

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In re: Nomination Petition of :
Kimberly Wheeler as Democratic :
Candidate for School Board Director : No. 293 C.D. 2023
of Souderton Area School District : Submitted: April 5, 2023
:
Appeal of: Kimberly Wheeler :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MARY HANNAH LEAVITT, Senior Judge

OPINION

BY SENIOR JUDGE LEAVITT

FILED: April 6, 2023

Kimberly Wheeler (Candidate), a Democratic party candidate for the office of school director of Souderton Area School District, appeals the order of the Court of Common Pleas of Montgomery County (trial court) that set aside her nomination petition and declared her ineligible to be on the primary election ballot as a Democratic party candidate for the office of school director. We affirm.

Section 910(f) of the Pennsylvania Election Code (Election Code)¹ allows a candidate for “the office of school director in a district where that office is elective” to seek both the Republican and Democratic party nominations, a process known as cross-filing. 25 P.S. §2870(f). Candidate, a registered Republican, filed nomination petitions to appear on both the Republican and Democratic primary election ballots for the office of school director.

On March 14, 2023, Erin Tynebor, Michael Pipe, and Melanie Lees (Objectors) filed a petition to set aside Candidate’s Democratic nomination petition for the stated reason that her petition was not circulated by a member of the

¹ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §2870(f).

Democratic party, in violation of the Election Code. Rather, Candidate circulated her Democratic party nomination petition, and she is a member of the Republican party. In response, Candidate argued that the Election Code is unconstitutional as applied to a candidate in an election where cross-filing is permitted. She argued that it unduly burdens such a candidate's freedom of speech, as guaranteed under the First and Fourteenth Amendments to the United States Constitution.²

Following a hearing on March 17, 2023, the trial court granted Objectors' petition and struck Candidate's Democratic party nomination petition as invalid.³ In so holding, the trial court relied on *In re Nomination Petitions of Smith*, 182 A.3d 12 (Pa. Cmwlth. 2018) (single-judge opinion by McCullough, J.) (*Smith*).⁴ In *Smith*, this Court rejected a constitutional challenge to the requirement in Section 909 of the Election Code⁵ that the circulator of a nomination petition must be a member of the candidate's party. This Court held that Section 909 did not violate the candidate's rights of free speech and association under the First Amendment.

² The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The Fourteenth Amendment to the United States Constitution states, in pertinent part, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV. All provisions of the Bill of Rights, which protect individuals against certain actions of government, including the First Amendment, are applicable to the states because of the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

³ The trial court stated in its PA. R.A.P. 1925(a) opinion that its reasoning for the order dated March 17, 2023, granting Objectors' petition to set aside, can be found at Page 12 of the hearing transcript. Trial Court 1925(a) Op., 3/30/2023, at 1.

⁴ A reported opinion of a single judge that is filed after October 1, 2013, in an election law matter may be cited as precedent in an election law matter. Section 414(d) of the Commonwealth Court's Internal Operating Procedures, 210 Pa. Code §69.414(d).

⁵ 25 P.S. §2869.

In her appeal to this Court,⁶ Candidate raises one question for our review. She contends that the trial court erred because Section 909 is unconstitutional under the First Amendment, as applied to Candidate. Unlike the candidate in *Smith*, Candidate is permitted to seek the nomination of both the Republican and Democratic parties for the office of school director. *See* Section 910(f) of the Election Code, 25 P.S. §2870(f). The associational rights of the political parties do not pertain to the office of school director because the legislature has determined that the election “does not benefit from partisanship in the same way that a Congressional seat or a Governorship does.” Candidate Brief at 7. As such, the general interest in preventing party raiding does not justify the burden placed on Candidate’s right to engage in political speech by circulating her own nomination petitions and having “one-on-one communication with people qualified to sign and vote for her.” Candidate Brief at 11. Candidate acknowledges that another member of the Republican party cannot circulate her petition among Democratic party members. However, she argues that this restriction should not apply where the circulator is the candidate for an elective office where cross-filing is allowed.

Candidate further argues that there are other safeguards to serve the government’s interest in preventing party raiding. Only members of the Democratic party can sign Candidate’s Democratic nomination petition and only they can vote in the primary election that will determine the Democratic Party candidate for the office of school director. These limits protect the government’s interest in “maintaining robust political parties by preventing party-raiding.” Candidate Brief at 13.

⁶ This Court’s review in election contest cases is limited to determining whether the trial court committed an error of law and whether the trial court’s findings were supported by substantial evidence. *Dayhoff v. Weaver*, 808 A.2d 1002, 1005 n.4 (Pa. Cmwlth. 2002).

Objectors respond that the requirement that the circulator be registered as a member of the party designated on the nomination petition serves to “prevent[] those outside the party from interfering in intra-party affairs.” Objectors Brief at 9 (quoting *In re Nomination of Nader*, 860 A.2d 1, 6 (Pa. 2004)). The same-party requirement in Section 909 of the Election Code imposes “only a trivial burden” upon a candidate’s First Amendment rights of free speech and association, which is outweighed by the Commonwealth’s interests “in preventing ‘party raiding’” and “retaining the importance of party affiliation and cohesion.” Objectors Brief at 9 (quoting *Smith*, 182 A.3d at 22-23). Objectors reason that Section 909 of the Election Code places no restriction on Candidate to speak with voters of the Democratic party or to seek their approval for her nomination. It merely restricts Candidate’s “ability to solely circulate a [n]omination [p]etition unaccompanied by a member of that political party.” Objectors Brief at 6.

We begin with a review of Section 909 of the Election Code, which provides the requirements for the circulation of a nomination petition. It states, in relevant part, as follows:

Said nomination petition may be on one or more sheets, and different sheets must be used for signers resident in different counties. If more than one sheet is used, they shall be bound together when offered for filing if they are intended to constitute one petition, and each sheet shall be numbered consecutively beginning with number one, at the foot of each page *Each sheet shall have appended thereto the statement of the circulator of each sheet, setting forth, subject to the penalties of 18 Pa. C.S. §4904 (relating to unsworn falsification to authorities)--(a) that he or she is a qualified elector of the Commonwealth, who is duly registered and enrolled as a member of the party designated in said petition, unless said petition relates to the nomination of a candidate for a court of common pleas, for the Philadelphia*

Municipal Court or for justice of the peace,^[7] in which event the circulator need not be a duly registered and enrolled member of the designated party; (b) his residence, giving city, borough or township, with street and number, if any; (c) that the signers thereto signed with full knowledge of the contents of the petition; (d) that their respective residences are correctly stated therein; (e) that they all reside in the county named in the statement; (f) that each signed on the date set opposite his name; and (g) that, to the best of the circulator's knowledge and belief, the signers are qualified electors and duly registered and enrolled members of the designated party of the State, or of the political district, as the case may be.

25 P.S. §2869 (emphasis added). In short, the circulator must be a member of the party designated in the petition, unless the petition concerns the nomination of a candidate for common pleas judge, Philadelphia Municipal Court, or justice of the peace.

Section 910 of the Election Code sets forth the requirements of a candidate affidavit. It states, in relevant part, as follows:

Each candidate for any State, county, city, borough, incorporated town, township, ward, school district, poor district, election district, party office, party delegate or alternate, or for the office of United States Senator or Representative in Congress, shall file with his nomination petition his affidavit stating--(a) his residence, with street and number, if any, and his post-office address; (b) his election district, giving city, borough, town or township; (c) the name of the office for which he consents to be a candidate; (d) that he is eligible for such office; (e) that he will not knowingly violate any provision of this act, or of any law regulating and limiting nomination and election expenses and prohibiting corrupt practices in connection therewith; (f) unless he is a candidate for judge of a court of common pleas, the Philadelphia Municipal Court or for the

⁷ Justices of the Peace are now known as Magisterial District Judges. See *In re Murphy*, 10 A.3d 932, 938 n.11 (Pa. Ct. Jud. Disc. 2010) (citing Pennsylvania Supreme Court Order dated January 6, 2005, effective January 29, 2005)).

office of school director in a district where that office is elective or for the office of justice of the peace that he is not a candidate for nomination for the same office of any party other than the one designated in such petition; . . . (i) that he is aware of the provisions of section 1626 of this act requiring pre-election and post-election reporting of campaign contributions and expenditures; and (j) that he is not a candidate for an office which he already holds, the term of which is not set to expire in the same year as the office subject to the affidavit.

25 P.S. §2870 (emphasis added). In sum, a candidate for “judge of a court of common pleas, the Philadelphia Municipal Court *or for the office of school director in a district where that office is elective* or for the office of justice of the peace,” may cross-file in the other party’s primary election. *Id.*

Sections 909 and 910 do not dovetail. Candidates for common pleas court judge, Philadelphia Municipal Court, and justice of the peace do not have to have their nomination petitions circulated by a member of the party whose nomination is sought by the candidate. However, the General Assembly chose not to extend this exception to the only other candidate that can cross-file: a candidate for office of school director in a district where that office is elective.

Candidate acknowledges that her petition for the Democratic party nomination for the office of school director did not comply with Section 909(a) of the Election Code because she circulated that petition, and she is not a member of that party. 25 P.S. §2869(a). However, Candidate argues that because cross-filing for the office of school director is permitted, the First Amendment entitled her to circulate her own petition. She argues that Section 909’s restriction is unconstitutional when applied to a candidate who is permitted to seek the nomination of both parties. She does not claim that her petition could be circulated by any other Republican party member, as is the case for the other candidates allowed to cross-

file. Her claim is that a circulator of a school director nomination petition can be the candidate, regardless of party affiliation. Her unique claim makes this a case of first impression.

All election laws impose some burden on the expressive and associational rights protected by the First Amendment. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). To determine whether a particular burden violates the First Amendment, a court “must weigh the character and magnitude of the asserted injury to the rights protected” by the First Amendment against “the precise interests put forward by the State as justifications for the burden.” *Id.* at 434 (citations omitted). When an election law imposes a “severe” burden on First Amendment rights, it is subject to strict scrutiny. Accordingly, the burden must be “narrowly drawn to advance a state interest of compelling importance.” *Id.* If the law imposes a “reasonable, nondiscriminatory” burden, “the State’s important regulatory interests are generally sufficient to justify” the restriction. *Id.* In cases where there is no burden, or the burden is trivial, the State need only prove that a legitimate interest is advanced by the law and the law bears a rational relationship to that interest. *See Republican Party of Pennsylvania v. Cortes*, 218 F. Supp. 3d 396, 409 (E.D. Pa. 2016); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362-63 (1997).

Here, the trial court relied upon *Smith*, 182 A.3d 12. There, the candidate sought the nomination of the Democratic party for the office of representative in the General Assembly. The objectors sought to invalidate, *inter alia*, 14 signatures obtained by a member of the Republican party. The candidate argued that the same party requirement for circulators in Section 909 of the Election Code violated the First Amendment of the United States Constitution. The Court

rejected the candidate’s constitutional claim and struck the 14 signatures, relying principally on *De La Fuente v. Cotes*, 261 F. Supp. 3d 543 (M.D. Pa. 2017), and *Maslow v. Board of Elections in City of New York*, 658 F.3d 291 (2d Cir. 2011).⁸

In *De La Fuente*, the federal district court concluded that where a circulator is registered with a party that is not the same as that of the candidate, the party-line restriction contained in Section 909 of the Election Code is constitutional. In *Maslow*, the Court of Appeals for the Second Circuit upheld a New York law that required circulators of nomination petitions to be members of the party whose nomination was sought. The *Maslow* court rejected the plaintiffs’ argument that the party membership restriction overly burdened the candidate’s First Amendment right to engage in political speech through the circulation of petitions. It explained:

Plaintiffs are only restrained from engaging in speech that is inseparably bound up with the subscribing witness^[9] plaintiffs’ association with a political party to which they do not belong. As Plaintiffs have no right to this association, they have no right to engage in any speech collateral to it.

Maslow, 658 F.3d at 298 (citation omitted).

Based on *De La Fuente* and *Maslow*, this Court concluded that the associational interests of the circulator and the party seeking to nominate a candidate

⁸ The Court also analyzed other relevant case law related to challenges to state law restrictions on petition circulation. In *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), the United States Supreme Court struck down a Colorado law requiring circulators of initiative petitions to be registered voters. In *Morrill v. Weaver*, 224 F. Supp. 2d 882 (E.D. Pa. 2002), the federal district court entered a permanent injunction prohibiting the Commonwealth from enforcing the requirements in Section 251(d) of the Election Code, 25 P.S. §2911(d), for third-party nominations. In *In re Stevenson*, 40 A.3d 1212 (Pa. 2012), the Pennsylvania Supreme Court held that the permanent injunction entered in *Morrill* was binding. This Court concluded that these cases did not support the candidate’s contention that the Commonwealth did not have a sufficient interest in maintaining a line of party division and prohibiting an individual registered as a Republican from serving as a circulator for a candidate that is a Democrat.

⁹ A “subscribing witness” would be a “circulator” under the Election Code.

are not aligned unless the circulator is a member of the party. *Smith*, 182 A.3d at 22. Given the party's interest in excluding another party's member from participating in their nomination process, Section 909 of the Election Code "imposes only a trivial burden upon [the c]andidate's or the circulator's First Amendment rights of free speech and association." *Smith*, 182 A.3d at 22. Because the Commonwealth has an interest in retaining the importance of party affiliation and cohesion, this Court rejected the candidate's First Amendment challenge to Section 909.

Candidate argues that *Smith* is distinguishable because the circulator was not the candidate, and the elective office at issue did not permit cross-filing. Candidate contends that being denied the right to engage with qualified voters to sign her petition and attest to the validity of those signatures greatly burdens her right to engage in First Amendment protected political activity and speech.

There is precedent for Candidate's suggestion that the candidate in a race where cross-filing is permitted has an interest different from the interest of other candidates. See *In re Petition to Set Aside Certain Nominating Petitions for Office of Lower Moreland Township School Director*, 657 A.2d 1382 (Pa. Cmwlth. 1995) (*Moreland*). In *Moreland*, a registered Democrat and candidate for school director on both the Republican and Democratic ballots challenged the nominating petitions for school director filed by registered Republicans for the Republican nomination. The Court of Common Pleas of Montgomery County dismissed the candidate's petition for lack of standing. This Court concluded that the trial court erred, reasoning that because the Election Code permits cross-filing, it "necessarily recognizes a differentiation between these and other elective offices." *Id.* at 1384. Accordingly, the candidate "has an interest at least as great as that of an elector [] in

the Republican primary election for school director.” *Id.* The dissent disagreed that the challenger had standing. It rejected the notion that just because a candidate can cross-file, she can become “a participant in the other party’s affairs.” *Id.* at 1385 (Pellegrini, J., dissenting).

Primary elections are held to select party candidates and, as such, constitute an internal party matter. *Working Families Party v. Commonwealth*, 169 A.3d 1247, 1252 (Pa. Cmwlth. 2017) (“a political party uses the primary election to nominate its candidate”); *see also* Section 902 of the Election Code, 25 P.S. §2862. One must be a member of a party to participate in the party’s affairs. Unless a person is registered and enrolled as a member of the party, a person cannot vote in the primary of such party, serve as party officer, or be a delegate to the party convention. Section 802 of the Election Code, 25 P.S. §2832.

Cross-filing was instituted so that in certain types of elections, where political ideology should be unimportant, electors can nominate anyone they choose, whether or not they are members of a party. *See generally Thompson v. Morrison*, 44 A.2d 55, 57 (Pa. 1945) (“One purpose of allowing those seeking judicial office to be candidates of more than one party ticket was to provide for the nonpartisan selection of judges.”). Cross-filing is for the benefit of the electorate not the candidate.

Requiring circulators of nomination petitions to be members of the party whose nomination is sought has been held constitutional on its face. *Smith*, 182 A.3d at 22-23. The reasons for requiring the circulator to be a member of the party shown on the nomination petition do not vanish simply because a candidate may cross-file. The importance of party affiliation and cohesion remains important in those races. Further, because there is a “strong presumption of constitutionality,

[] a challenging party bears a very heavy burden of persuasion” to invalidate a statute on constitutional grounds. *McLinko v. Department of State*, 279 A.3d 539, 565 (Pa. 2022). Legislation will be voided only where it violates the constitution “clearly, palpably [and] plainly.” *Id.* (citation omitted).

We hold that Section 909 of the Election Code does not impermissibly burden Candidate’s First Amendment right to engage with Democratic party members. Candidate may speak with registered members of the Democratic party and accompany the Democratic circulator of her nomination petition. The burden is not great. She needs to persuade only one member of the Democratic party to circulate her petition, for which she needs 10 signatures. Section 912.1(35) of the Election Code, added by the Act of December 12, 1984, P.L. 968, 25 P.S. §2872.1(35).¹⁰

The legislature did not exempt the office of school director from the same party rule in Section 909 for circulators of nomination petitions as it did for candidates for the court of common pleas, Philadelphia Municipal Court, and justice of the peace. This is a matter to be addressed to the General Assembly.

We conclude that the same party requirement for circulators in Section 909 of the Election Code is constitutional under the First Amendment as applied to Candidate. Accordingly, we affirm the trial court’s order of March 17, 2023.

MARY HANNAH LEAVITT, President Judge Emerita

¹⁰ A candidate for judge of court of common pleas or Philadelphia Municipal Court needs 250 signatures. Section 912.1(28) of the Election Code, 25 P.S. §2872.1(28). Justices of the peace need 100 signatures. *Id.* at (32).

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:
Appeal of: Kimberly Wheeler :

ORDER

AND NOW, this 6th day of April, 2023, the order of the Court of Common Pleas of Montgomery County, dated March 17, 2023, in the above-captioned matter, is AFFIRMED.

MARY HANNAH LEAVITT, President Judge Emerita