Court of Pennsylvania is REVERSED. The November 18, 2020 Order of the Court of Common Pleas of Allegheny County dismissing the Petition of Nicole Ziccarelli and affirming the decision of the Allegheny County Board of Elections is AFFIRMED.

BY THE COURT:

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2020, I caused the foregoing to be electronically filed and to be served on counsel of record for Plaintiffs and Defendants listed on the docket via the Court's ECF system.

/s/ Clifford B. Levine