

IN THE

**Commonwealth Court of Pennsylvania**

No. 125 CD 2021

DELAWARE COUNTY REPUBLICAN EXECUTIVE COMMITTEE,

Appellant,

v.

BOARD OF ELECTIONS,

Appellee.

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Appeal from Docketed Order dated January 12, 2021,

Issued by the Honorable Judge John Capuzzi,

Of the Court of Common Pleas of Delaware County, No. CV-2020-007523

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**APPELLATE BRIEF**

**OF APPELLANTS/PROSPECTIVE INTERVENORS**

**GREGORY STENSTROM & LEAH HOOPES**

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## **I. STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to Pa. R.A.P. 313(a) under which an appeal may be taken as of right from a collateral order of an administrative agency or lower court.

Appellants, Prospective Intervenors Gregory Stenstrom and Leah Hoopes (hereinafter “Intervenors”), are appealing the Order of the Honorable John Capuzzi, dated January 12, 2021, wherein he denied Intervenors’ Petition to Intervene, and Petition for Sanctions against the Board of Elections, with prejudice.

That Order, and Judge Capuzzi’s written Opinion which accompanied said Order, are attached hereto as **Exhibit 1**.

On February 17, 2021, Judge Capuzzi filed a Statement with the Court of Common Pleas of Delaware County, quoting his 1/12/2021 Opinion *verbatim*, which Opinion constitutes his Rule 1925(a) Opinion. This Statement is attached hereto as **Exhibit 2**. Hence, it was not required of Intervenors to submit a Concise Statement of Errors Claimed of on Appeal pursuant to Rule 1925(b).

Rather than granting Intervenors’ Petition to Intervene and Petition for Sanctions against the Board of Elections, Judge Capuzzi denied both Petitions with prejudice, which denial constitutes an appealable collateral Order, providing the Commonwealth Court with jurisdiction to consider this appeal.



## **II. ORDER IN QUESTION**

1. On 1/12/2021, Judge Capuzzi issued an Order and Opinion, denying Intervenor's Petition to Intervene, and Petition for Sanctions against the Board of Elections, with prejudice. This Order and Opinion were both docketed on January 13, 2021.

2. This Order and Opinion, attached hereto as **Exhibit 1**, were issued by Judge Capuzzi based upon errors of fact and law, which will be discussed below.

3. The text of this 1/12/2021 Order, docketed 1/13/2021, states:

"Before the Court are two Petitions. The first is the Emergency Petition to Intervene of Candidate for Political Office, Dasha Pruett, and Observers Gregory Stenstrom and Leah Hoopes. The second is an Emergency Petition Against the Board of Elections for Contempt for Violating Judge Capuzzi's 11/4/2020 Order and for Violating Election Code Provisions Allowing Observers. For the reasons set forth in this Opinion below, both Petitions are **DENIED WITH PREJUDICE.**" [Bolding in Original.]

4. A true and correct copy of this Order is attached hereto as part of **Exhibit 1.**

## **III. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW**

### **A. Questions of Law:**

A Pennsylvania appellate court is always free, and is duty bound, to modify erroneous applications of law by the trial court, and the conclusion of the trial judge on a question of law is subject to reversal if the appellate court finds it to be erroneous. *Mutual Ben. Ins. Co. v. Politopoulos*, 2013 Pa.Super. 250, 75 A.3d 528,

531 (2013); *E.T.S. v. S.L.H.*, 2012 Pa.Super. 207, 54 A.3d 880, 881 (2012); *Adamitis v. Erie Ins. Exchange*, 2012 Pa. Super. 204, 54 A.3d 371, 375 (2012).

“Where the petitioner raises questions of law, our standard of review is *de novo* and our scope of review is plenary.” *Commonwealth v. Riding*, 2013 Pa.Super. 141, 68 A.3d 990, 994, (Pa.Super. 2013).

To the extent that a legal question is at issue, a determination by the trial court will be given no deference and will instead be reviewed *de novo*. *Messina v. East Penn Twp.*, 619 Pa. 326, 62 A.3d 363, 366 (Pa. 2012).

Upon appellate review, this Court is not bound by the trial court’s conclusions of law. The Commonwealth Court may reach its own conclusions. Hence, this Court need not defer to or accept the conclusions of the court below when determining whether the lower court erred as a matter of law in concluding that (1) Intervenors purportedly lack standing to intervene, (2) Intervenors’ Petitions should be dismissed purportedly because of “laches” or undue delay, (3) Intervenors’ Petitions purportedly are not supported by even a “scintilla” or “smidgen” of legal merit, and/or are purportedly “baseless,” (4) the Board of Elections purportedly “fully complied” with Judge Capuzzi’s 11/4/2020 Order, (5) there was purportedly insufficient evidence to support Intervenors’ Petitions notwithstanding that Judge Capuzzi denied the request in their prayer for relief in each Petition, for an evidentiary hearing, and (6) Intervenors purportedly have “unclean hands” and their

lawyer, Attorney Deborah Silver, is purportedly “unconscionable” and/or “inexcusable” for not revealing a November 2020 Pennsylvania Supreme Court decision that actually helped Intervenor’s case, and does not hurt them.

This Court, sitting as an appellate court, is free to reject all of these erroneous conclusions of law and fact, if the Court finds them erroneous as a matter of law, and/or if the facts upon which Judge Capuzzi bases his erroneous conclusions of law are, themselves, unreliable and erroneous.

The trial court abuses its discretion if it does not follow legal procedure, incorrectly applies the law, or where its decision lacks reason. *Miller v. Sacred Heart Hospital*, 753 A.2d 829, 832 (Pa. Super. 2000).

This Court may reverse or modify a decision or ruling where there has been an error of law, an abuse of discretion, findings are not supported by the record, or for a capricious disbelief of the credible evidence. *C.R. by Dunn v. the Travelers*, 426 Pa. Super. 92, 626 A.2d 588, 592 (Pa. Super. 1993).

B. Order resulting in dismissal: Judge Capuzzi denied both Petitions with prejudice. “Our scope of review of a trial court order dismissing a complaint is whether the trial court committed an error of law or abused its discretion.” *Bell v. Rockview State Correctional Facility*, 153 Pa.Cmwlth. 121, 123, 620 A.2d 645, 647 n. 4, (Pa. Cmwlth. 1993).

The effect of Judge Capuzzi's denial of Intervenor's Petitions with prejudice is tantamount to a dismissal of their entire case, with prejudice.

C. Evidentiary Rulings: Generally, an appellate court's standard of review of a trial court's evidentiary rulings is whether the trial court abused its discretion; however, where the evidentiary ruling turns on a question of law, review is plenary. *Buckman v. Verazin*, 2012 Pa.Super. 216, 54 A.3d 956, 960 (2012).

The appellate court may consider whether the evidentiary ruling was harmful or prejudicial to the complaining party. *B.K. v. J.K.*, 823 A.2d 987, 991-992 (Pa. Super. 2003); *Hawkey v. Peirsel*, 869 A.2d 983, 989 (Pa.Super. 2005).

Judge Capuzzi erred by wrongly concluding that the Board of Elections is in "full compliance" with his 11/4/2020 Order.

Judge Capuzzi erred by wrongly concluding that Intervenor's lawyer, Attorney Deborah Silver, is "unconscionable" and/or "inexcusable," for not revealing a November 2020 Pennsylvania Supreme Court case which helps Intervenor's case and does not hurt them.

Judge Capuzzi erred by wrongly concluding that Intervenor has "unclean hands" for purportedly acting with "laches" and undue delay in bringing their Petitions.

#### **IV. STATEMENT OF THE QUESTIONS INVOLVED**

1. Did Judge Capuzzi err as a matter of law in determining that Intervenors purportedly lack standing to intervene?

(The issue was not adequately addressed by Judge Capuzzi in his Opinion. It does not appear that Judge Capuzzi considered any of the relevant case law raised by Intervenors in their Petition to Intervene.) **Appellants' answer: yes.**

2. Did Judge Capuzzi err as a matter of law in determining that Intervenors purportedly are guilty of having acted with undue delay or “laches” in filing their Petitions a mere 48 days after Judge Capuzzi issued his Order on 11/4/2020?

(This issue was not adequately addressed by Judge Capuzzi in his Opinion. It does not appear that Judge Capuzzi considered any of the relevant case law raised by Intervenors in their Petition to Intervene, or in their Petition for Sanctions against the Board of Elections.) **Appellants' answer: yes.**

3. Did Judge Capuzzi err as a matter of law by wrongly concluding that Intervenors' Petitions are not supported by a “scintilla” or “smidgen” of legal merit, and/or that Intervenors' Petitions are “baseless”?

(This issue was not adequately addressed by Judge Capuzzi in his Opinion. It does not appear that Judge Capuzzi considered any of the relevant case law raised by Intervenors in their Petition to Intervene, or in their Petition for Sanctions against the Board of Elections. Most noteworthy is that Judge Capuzzi essentially dismissed

Intervenors' case without allowing them the evidentiary hearing they asked for in the prayer for relief in each of the Petitions they filed. Judge Capuzzi wrongly concluded that the Petitions are not supported by an adequate or reasonable legal basis, but did not establish or rule that the Petitions lack evidentiary support, since Intervenors never received the evidentiary hearing they asked for. Appellants' answer: yes.

4. Did Judge Capuzzi err as a matter of law by wrongly concluding that the Pennsylvania Supreme Court case from November 2020, *In re Canvassing Observation*, 241 A.3d 339 (Pa. 2020), hurts Intervenors' case, and by wrongly concluding that Attorney Deborah Silver's failure to cite this decision was both "unconscionable" and "inexcusable," where the Board of Elections did not, itself, cite this decision, and where this case actually supports Intervenors' position, and is not adverse them?

(This issue was not adequately addressed by Judge Capuzzi in his Opinion. Most noteworthy is that counsel for the Board of Elections, Attorney Manly Parks, did not, himself, cite the case prior to the January 12, 2021 decision by Judge Capuzzi as supporting the Board's position doubtless because the case *does not* support Board's position. If the case so obviously supports the Board and is averse to Intervenors, as the trial court contends, the finding of "unconscionable" and "inexcusable" applies to both parties to this dispute... or neither.)

While as of this writing, *In re Canvassing Observation*, remains the law in the Commonwealth, *In re Canvassing Observation* is not adverse to Intervenor's position, and it is denied that it is settled law in favor of the Board of Elections, as it evidently maintains.) **Appellants' answer: yes.**

**V. STATEMENT OF THE CASE**

This is an appeal from Judge Capuzzi's essential dismissal of Intervenor's case by denying with prejudice their Petition to Intervene, and their Petition for Sanctions against the Board of Elections, by Order and Opinion dated January 12, 2021, and docketed in the Delaware County Court of Common Pleas on January 13, 2021.

On November 4, 2020, a case was initiated by Attorney John McBlain ("McBlain"), on behalf of the Delaware County Republican Executive Committee ("DCREC"), against the Board of Elections ("BOE") by the filing of an Emergency Petition, because the BOE was failing to comply with the Election Code provisions permitting observers to be present at all hours that mail-in ballots are opened, handled, and counted.<sup>1</sup>

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<sup>1</sup> Appellants sought out the services of Attorney McBlain to file on behalf of the DCREC and thus helped initiate the original case hoping to shine a light on the counting process as a means of ensuring the integrity of the election for their candidate for Congress, Dasha Pruett. Thus, at least at the outset, Appellants and DCREC were allied before DCREC disengaged.

As stated in both Petitions filed by Intervenor, the BOE completely kept out ALL observers from a rear room at the Wharf Office Building in Chester, which the BOE rented for the purpose of opening, handling, and counting all ballots purportedly cast by residents of Delaware County, Pennsylvania.

As set forth in the Emergency Petition, in keeping with the notion that the handling of voting ballots ought be done in plain view to ensure their integrity, filed by McBlain on behalf of the DCREC, McBlain, and the DCREC asked the Court for an Order directing the BOE to grant access and permit watchers and attorneys to be present in all areas of the BOE offices where pre-canvassing, sorting, opening, counting and recording of absentee and mail-in ballots was occurring or taking place during the November 3, 2020 General Election. A true and correct copy of this Petition filed by Attorney John McBlain is attached hereto as **Exhibit 3**.

As stated in this petition, “Petitioner seeks the basic fairness and transparency to allow its watchers and attorneys to be present and observe in a meaningful way the pre-canvassing, sorting, opening, counting and recording of absentee and mail-in ballots cast in the November 3, 2020 General Election, which right is guaranteed by the Pennsylvania Election Code.” See paragraph 3 of this petition. [**Reproduced Record** (hereinafter “**RR**”), page 151.]

The pre-canvass and canvass of the absentee and mail-in ballots occurred at the BOE’s Wharf Office located on one floor of the building and consisted of various



rooms. One wall bisects the office to create an open front area (the “front”) and a rear area that consists of various offices and workstations (the “rear”). See paragraph 6 of this petition. [RR151 - RR152.]

Watchers appointed by Petitioner DCREC and various candidates appeared at the Wharf Office of the BOE after polls closed on November 3, 2020, to be present and observe the opening, counting and recording of the absentee and mail-in ballots, in conformity with 25 P.S. § 3146.8(b), and to observe the pre-canvass of any ballots, in conformity with 25 P.S. § 3146.8(g)(1.1). See paragraph 8 of this petition. [RR152.]

The BOE established a “pen” for watchers to “observe” the pre-canvass and canvass of the ballots at the entrance of the front, but refused to permit watchers or attorneys to leave this “pen” area *to actually observe* the pre-canvass and canvass of ballots, in violation of the Election Code which permitted observers to be present. See paragraph 9 of this petition. [RR152.]

The BOE acknowledges that there were various activities of the pre-canvass and canvass activities that occurred in the rear, which provided no visual access to *persons present for the explicit purpose of watching the handling of ballots to ensure their integrity*. Instead, these people designated as “watchers” were confined by the Board to the “pen” area where they were physically unable to see what was happening with the ballots. See paragraph 10 of this petition. [RR152.] The persons “watching,”

then, could not “watch” because the Board did not allow them the ability to “see” the pre-canvass and canvass activities occurring in the room at the rear of the building.<sup>2</sup>

The watchers of the DCREC, and of candidates and their attorneys, pleaded with employees of the BOE to be allowed in the rear to observe the pre-canvass and canvass activities in both the front and the rear throughout the evening hours of November 3, 2020, and into the morning hours of November 4, 2020, to no avail. See paragraph 11 of this petition. [RR152 - RR153.]

The solicitor to the BOE, William Martin, Esq., was present in the Wharf Office of the BOE during this time but refused to discuss the issue of access, transparency, and fairness. He instead retreated to the rear of the building for most of the night, out of sight of those confined to the “pen.”. See paragraph 11. [RR152 - RR153.]

When various watchers acting with credentials on behalf of various candidates and McBlain appeared at 9:30 a.m. at the Wharf Office of the BOE on November 4,

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<sup>2</sup> Undersigned counsel suggests the position of the Board, now incidentally seeking sanctions below against those complaining here, defies common sense. The whole idea of the General Assembly providing for “sunshine” in the handling of physical ballots cast for *any* office, *any* candidate, in *any* election, undisputedly is motivated by the General Assembly’s desire to create a disincentive to mishandle those ballots either out of negligence, or for a more nefarious reason. Surely it does not take hundreds of briefing and record pages, tens of thousands of dollars in attorney fees, accusations of “unconscionable” and “inexcusable” conduct by lawyer against lawyer, much less from the bench, and the efforts of members of this court and its staff, to reach the undeniable conclusion that it is intrinsically “a good idea” that ballots for public office are counted in public view as a means of obtaining public “buy-in” to the notion of a fair count which is imperative in *any* republic.

2020 for inspection/view of the pre-canvass and canvass activities, the BOE's employees continued to refuse entry to the rear portion of the floor. See paragraph 13 of this petition. **[RR153.]** These "watchers," again could not carry out their charge to "watch" the pre-canvass and canvass the morning after the polls closed.

As stated by McBlain in his petition on behalf of the DCREC, the Election Code permits watchers and their attorneys to be present for all the pre-canvass and canvass activities. 25 P.S. §§ 2650, 3146.8. See paragraph 15 of this petition. **[RR153.]**

The ballots and envelopes for such ballots are public records and must be held open for inspection in accordance with the rules established by the Election Code. 25 P.S. §§ 3146.9, 2648 and 3150.17. See paragraph 16 of this petition. **[RR153 - RR154.]**

The Code provides that the general returns from the various election precincts which have been returned unsealed shall be open to public inspection at the office of the county board as soon as they are received from the judges of election. 25 P.S. § 3152. See paragraph 17 of this petition. **[RR154.]**

The refusal of any member of a county board of elections to permit a watcher or their attorney to observe the canvassing of returns is guilty of a misdemeanor upon such conviction. 25 P.S. § 3506. See paragraph 18 of this petition. **[RR154.]**

On the evening of November 4, 2020, counsel for the DCREC and the BOE appeared at a hearing before Judge John Capuzzi, Sr., after which the Court entered an Order drafted in consultation with the aforesaid parties.

Although Appellee BOE contends that the parties cooperated in order to implement the November 4, 2020 Order, that contention is in dispute as Appellants contend the Order was actually violated by the BOE. On December 22, 2020, Appellants filed an Emergency Petition to Intervene along with an Emergency Petition for Sanctions.

Appellants alleged below that, in violation of Pennsylvania Supreme Court precedent, in violation of Judge Capuzzi's Order, and in violation of the Election Code, the BOE completely kept out all observers from the rear room where mail-in ballots were being opened, handled, and counted. As stated in both Petitions filed by Appellants, the BOE completely kept out ALL observers from a rear room at the Wharf Office Building in Chester, which the BOE rented for the purpose of opening, handling, and counting all ballots purportedly cast by residents of Delaware County, Pennsylvania.

The restriction of watchers and attorneys to a "pen" in the front precludes them from observing even basic matters such as the number of ballots already canvassed, the number of ballots yet to be canvassed, the number of ballots to be set aside as defective and how the BOE makes any determination about what votes will

or will not be counted for this most important election. See paragraph 20 of this petition. [RR154.]

As set forth in the Petitions below, instead of allowing observers to be present “at all hours” as required by the Election Code and by paragraph 1 of Judge Capuzzi’s November 4, 2020 Order, the BOE allowed just two observers (of the whole number gathered) to be present for 5 minutes every 2 hours. See Petition to Intervene, paragraph 29, page 7, and paragraph 64, page 13. [RR90 and RR96.] This is hardly “full compliance” with either the Election Code or with Judge Capuzzi’s Order. Appellants respectfully assert that Judge Capuzzi wrongly concluded otherwise.

In the absence of statutorily permitted observers, the Board deprived candidate Pruett of her right to a fair and transparent election because the Board failed to follow the procedural safeguards the Code sets forth to ensure against elections being “rigged” or fraud being committed.

Hence, Intervenors, Dasha Pruett (“Pruett”), Gregory Stenstrom (“Stenstrom”) and Leah Hoopes (“Hoopes”), requested in their Petition for Sanctions against the Board of Elections that Judge Capuzzi issue an Order of sanctions against the BOE for violating the Election Code, and for a Declaration that the BOE is guilty of a misdemeanor for not allowing observers in the rear of the Wharf Office where absentee and mail-in ballots were resolved for all of Election

Day, November 3, 2020, and all but a tiny fraction of November 4, 2020 as well. Intervenor below argue that the intentional and willful disregard by the Board to follow Election Code procedures designed to give candidates and the voting public confidence in the outcomes of elections warrants the sanctions sought.

On January 12, 2021, the Court issued an Order and Opinion denying the Petition to Intervene and Petition for Sanctions with prejudice, which was docketed the following day on January 13, 2021.

Appellants originally filed a *pro se* Notice of Appeal of Judge Capuzzi's Order on February 11, 2021. The following day, on February 12, 2021, Appellants filed a Revised Notice of Appeal. On March 4, 2021, Appellants through new counsel filed two Praecipae to Attach in the Trial Court including the Request for Transcript, Certificate of Service and Certificate of Compliance which were to have been included with the Notice of Appeal and Revised Notice of Appeal.

## **VI. SUMMARY OF ARGUMENT**

Judge Capuzzi erred as a matter of law, in essentially dismissing Intervenor's entire case, by denying both of their Petitions with prejudice, for the following reasons.

### **A. Standing**

First, Intervenor has standing to intervene. This is discussed in more detail below, but importantly, one of the grounds to establish standing is that there is a case

or controversy where the current party, in this case, the DCREC, is not adequately representing the interests of the proposed intervenors.

The BOE first allowed 2 observers to enter the rear ballot storage room (a separate room from where the mail-in ballots were being opened, handled and counted) for up to 5 minutes, at 1:30 p.m., despite the fact that the BOE knew full well that it was required by paragraph 2 of Judge Capuzzi's Order issued the night before, to let them in the following morning. See Petition for Sanctions, paragraph 62, page 11. **[RR21.]**

Stenstrom and Hoopes attempted to gain entrance to the rear room where absentee and mail-in ballots were being resolved when they arrived at or around 8:30 on the morning of November 5, 2020, the Sheriff, at the behest of the Solicitor for the BOE (William Martin), barred their entry, in defiance of Judge Capuzzi's Order. See Petition for Sanctions, paragraph 65, page 12. **[RR22.]**

This delay prevented observers from being present to see that the unopened number of ballots in the rear storage room inexplicably increased from 6,000 at 11:30 a.m., to upwards of 50,000 at 1:30 p.m., to upwards of 70,000 at 3:30 p.m. See Petition for Sanctions, paragraphs 69 and 72, pages 12-13. **[RR22-R23.]** See Petition to Intervene, paragraph 41, page 9 **[RR92.]** While it is certainly within the realm of possibility that going from 6,000 ballots to 70,000 ballots in four hours' time two days after the election occurred with good sound legal reasons, the exclusion of the

watchers who Judge Capuzzi's order stated could be present, casts doubt on that conclusion. Perhaps, the total ballots truly did not increase more than 1000 percent during those four hours, but the absence of an evidentiary hearing makes it impossible to know on the existing record.<sup>3</sup>

Appellants agree that, if true, their allegations do not necessarily lead to the conclusion that improper conduct occurred in the collection and counting of ballots. Appellants instead contend that the failure of the Board to comply with Judge Capuzzi's order, and the plain wording of the election code, created the appearance of impropriety to the point that at the very least the Board ought to be compelled to explain its conduct and what it did outside of public view under oath and on the record. Instead, the Board has gone on offense against Intervenors and their former counsel seeking to intimidate, threaten, and bankrupt them for pointing out that a basic goal of the election code is to ensure the integrity of elections by creating an atmosphere where the voters believe the counting of their votes is done fairly.

One way the General Assembly has provided to enhance public confidence in the vote counting process is the institution of a system where candidates may appoint watchers to watch the count. A candidate for Congress, Dasha Pruett appointed two such persons, Intervenors here, whom the Board prevented from carrying out their

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<sup>3</sup> Appellants aver that 127,000 mail in and drop box ballots had already been counted before Appellant Stenstrom observed the 50,000 to 70,000 unopened ballots during the two five-minute intervals the Board permitted him to "watch" on November 5<sup>th</sup> at 1:30 p.m. and 3:30 p.m.



appointed duties, not unreasonably giving rise to the question of “why?” When Intervenorors sought relief and enforcement from the Delaware County Court of Common Pleas, they were not only denied, but belittled, vilified, chastised, and threatened with punishment. Curiously, when Intervenorors/Appellants complied with Judge Capuzzi’s order, and filed an answer to the Board’s petition seeking to punish them, Judge Capuzzi then decided that he no longer had jurisdiction to determine the matter since the present action had commenced by appeal.

The curious part is that this appeal had been filed before the Board sought to punish Intervenorors/Appellants, and before Judge Capuzzi ordered Intervenorors/Appellants to answer the Board’s petition for sanctions. By the logic Judge Capuzzi asserted in concluding he had lost jurisdiction to hear the sanctions motion on account of the present appeal, he also lost jurisdiction to entertain the Board’s sanctions petition in the first place, and jurisdiction to order Intervenorors/Appellants to answer the Board’s sanction petition at great cost since they were compelled to hire undersigned counsel to review the case and author the ordered response.

Stenstrom was only allowed to enter the ballot room at 1:30 p.m. and 3:30 p.m., on November 5, 2020 observing what appeared to him and that he would so testify to be an increase in the amount of unopened mail-in ballots, from approaching

50,000 at 1:30 p.m., to approaching 70,000 at 3:30 p.m., again with no explanation for the additional 20,000 ballots over a period of 2 hours. Id. [RR22-23, RR92.]

Intervenors are all intended beneficiaries of Judge Capuzzi's 11/4/2020 Order, in that each of them has a substantial, direct, immediate and legally enforceable interest, which surpasses the common interest of all citizens, in a fair, free and transparent election.

All of this gives Intervenors standing to intervene in this matter.

**B. No laches or "undue" delay**

Second, Intervenors did not commit laches or undue delay by waiting 48 days to bring their Petitions. Judge Capuzzi erred as a matter of law by concluding otherwise, and by concluding that Intervenors have "unclean hands."

The members of the BOE never advanced any facts in support of any legally recognizable prejudice they purportedly suffered as a result of this brief time lapse.

Where is the prejudice to the BOE from a 48-day waiting period? Did, as it appears, the BOE get upset that someone is trying to hold it accountable for violating a court order and the Election Code?

That "upset" does not rise to the level of prejudice which is necessary to establish a "laches" defense. The BOE does not describe in what way it has been prejudiced by a delay of only 48 days. The code suggests that the Board committed a misdemeanor offense. Even at present, Appellants could request the

Commonwealth bring a private criminal complaint against the BOE and the request would still be within the normal 2-year statute of limitations for most misdemeanor offenses. Appellants are not yet suggesting they are intent on doing so. Instead, Appellants simply want their grievance heard in a court of record and for the Board to give its explanation, if any it has, concerning its behavior during those relevant days and for a court of this Commonwealth to render a judgment concerning whether the Board conformed its conduct to the Election Code and the orders of court, or if it did not, why not?

Nor is there any deadline, properly so, set forth in the Election Code for seeking sanctions against the Board of Elections for violating the provisions permitting observers to be present at all hours that the ballots are opened, handled, and counted.

Especially, in light of the then fluid state of the law, multiple petitions to the United States Supreme Court that had the potential to affect election law throughout the country, the desire to exhaust administrative remedies to acquire standing, and a pandemic with an accompanying unprecedented number of mail-in ballots, thrusting courts into unknown territory requiring statutory interpretations under circumstances state legislatures could never have anticipated.

Intervenors aver the concept of “undue delay” begs the question of “compared to what?” The Nation faced unprecedented issues relating to the 2020 General

Election including unusual (undue?) delay in the counting of ballots relative to previous years' count even in presidential election cycles. Pennsylvania, indeed, all of the United States to some degree, altered its "norms" in response to the pandemic.

**C. Adequate and reasonable factual and legal basis to support both Petitions.**

Third, Judge Capuzzi erred as a matter of law by wrongly concluding that the Petitions are not supported by a "scintilla" or "smidgen" of legal merit. These are the terms used by the trial court.

Judge Capuzzi erred as a matter of law by wrongly concluding that there was not an adequate legal or factual basis to support the Petitions, particularly where Judge Capuzzi did not allow Intervenors the evidentiary hearing they requested in the prayer for relief in each of their Petitions.

**D. Blatant violation does not equal "full compliance."**

Fourth, Judge Capuzzi erred as a matter of law by wrongly concluding that the BOE "fully complied" with his 11/4/2020 Order. That makes no sense legally, factually, or rationally. Five minutes every two hours does not equal "at all hours," as stated in paragraph 1 of Judge Capuzzi's Order.

A true and correct copy of Judge Capuzzi's 11/4/2020 Order is attached as **Exhibit 4.**

In relevant part, paragraph 1 of this Order states:

“1. Four Observers in total (2 observers from the Republican Party, or affiliated candidates, and 2 observers from the Democratic Party, or affiliated candidates) are permitted to observe the resolution area **at all hours** while ballots are being resolved;” [Emphasis added.]

It makes no sense for Judge Capuzzi to conclude that the BOE “fully complied” with his Order where the BOE only allowed observers to be present for 5 minutes every 2 hours, rather than “at all hours” while ballots are being resolved.

Resolved means the process by which ballots, such as mail-in ballots, are opened, handled and counted. As opposed to a ballot storeroom, where unopened mail-in ballots were stored.

The BOE clearly violated paragraph 1 of Judge Capuzzi’s Order, and the judge erred as a matter of law by wrongly concluding that the BOE “fully complied” with his Order.

**E. Attorney Deborah Silver was neither “unconscionable,” nor was her failure to cite to a recent Supreme Court Case “inexcusable.”**

Fifth, Judge Capuzzi erred as a matter of law by wrongly concluding that Attorney Deborah Silver was “unconscionable” and that her failure to cite to a November 2020 Pennsylvania Supreme Court case was “inexcusable.”

On November 17, 2020, the Pennsylvania Supreme Court handed down a case of first impression, *In re Canvassing Observation*, 241 A.3rd 339 (Pa. 2020).

The BOE's counsel failed to cite the case prior to the January 12, 2021 Opinion of Judge Capuzzi. Intervenors' counsel and the BOE's counsel each should have been aware of and addressed the Supreme Court's decision prior to Judge Capuzzi entering his Order with Opinion of January 12, 2021.

Although *In re Canvassing Observation* remains the law in the Commonwealth, it is denied that it is adverse to Intervenors' position, and it is denied that it is settled law in favor of the members of the BOE, as they evidently maintain.

A review of *In re Canvassing Observation* on Westlaw reveals an opinion riddled with yellow cautionary flags in those portions of the opinion where the majority interpreted existing statutes (in relevant context) for the first time, with no prior authority of its own upon which to rely.

A minimal investigation of these cautionary flags reveals that members of the Pennsylvania General Assembly have introduced bills that would change the very statutes the Supreme Court was called upon to interpret for the first time in *In re Canvassing Observation*. All three proposed changes to the statutes upon which the Supreme Court relied, if enacted, would legislatively alter *In re Canvassing Observation* so as potentially to render its holding meaningless.

Notably, Counsel for the members of the Board of Elections did not bring these three House Bills to the Court's attention, though all were introduced in the

General Assembly prior to February 11, 2021, which is the date that the Board of Elections filed a Petition for Counsel Fees against Intervenors.

Accordingly, Judge Capuzzi erred as a matter of law by wrongly concluding that Attorney Deborah Silver's failure to cite to this recent Pennsylvania Supreme Court case was "unconscionable" or "inexcusable."

## **VII. ARGUMENT**

### **A. The Appeal is Timely.**

Pursuant to Pa. R.A.P. 903(a), a notice of appeal shall be filed within 30 days after the entry of the order from which the appeal was taken. The appeal period does not begin to run until the clerk notes on the docket that notice of the entry of judgment has been sent to the prospective appellant. *Calabrese v. Zeager*, 976 A.2d 1151 (Pa. Super. 2009).

Although Pa. R.A.P. 903(c)(1)(ii) states that an appeal from an order in any matter arising under the Pennsylvania Election Code must be taken within ten days after the entry of the order from which the appeal is taken, the order appealed from in this matter, however, does not arise under the Election Code.

The January 12, 2021 Order which is the subject of the within appeal denied the Emergency Petition to Intervene and Emergency Petition for Sanctions filed by Appellants in this matter. Although Appellants reference and rely upon the Election Code in the aforesaid Petitions, the legal basis upon which Appellants rely in seeking

to intervene and prosecute the Petition for Sanctions is the Pennsylvania Rules of Civil Procedure, namely Pa. R.C.P. 2327(4)<sup>4</sup> and Pa. R.C.P. 2329(2)<sup>5</sup> governing intervention in matters before the trial court.

Since the legal basis upon which Appellants sought to intervene in the trial court and pursue their Petition for Sanctions is codified in the Pennsylvania Rules of Civil Procedure, rather than the Election Code, the deadline within which an appeal must be filed is 30 days rather than 10 days. The Order under appeal in this matter was not docketed in the trial court until January 13, 2021. See Exhibit “D”, page 11. Thus, the 30-day deadline within which an appeal of the aforesaid Order would need to be filed was February 12, 2021. Appellants met this deadline since the Notice of Appeal and Revised Notice of Appeal were filed on February 11, 2021 and February 12, 2021, respectively.

As a result, Appellants’ appeal was timely filed in this matter.

**B. This Court has Subject Matter Jurisdiction.**

Although courts generally do not have the ability to amend, modify or vacate final orders within 30 days of the entry of the order, it is beyond question that courts

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<sup>4</sup> Pa. R.C.P. 2327(4) provides that: “At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if...(4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

<sup>5</sup> Pa. R.C.P. 2329(2) states that the Court may refuse an application for intervention if the interest of the petitioner is already adequately represented. Here, Appellants allege that their interests are not adequately represented in the trial court.



have the inherent power to enforce compliance with their lawful orders through civil contempt. *In re Martorano*, 346 A.2d 22, 27 (Pa. 1975); 42 Pa. C.S.A. § 4132.

In this matter, Appellants are seeking to address violations of Judge Capuzzi's November 4, 2020 Order. The trial court unquestionably has continuing jurisdiction to consider Appellants' Petition for Sanctions and determine whether the BOE violated the order. Additionally, the Election Code does not contain a deadline for seeking sanctions against the Board of Elections for violating the provisions permitting observers to be present at all hours that the ballots are opened, handled, and counted.

To seek redress for the actions of the BOE, which were in contempt of the November 4, 2020 Order, and have the Petition for Sanctions heard by the Court, Appellants were required to file the Petition to Intervene in the trial court. Under Pennsylvania Rule of Civil Procedure 2327, the Court may permit a party to intervene "*at any time* during the pendency of an action." [Emphasis added.] Intervention is allowed by the Pennsylvania Rules of Civil Procedure before a matter has been finally resolved. Not controlling, but persuasively, the Supreme Court of Pennsylvania, in *Robinson Twp. Sch. Dist. v. Houghton*, 128 A.2d 58 (Pa. 1956) (dissenting opinion), stated:

"The commentary on Rule 2327 in Standard Pennsylvania Practice, Goodrich-Amram, under the title "Time for Intervention", says, *inter alia*: "Under these rules a person may intervene '*at any time during the pendency of the action.*'

*For this purpose, an action is pending from the moment it is first brought until the record of the action is removed on appeal.*" [Emphasis supplied.]

An action is "pending", according to Black's Law Dictionary (5th Ed.), when it is "begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment. Thus, an action or suit is "pending" from its inception until the rendition of final judgment." *Fin. Freedom, SFC v. Cooper*, 21 A.3d 1229, 1231 (Pa. Super. 2011) (hereinafter referred to as "Cooper"), citing *In re Estate of Albright*, 545 A.2d 896, 899 (Pa. Super. 1988) ("where a court no longer has power to permit intervention because a matter has been finally adjudicated, a hearing on a petition to intervene would be pointless").

Judge Capuzzi's November 4, 2020 Order does not constitute a rendition of final judgment in the emergency action between the Delaware County Republican Executive Committee on the one hand, and the Delaware County Board of Elections, on the other hand. Since the matter had not been finally adjudicated, intervention is still possible where, as here, Appellants sought to intervene 48 days after Judge Capuzzi issued his November 4, 2020 Order, before the rendering of any final judgment.

Appellants sought to intervene during the pendency of the action before any final adjudication of the matter. Since there was no final judgment from the time that Judge Capuzzi issued his emergency Order on November 4, 2020, until the time that Appellants sought to intervene on December 22, 2020, the trial court had jurisdiction

to grant Appellants' Petition to Intervene and consider the accompanying Petition for Sanctions in due course, without being required to modify the underlying order.

Since the trial court had jurisdiction to enforce its own order of November 4, 2020, this Court has subject matter jurisdiction to consider the within appeal.

**C. The January 12, 2021 Order is an Appealable Order.**

The January 12, 2021 Order is appealable as a collateral order. Pursuant to Pa. R.A.P. 313(a), an appeal may be taken as of right from a collateral order of an administrative agency or lower court.

A collateral order is an order that: (1) is separable from and collateral to the main cause of action; (2) involves a right too important to be denied review; and (3) presents a question that, if review is postponed until final judgment in the case, the claim will be irreparably lost. *In re Bridgeport Fire Litigation*, 51 A.3d 224 (Pa. Super. 2012); Pa. R.A.P. 313(b).

In this matter, the issue of whether Appellants should be granted permission to intervene in the underlying case before the trial court is separable from, and collateral to, the main cause of action between the DCREC and the BOE. *See Wells Fargo Bank N.A. v. James*, 90 A.3d 813, 815 (Pa. Cmwlth. 2014) (holding that the question of whether the proposed intervenor may intervene is separable from and collateral to the main cause of action).

The issues raised by Appellants also constitute rights which are too important to be denied review. A right is too important to be denied review when the issues presented “transcend the particular interests of the parties and involve rights deeply rooted in public policy.” *Id.* Additionally, if review of Appellants’ claims is postponed until final judgment in this matter, the claims of Appellants will irreparably be lost.

The integrity of the November 3, 2020 election, and compliance with Judge Capuzzi’s Order of November 4, 2020, unquestionably involve the public’s right to be confident in having free and fair elections, a right which, respectfully, is too important to be denied review by this Court or the trial court. Appellants’ claims, again respectfully, must also be reviewed now, or those claims will forever be lost, thereby impacting the public’s perception of the integrity of future elections.

The candidate for the U.S. House of Representatives for the Fifth Congressional District in the 2020 General Election, Dasha Pruett (“Pruett”), and the poll watcher observers, Gregory Stenstrom and Leah Hoopes, and through them, countless voters seeking confidence that the Board engaged in an election count fairly and in accordance with all procedural safeguards the law provides to provide that level of confidence are all directly affected by the BOE’s failure to comply with Judge Capuzzi’s Order as to poll watcher observers.

Appellants respectfully suggest that candidate Pruett is an intended beneficiary of the November 4, 2020 Order issued by Judge Capuzzi because her duly appointed

observers were present precisely to ensure the Board complied with all the procedural safeguards the law mandates so she, the candidate, her supporters, and the voters at large can feel confident Delaware County not only held a fair election above reproach, but did so transparently so as to convey that message to the public at large by applying the law's safeguards that expose the vote count to the disinfection of sunshine. This the Board failed to do, and the court below failed to take action to hold the Board accountable for this failure. The actions of the BOE, and its failure to comply with Judge Capuzzi's Order, deprived Pruett of her right to a transparent election to the public office she sought to hold thereby sowing the seeds of doubt into the minds of not only the candidate and her supporters, but the voting public.

Similarly, both Stenstrom and Hoopes are intended beneficiaries of the November 4, 2020 Order issued by Judge Capuzzi since they were duly appointed observers who Judge Capuzzi ordered must be permitted to observe (a) the resolution area at *all hours* while ballots are being resolved, (b) the sorting machine *at all times* while the machine is in use, and (c) the ballot room. The Board must grant them the ability to "observe" any irregularities or illegalities for the purpose of allowing Stenstrom and Hoopes the opportunity to bring any concerns and questions to the attention of the BOE's staff and representatives to remedy on the spot. No watchers can perform the functions that they are required to perform in their position as observers in order to ensure the integrity, transparency and fairness of the 2020

General Election if they cannot see what it is the code mandates they be permitted to be present to observe.

Without contempt penalties against the BOE for violating Judge Capuzzi's Order, this Court will create precedent for future elections perpetuating the public's lack of confidence in the election results and demonstrating the futility of candidates' and their watchers' efforts to exercise their rights under the Election Code which only exist to perpetuate public confidence in election integrity. In their Petitions, Appellants focus specifically and uniquely on protecting the right to a fair and transparent election by asking the Court to punish the BOE for breaking the law. No one disputes that election fraud is a crime. The Pennsylvania General Assembly sought to guard against election fraud by placing various protections in the Election Code, not to *uncover* fraud, but to *deter* it from happening at all: as those who might have a penchant to engage in conduct undermining election integrity would know that watchers would be present to observe, thus disinfecting and retarding the opportunity to engage in fraud in the first place.

The misconduct by the members of the BOE here cast doubt upon the integrity of the count enabling opportunities for irregularities, illegalities and, perhaps, even fraud to occur. Appellants maintain, however, that this Court's determination is not dependent on a finding that irregularities, illegalities, or fraud occurred. Rather Appellants maintain that the failure of the Board to comply with the Code and the trial

court's order allowed for the *potential* for such to occur leading directly to a loss of confidence by the voters in the integrity of the election, and if allowed to stand unaltered, will act as accepted precedent for future elections to the detriment of our Republic.

The Court of Common Pleas of Delaware County is the only forum where Appellants could be heard, because any opportunity to challenge the BOE's violations of Judge Capuzzi's Order must be directed to the same Court which issued the underlying order. Appellants have additional separate legally enforceable interests which are distinct from the general interests of the other parties, and therefore their interests are not adequately represented by the DCREC warranting intervention.

More specifically, since the November 3, 2020 General Election, the DCREC has not sought any sanctions against the BOE for violating Judge Capuzzi's Order. Also, to date, in the exercise of their discretion, the District Attorney of Delaware County and the Pennsylvania Attorney General have not investigated the BOE, for violating the Election Code relative to its treatment of observers.

As set forth above, Appellants meet the three requirements such that the Order entered on January 12, 2021 is appealable as a collateral order. Therefore, this Court may consider the within appeal.

**D. The Order denying with prejudice Intervenor's Petition to Intervene must be Reversed.**

**1. Intervention is mandatory absent grounds for refusing the petition under Pa. R.C.P. 2329.**

Allowance of intervention is mandatory so long as the proposed intervenors satisfy the requirements of intervention, and so long as there are no grounds for refusing the petition to intervene under Pa. R.C.P. 2329; *T.H. Props., L.P. v. Upper Salford Twp. Bd. of Supervisors*, 970 A.2d 495, 499 (Pa. Cmwlth. 2009). See also *In re Pa. Crime Comm'n Subpoena*, 309 A.2d 401, 408 n.11 (1973) (if a petitioner satisfies Rule 2327, "the allowance of intervention is not discretionary, but is mandatory, unless one of the grounds for refusal of intervention enumerated in Rule 2329 is present").

"Thus, the court is given the discretion to allow or to refuse intervention only where the petitioner falls within one of the classes enumerated in [Pa. R.C.P. No.] 2327 and only where one of the grounds under [Pa. R.C.P. No.] 2329 is present which authorizes the refusal of intervention." *Wells Fargo Bank N.A. v. James*, 90 A.3d 813, 820 (Pa. Cmwlth. 2014), citing *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Cmwlth. 1999) (emphasis added).



**2. Before the rendering of a final judgment, intervention is allowed at any time during the pendency of an action.**

Under Pennsylvania Rule of Civil Procedure 2327, the Court may permit a party to intervene “at *any* time during the pendency of an action.” [Emphasis added.]

Intervention is allowed by the Pennsylvania Rules of Civil Procedure before a matter has been finally resolved.

The Supreme Court of Pennsylvania, in *Robinson Twp. Sch. Dist. v. Houghton*, 387 Pa. 236, 245-246, 128 A.2d 58 (1956) (dissenting opinion), stated:

“The commentary on Rule 2327 in Standard Pennsylvania Practice, Goodrich-Amram, under the title “Time for Intervention”, says, inter alia: “Under these rules a person may intervene ‘at any time during the pendency of the action.’ For this purpose, an action is pending from the moment it is first brought *until the record of the action is removed on appeal.*” [Emphasis supplied.]

An action is “pending”, according to Black's Law Dictionary (5th Ed.), when it is:

“begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment. Thus, an action or suit is “pending” from its inception until the rendition of final judgment.”

*Fin. Freedom, SFC v. Cooper*, 2011 PA. Super 101, 21 A.3d 1229, 1231 (Pa. Super. 2011) (hereinafter referred to as “*Cooper*”), citing *In re Estate of Albright*, 376 Pa. Super. 201, 545 A.2d 896, 899 (Pa. Super. 1988) (“where a court no longer has power to permit intervention because a matter has been finally adjudicated, a hearing on a petition to intervene would be pointless”).

Judge Capuzzi's 11/4/2020 Order does not constitute a rendition of final judgment in the emergency action between the Delaware County Republican Executive Committee on the one hand, and the Delaware County Board of Elections, on the other hand.

Since the matter has not been finally adjudicated, intervention is still possible where, as here, Intervenors sought to intervene just 48 days after Judge Capuzzi issued his 11/4/2020 Order, before the rendering of any final judgment.

In a relatively recent decision by the Commonwealth Court of Pennsylvania, the Court reversed a lower court's denial of intervention where intervention was sought prior to any final judgment. *Wells Fargo Bank N.A. v. James*, 90 A.3d 813, 816-818 (Pa. Cmwlth. 2014).

Contrast *Bank of Am. v. Heckscher*, No. 2009-05228, 2014 Pa. Dist. & Cnty. Dec. LEXIS 590 (C.P. Oct. 27, 2014), \*7-8, where the Court noted:

"It was not until January 21, 2011, approximately ten (10) months later, that Appellants filed their Motion for Leave to Intervene. The consent judgment that was entered in favor of Plaintiff on March 24, 2010 was a final judgment, which terminated the "pendency" of the instant action. The issue before us is directly in line with the *Cooper* decision. Thus, we believe intervention is not permitted pursuant to Pa. R.C.P. 2327. . . [T]he *Cooper* Court made a clear statement that an action is "pending" until the rendition of final judgment."

Intervenors sought to intervene during the pendency of the action, before any final adjudication of the matter. Since there was no final judgment from the time that Judge Capuzzi issued his emergency Order on 11/4/2020, until the time that Pruett,

Stenstrom and Hoopes sought to intervene on 12/22/2020, Judge Capuzzi erred as a matter of law, by denying their Petition to Intervene with prejudice.

**3. There is an actual case or controversy entitling intervention.**

Standing is satisfied so long as there is a valid case or controversy between the named parties. There was certainly a case or controversy at the time, or Judge Capuzzi would not have issued his 11/4/2020 Order.

If the BOE had complied with the law, with a Court Order and the Election Code, Attorney John McBlain and the DCREC would not have needed to file an Emergency Petition with Judge Capuzzi in the first place.

Just because, thereafter, Attorney John McBlain and the DCREC took no further action to enforce Judge Capuzzi's 11/4/2020 Order, which the BOE blatantly violated, does not mean the case or controversy ended.

Nor does it mean that Dasha Pruett, Gregory Stenstrom and Leah Hoopes were not directly and seriously harmed by the BOE's lawless misconduct.

Judge Capuzzi suggests in his Opinion that because the DCREC did not object when the Board of Elections violated his 11/4/2020 Order, there is no "controversy" for Pruett, Stenstrom and Hoopes to intervene into.

Judge Capuzzi then states that their only remedy is, therefore, to have filed a new separate action, despite the fact that the additional time and expense of filing a new action, before a different judge than the one that issued the Order, would not

result in a different judge being able to adjudicate whether the Board of Elections violated Judge Capuzzi's Order. Only Judge Capuzzi can adjudicate whether his own order was violated.

Furthermore, see dissenting opinion of Justice Musmanno, in *Robinson Twp. Sch. Dist. v. Houghton*, 387 Pa. 236, 249-250, 128 A.2d 58, 64-65 (Pa. 1956), wherein he dismisses the idea of an intervenor having to file a new separate action rather than intervening into an existing one.

Why should Pruett, Stenstrom and Hoopes have to file a new separate action just because the DCREC failed to seek sanctions against the Board of Elections for violating Judge Capuzzi's Order? Why should they have to go back, launch another ship, wasting time and money, subject themselves to all the trouble, annoyance and costs of fresh litigation, when Judge Capuzzi can settle the whole controversy once and for all, right now?

Intervenors assert a right to intervene based on a legally enforceable interest that is substantial, direct and immediate, where actual harm has been alleged.

Both the Political Candidate, Dasha Pruett, and the Poll Watcher Observers, Gregory Stenstrom and Leah Hoopes (collectively, "Intervenors"), have the requisite substantial interest to intervene in this lawsuit.

"A direct interest requires a causal connection between the asserted violation and the harm complained of. An interest is immediate when the causal connection is

not remote or speculative.” *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1215 (Pa. Cmwlth. 2018) (*en banc*). To hold otherwise elevates form over substance in a matter of extreme importance to the people of Pennsylvania.

Under Pennsylvania Rule of Civil Procedure 2327(4), the Court may permit a party to intervene if “the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.” Pa. R.C.P. 2327(4).

Pennsylvania courts define a “legally enforceable interest” as a substantial, direct, and immediate interest in the outcome of the litigation. *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1215 (Pa. Cmwlth. 2018) (*en banc*) (citations omitted). “A substantial interest in the outcome of the litigation is one that surpasses the common interest of all citizens in procuring obedience to the law.”

Congressional Candidate Dasha Pruett clearly meets this test of having a legally enforceable interest which is both substantial and which surpasses the common interests of all citizens in having a fair, free and transparent election. Intervenors’ interests are immediate because without the personal observations of Stenstrom and Hoopes it is not possible for Dasha Pruett to prove that the BOE violated Judge Capuzzi’s Order.

There is a direct connection between the disobeying of Judge Capuzzi’s Order and the *potential for* fraudulent, irregular and illegal activities that may have

transpired a *potential* enabled because the Board precluded poll watcher observers from allowing them to see the resolution of absentee and mail-in ballots. Appellants respectfully suggest this case presents precisely the type of circumstance where intervention is warranted.

Contrast *Commonwealth v. Philip Morris, Inc.*, 40 Pa. D. & C.4th 225, 246 (C.P. 1999), where a trial court concluded that intervention could not be allowed where the alleged harm was not actual but was, at best, conjectural. “[T]he issues involved must be ripe for judicial determination, meaning that there must be the presence of an actual case or controversy.” *Pennsylvania State Lodge, Fraternal Order of Police v. Commonwealth, Department of Labor & Industry*, 692 A.2d 609, 613 (Pa. Cmwlth. 1997), *aff’d*, 550 Pa. 549, 707 A.2d 1129 (1998).

The issue of integrity in the elections, and the right to a fair and transparent election, are issues ripe for judicial determination. Because the members of the Board of Elections prevented all observers from entering the rear room where mail-in ballots were being opened, handled and counted for 3 days, and thereafter only allowed 2 observers for 5 minutes every two hours, instead of at all hours, in violation of Judge Capuzzi’s Order and the Election Code, Stenstrom and Hoopes were prevented from doing their job, and Candidate Pruett was prevented from knowing whether the large number of mail-in ballots cast for her opponent were real or fake ballots. She will never know with assurance whether she lost. Instead, she

must “trust” in the integrity of the public officials of her opposing party that they removed their partisan hats as a Board controlled by the Democrat Party and wore their “sworn government official” hats acting with fairness and justice without favor.

The Election Code and Judge Capuzzi’s order were designed not to require a candidate to have faith and trust in a partisan board to conduct a fair election (and Appellants expect and hope that the vast majority of such boards do, in fact, act in such a morally upright way). The Election Code and Judge Capuzzi’s order contain “sunshine” provisions precisely so that Candidate Pruett does not, in the small hours of the morning when fear grips us the most have to wonder, with or without reason, whether she was the victim of a rigged and stolen election. Had the Board followed the law, and the commonsense reason for that law and allowed the watchers, no one could suffer such doubts.

An actual case or controversy need not exist at all states of appellate review. The Commonwealth Court in *Atticks v. Lancaster Twp. Zoning Hearing Bd.*, 915 A.2d 713, 716-717 (Pa. Cmwlth. 2007), rejected this, declining to dismiss an appeal as moot since, “[i]f it were determined on appeal that [the proposed intervenor] was entitled to intervene, the Court could order the remedy of a new trial with [the intervenor's] participation. 17, citing *Cogan v. County of Beaver*, 690 A.2d 763, (Pa. Cmwlth.), *appeal denied*, 548 Pa. 661, 698 A.2d 68 (1997).

This Court can, likewise, issue an Order, reversing Judge Capuzzi's denial of the Petition to Intervene with prejudice, and order the remedy of a new trial or an evidentiary hearing, with the participation of Intervenor Dasha Pruett, Greg Stenstrom and Leah Hoopes.

**4. Intervenor's are intended beneficiaries of Judge Capuzzi's 11/4/2020 Order.**

The candidate for political office, Dasha Pruett, and the poll watcher observers, Gregory Stenstrom and Leah Hoopes, are all directly affected by the BOE's failure to comply with Judge Capuzzi's Order as to poll watcher observers.

Dasha Pruett ("Pruett") is clearly an intended beneficiary of the 11/4/2020 Order issued by Judge Capuzzi because the duly appointed observers ensure that she obtains a fair and transparent election in her run for public office.

Pruett, residing at 1122 Childs Avenue, Drexel Hill, PA. 19026, ran for the U.S. House of Representatives for the Fifth Congressional District, in the 2020 General Election. See Petition to Intervene, paragraph 4, page 2 [RR85], and paragraph 50, page 11 [RR94.] The actions of the BOE, and its failure to comply with Judge Capuzzi's Order, has deprived Candidate Dasha Pruett of her right to a transparent and fair election to the public office she sought to hold.

Both Stenstrom and Hoopes are, likewise, intended beneficiaries of the 11/4/2020 Order issued by Judge Capuzzi because they were duly appointed observers which Judge Capuzzi ordered must be permitted to observe (a) the



resolution area at all hours while ballots are being resolved, (b) the sorting machine at all times while the machine is in use, and (c) the ballot room. See Petition to Intervene, paragraph 7, page 3. [RR86.] See Judge Capuzzi's Order, attached as **Exhibit 4** to this Appellate Brief.

Unless Stenstrom and Hoopes can see what is happening and bring their concerns and questions to the attention of the BOE's staff and representatives should they observe any irregularities or illegalities, they cannot perform the functions that their position as observers requires them to perform to ensure the integrity, transparency and fairness of the 2020 General Election. *Id.*, paragraph 8, page 3. [RR86.]

**5. Intervenors have a legally enforceable interest in a fair and transparent election.**

Without possible contempt penalties against the Board of Elections for violating Judge Capuzzi's Order, a message of deterrence cannot be sent that will discourage creating the appearance of potential fraud in future elections. Fear of a rigged election cannot be allowed to stand. In their Petition, Intervenors focus specifically and uniquely on protecting the right to a fair and transparent election by asking the Court to punish the Board of Elections for breaking the law designed to remove that fear. The misconduct by the members of the Board of Elections enabled, perhaps even invited, irregularities, illegalities and maybe even fraud to occur that

would have been deterred had the law been followed and watchers permitted to “watch.”

Having observers present at all times that the mail-in ballots are opened, handled and resolved, in a historic election occurring during a pandemic, where a much larger than normal amount of mail-in ballots were cast by registered voters of Delaware County, was the only way to ensure that only legal votes are counted and reassure the public by use of that built into the system “check.”

Members of the Board of Elections admittedly failed to preserve evidence and lost or intentionally disposed of USB-V drives and return receipts, both of which are needed in order to certify the election results, it is not now possible to ascertain what ballots were cast legally from those that were cast illegally. These members ought to have to explain their conduct at a hearing below and satisfy the court that their handling of this evidence comported with the Election Code, Judge Capuzzi’s order, and their own oaths of office. Without end of the day receipts, showing how many votes each candidate received, and with missing cartridges and USB-V sticks, the BOE employees at the Wharf Office Building may have pressured election judges and inspectors, or least some of them, to recreate the return receipts with numbers not based on any credible source of information. See Reply Brief, page 18. **[RR138.]**

Without a hearing, members of the BOE do not have to explain their conduct done outside the view of Appellants and other persons designated as watchers to the

detriment of Candidate Pruett, other candidates, and members of the public at large. Maybe the BOE has a compelling interest that outweighed the interests of Candidate Pruett, her agents, other candidates and their agents and the public. However, the court below has not required the BOE to disclose that compelling interest which it concluded gave it the right to disregard the Election Code and the court's order. The return receipts which are necessary in order for the Board of Elections to certify the election were evidently lost or purposefully discarded by employees of the BOE. See Reply Brief, page 17. [RR137.]

Allegedly, an independent consultant of the BOE, Christina Iacono, sent an email [RR141] to the election judges and minority inspectors telling them to return to the Wharf Office Building on November 13, 2020, to "reconcile" the return receipts. If presented, the evidence may tend to show these persons were called to work because of inept work or intentional spoliation of evidence, resulting in some or all of the original return receipts to disappear. See Reply Brief, page 17. [RR137.]

At a hearing, evidence would show that knowing the members of the Board of Elections could not certify the election results without these return receipts, they asked election judges and minority inspectors to *recreate* these return receipts even though, in at least some cases, the end of the day receipts tabulating how many votes each candidate received from each precinct were missing. See Reply Brief, page 17. [RR137]. The actual email dated November 12, 2020, sent by BOE employee,

Christina Iacono, is **Exhibit A** to the Reply Brief [RR141]. Some inspectors cried when being questioned, stating that they were pressured to include numbers on the recreated return receipts that were not based on anything. See Reply Brief, page 17. [RR137.]

To a large extent the alleged illegalities occurred because the BOE representatives kept poll watcher observers from performing their duties, in direct violation of Judge Capuzzi's November 4, 2020 Order and the "sunshine" provisions of the Election Code. Not allowing poll watcher observers to be present at all hours, to observe the resolution process, at all stages where votes are resolved, made it *possible* for election fraud to occur, particularly where there is an unprecedented number of absentee and mail-in ballots as occurred in the 2020 General Election.

The candidates, their watchers, and the public is left to wonder if while the provisions of the law designed to safeguard against allowing election fraud languished because the Board simply refused to implement those safeguards, did unscrupulous people use the opportunity to damage Dasha Pruett's effort to become a member of Congress? She hired watchers willing to watch to protect her interests. Delaware County officials refused her watchers the ability to carry out that commission apparently in direct contravention of an order of court. What non-nefarious reason is there for those officials to do so?

**6. Intervenor's interests are not adequately protected by the Delaware County Republican Executive Committee.**

Pursuant to Rule 2329 of the Pennsylvania Rules of Civil Procedure, a court may deny a petition to intervene—even when a party has demonstrated an enforceable interest in the matter — if any one of four factors is present, including whether the interests of the proposed intervenors are adequately represented by other parties in the case.

Here, the inadequacy of representation of these Intervenor's interests is evidenced by the failure of any existing party to raise issues concerning the Board of Elections violating Judge Capuzzi's Order as to poll watcher observers, nor has any existing party requested the Court to impose sanctions for same.

The political candidate, Dasha Pruett, and the poll watcher observers, Gregory Stenstrom and Leah Hoopes, have additional separate legally enforceable interests which are distinct from the general interests of the other parties, and hence, they are not adequately represented by the Delaware County Republican Executive Committee.

The other Petitioner, the Delaware County Republican Executive Committee, does not adequately represent the interests of the candidate and the poll watcher observers because since the November 3, 2020 General Election this organization has not sought any sanctions against the Board of Elections for violating Judge Capuzzi's Order. The Delaware County Republican Executive Committee, as committed as it is to electing candidates reflective of its political philosophy, it is

*not* the candidate. Dasha Pruett *is* the candidate, and her agents work for her and *not* the Executive Committee. Ms. Pruett and her team has a much more direct and focused interest in the enforcement of the court's order, as the outcome of the election affects Ms. Pruett's livelihood and career. To the Executive Committee, Ms. Pruett is one of many candidates it seeks to support. But Ms. Pruett's most important race is her own. The distinction makes her position and that of her agents substantially different from that of the Executive Committee.

**7. There Is No Other Basis to Deny this Petition.**

Finally, none of the other applicable factors warranting a denial of this petition under Pa. R.C.P. 2329 is present.

Pursuant to Pa. R.C.P. 2327(3), a person may intervene where such person could have joined as an original party in the action or could have been joined therein.

Intervenors have not unduly delayed in making application for intervention, nor will their proposed intervention unduly delay, embarrass or prejudice the adjudication of the rights of the parties. Pa. R.C.P. 2329(3). The poll watcher observers tried different courses of action to bring to the attention of different bodies, including the Attorney General, what they witnessed and how they were kept from performing their duties to ensure a fair and transparent election. While exhausting their administrative remedies, appearing to testify before Pennsylvania legislators in Gettysburg and elsewhere, Stenstrom and Hoopes were both busy fact gathering and

speaking to other observers to coordinate an investigation that the law enforcement agents should have taken on but did not, because they are politically motivated Democrats. See Reply Brief, page 7. [RR127.]

To date, the District Attorney of Delaware County and the Pennsylvania Attorney General have not investigated BOE for violating the Election Code as to observers. Id. So instead of rushing to court, Stenstrom and Hoopes conducted their own investigation, speaking with witnesses and other observers who were also kept away from where the ballots were being resolved. Id. A 48-day period is hardly an undue delay under the unique facts of this case. No grounds exist for refusing the Petition to Intervene under Pa. R.C.P. 2329, rendering intervention mandatory.

**E. There was no laches or undue delay.**

As stated above, there was no laches or undue delay from a 48-day lapse in time from November 4, 2020, when Judge Capuzzi issued his Order, until December 22, 2020, when Intervenors filed their Petition to Intervene, and their Petition for Sanctions against the Board of Elections. It is denied that any delay was undue. Especially, in light of the then fluid state of the law, multiple petitions to the United States Supreme Court that had the potential to affect election law throughout the country, the desire to exhaust administrative remedies to acquire standing, and a pandemic with an accompanying unprecedented number of mail-in ballots, thrusting

courts into unknown territory requiring statutory interpretations under circumstances state legislatures could never have anticipated.

Intervenors aver the concept of “undue delay” begs the question of “compared to what?” The Nation faced unprecedented issues relating to the 2020 General Election including unusual (undue?) delay in the counting of ballots relative to previous years’ count even in presidential election cycles. Pennsylvania, indeed, all of the United States to some degree, altered its “norms” in response to the pandemic.

**F. Judge Capuzzi erred as a matter of law by wrongly concluding that there was not a reasonable legal basis supporting the two Petitions filed by Intervenors.**

In light of the subsequent actions of the Pennsylvania General Assembly, this Honorable Court should consider whether Judge Capuzzi of the Delaware County Court of Common Pleas would even still conclude that Intervenors’ Petitions have “a total absence of legal merit,” specifically with respect to the word “total.” The Pennsylvania General Assembly is considering altering the statutory law in Intervenors’ favor. Intervenors aver that if the General Assembly is considering amending the law of the Commonwealth to generally favor Intervenors’ position, Intervenors’ position is not so void of merit as to support Judge Capuzzi’s finding that there is not even a “scintilla” of legal merit to Intervenors’ Petitions.

Judge Capuzzi, by denying with prejudice, both Petitions filed by Intervenors, based on the pleadings alone, deprived Intervenors of the evidentiary hearing they



sought to provide the court with their evidence, and for which they specifically asked in their prayers for relief in each of the Petitions filed. The court denied the request for an evidentiary hearing wholesale.

The trial court could have chosen to place restrictions on the evidence presented: for example limiting evidence to matters directly related to whether the Board complied with the court's order and relevant Election Code provisions, whether any violations were *de minimis*, or could reasonably have affected the count, and whether the legislative intent of the General Assembly in enacting the Election Code was advanced by the manner in which the Board carried out its pre-canvass and canvass relative to the ability of the watchers to see. However, by refusing to hear any evidence at all, the trial court has stripped this Court of the trial court's firsthand factual evaluation of the severity of the alleged violations, and further deprived this Court with the benefit of the trial court's observation of the witnesses' credibility.

In short, with the trial court disallowing the presentation of evidence below, with whatever constraints the trial court deemed warranted, this Court is now deprived of a record upon which to base any determination of "how bad" the conduct of the Board was, *if* it was bad, whether the conduct was of such a nature that public policy demands a remedy to restore the public's faith in the integrity of the election count.

Appellants aver that surely the General Assembly intended “watchers” to be permitted to actually “see,” and further aver Judge Capuzzi initially agreed with this self-evident assertion. Appellants would demonstrate at a hearing they were unable to perform their duties as “watchers” because they could not “see.” Their petition to intervene on behalf of the congressional candidate that engaged them came *prior* to the opposing candidate being seated in Congress and might have formed the basis for further proceedings affecting the seating of that (now) Member of Congress.

Appellants respectfully assert they are entitled to rely upon the obvious intent of the General Assembly, the evidence they knew they could present, and the fact that the damage of the seating of the supposed victor had not accrued, to seek redress in their local county court of common pleas. They are citizens of the United States, of Pennsylvania, as well as of Delaware County without litigious history, who sought access to the judiciary in the sincere belief they presented a justiciable issue. They trusted in their county judicial system to treat them fairly and with respect. Instead, they have been vilified by Delaware County authorities and attacked personally and financially for trying to operate “within the system.”

Appellants respectfully assert they are entitled to due process of law and access to the courts to address their claims on their merits. Not having had the benefit of being permitted to act as observers as the plain language of the Election Code appears to make a routine fact of election vote counts throughout the

Commonwealth, the vehemence with which their efforts to “watch” (and later efforts to enforce that right) have been met by Delaware County is troubling. Congressional districts are not so large in terms of votes cast in general elections, that a few hundred votes one way or the other lack the potential to change the outcome.

Appellants respectfully suggest it is entirely reasonable for a congressional candidate to appoint watchers to observe the vote count according to law. A congressional seat is important to the people who live in that district, to Pennsylvania as a state and to the Nation as a whole where presently the House of Representatives is almost equally divided. Appellants argue that *everyone* ought to favor the public having confidence in the counting of votes. The General Assembly considered in the Election Code that one mechanism for ensuring the integrity of election counts was for candidates to be permitted to appoint agents to watch the count to look for irregularities. The Delaware County Board of Elections did not allow Appellants to perform their duties under the Election Code. The trial court did not believe Appellants had evidence upon which the court would entertain a hearing, despite there being no dispute that employees of the Board prohibited Appellants from being able to observe the counting of ballots on behalf of congressional candidate Dasha Pruett.

The trial court at the very least ought to have heard evidence and made a determination of whether the Board acted reasonably and within the law. Appellants

suggest that under present circumstances, it is not entirely unreasonable that they might fear they uncovered evidence of irregularities, fraud and elections law violations, perhaps even including, but not limited to the fabrication of return sheets, which might have developed at an evidentiary hearing.<sup>6</sup> The opposite conclusion might also be true. It might well have been that Appellants' fear of nefarious conduct by the Board is entirely mistaken, despite the Board's actions blocking their ability to "watch" thus vastly limiting their fact-gathering opportunities. If Appellants are mistaken, the Board will refute any nefarious conclusions drawn in error (and in ignorance because the Board refused to permit Appellants to engage in their watching function) on cross-examination and upon presentation of its own evidence.

However, Appellants were not afforded the opportunity to do so by the trial court, which denied Appellants' petitions without hearing or considering any of the evidence which would have been presented in support of Appellants' allegations. Further, Appellees refused to provide any discovery to Appellants which, if provided, would have permitted Appellants to draft the subject petitions with greater precision. Delaware County's efforts to stifle Appellants' access to the courts and

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<sup>6</sup> Appellants documented and currently possess extensive evidence to present at the trial court level that Appellants contend conclusively demonstrates substantial irregularities in the vote count which Appellees steadfastly kept them from observing. Because the trial court refused an evidentiary hearing, this Court cannot evaluate the strength of such evidence. Curiously, the trial court denigrates Appellants' efforts as not having shown a "smidgeon" or "scintilla" of evidence, when it is the trial court who refused to allow Appellants to produce evidence. Perhaps such evidence would have been lacking if produced at a hearing, but presently there is no way to make such a determination.

ability to present evidence, perhaps unintentionally, creates the inescapable suggestion, perhaps even a presumption, that Delaware County *fears* the revelation of the purported evidence Appellants' wish to present, and *fears* the arguments Appellants make.

**G. To the extent that Judge Capuzzi denied with prejudice Intervenor's Petitions based on his mistaken conclusion that Intervenor had "unclean hands," or that Attorney Deborah Silver was "unconscionable" or "inexcusable" for failing to cite to recent Supreme Court case law precedent, this Commonwealth Court must reverse him.**

As stated above, neither party cited the November 2020 Pennsylvania Supreme Court decision, *In re Canvassing Observation*, 241 A.3d 339 (Pa. 2020), while the trial court had the underlying matter under advisement. Curiously (because of the intense reliance placed on the case presently), counsel for the Appellee-BOE did not cite the trial court to the case *prior* to the January 12, 2021 Order and Opinion of Judge Capuzzi, though counsel certainly could have chosen to do so. Appellants assert that Board counsel affirmatively elected *not* to cite the case because the case does not advance the Board's position. If it did so, Board counsel certainly would have delighted in flourishing it to Judge Capuzzi to the detriment of Appellants.

On November 17, 2020, the Pennsylvania Supreme Court handed down a case of first impression *In re Canvassing Observation*, 241 A.3d 339 (Pa. 2020), with five justices in the majority and with the Chief Justice and Justice Mundy authoring dissenting opinions. Intervenor's counsel at the time and Defendant's Counsel each

should have been aware of and addressed the Supreme Court's decision in briefing and argument before Judge Capuzzi to help him craft his his Order with Opinion of January 12, 2021. As events have unfolded, Judge Capuzzi located the case himself and without argument from the parties, decided the level of import and applicability to the matter then before him.

While as of this writing, *In re Canvassing Observation* remains the law in the Commonwealth, that decision is not adverse to Appellants' position. Appellants also deny that the case is settled law in favor of the members of the Board of Elections, as they evidently *now* maintain only *after* the trial judge below indicated *he* found it important without any prompting from Board's counsel.

A review of *In re Canvassing Observation* on Westlaw reveals an opinion riddled with yellow cautionary flags in those portions of the opinion where the majority interpreted existing statutes (in relevant context) for the first time with no prior authority of its own upon which to rely. The Supreme Court interpreted the General Assembly's intent as best it could, operating in a compressed timeframe to allow further review, if sought, by the Supreme Court of the United States.

Westlaw uses the yellow cautionary flags to alert researchers to potential pitfalls in relying upon a specific case, or provision within a case, to be careful when citing the case or provision as settled authority. A minimal investigation of these cautionary flags reveal that members of the Pennsylvania General Assembly have

introduced bills that would change the very statutes the Supreme Court was called upon to interpret for the first time in *In re Canvassing Observation*.

These bills under consideration in the General Assembly are HB 25 (introduced January 11, 2021, just a day before Judge Capuzzi's Order with Opinion issued), HB 366 (introduced February 3, 2021) and HB 470 (introduced February 9, 2021).

All three proposed changes to the statutes upon which the Supreme Court relied, if enacted, would legislatively alter *In re Canvassing Observation* so as potentially to render its holding meaningless.

Notably, as with the Supreme Court decision itself, counsel for the members of the Board of Elections did not, himself, bring these three House Bills to the Court's attention, though all were introduced in the General Assembly prior to February 11, 2021, when the Board of Elections filed its sanctions Petition for Counsel Fees against Intervenor to punish Appellants for resorting to common pleas court when as duly appointed "watchers" of a congressional candidate, a government entity simply refused them the right to "watch." Appellants might well wonder, from the Board's perspective, what were they supposed to do when they legitimately thought a government agency illegally and in violation of a court order, refused them the ability to watch the counting of votes for their candidate? What Appellants did

*not* do was riot, block traffic, set fires, destroy property, attack police, and/or seek to injure anyone. They went to court in Delaware County instead.

Appellants contend Judge Capuzzi erred as a matter of law *if* he dismissed Intervenors' Petitions based on their lawyer, Attorney Deborah Silver, failing to cite to this recent Supreme Court case law precedent.

### **VIII. CONCLUSION**

For the foregoing reasons, Appellants respectfully request the following relief:

1. That the Order of Judge Capuzzi, essentially dismissing Intervenors' case by denying their Petition to Intervene and their Petition for Sanctions against the Board of Elections, with prejudice, **BE REVERSED** and **BE REMANDED** for an evidentiary hearing;
2. That Appellants (as Intervenors below) be granted standing to assert the rights of congressional candidate Dasha Pruett to have had watchers under the Election Code and under the Order of Judge Capuzzi of November 4, 2020; and
3. Such other relief as the Commonwealth Court deems just and proper.

Date: April 19, 2021

Respectfully Submitted,

/s/ Bruce L. Castor, Jr.

Bruce L. Castor, Jr., Esq.

Attorney I.D. #46370

Counsel for Appellants/Intervenors

Gregory Stenstrom

and Leah Hoopes



/s/ Deborah Silver  
Deborah Silver, Esq.  
PA. Attorney I.D. #45521  
Counsel for Appellants/Intervenors  
Gregory Stenstrom and Leah Hoopes

### **CERTIFICATE OF COMPLIANCE**

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully Submitted,

/s/ Bruce L. Castor, Jr.

Bruce L. Castor, Jr.

Counsel for Appellants/Intervenors

Gregory Stenstrom and Leah Hoopes

Date: April 19, 2021

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

**125 CD 2021**

**Trial Court Case No. CV-2020--007523**

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Delaware County Republican Executive Committee,	:
	:
Appellant,	:
	:
v.	:
	:
Delaware County Board of Elections,	:
	:
Appellee.	:

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**CERTIFICATE OF COMPLIANCE**

I certify that the Appellate Brief of Appellants contains 13,825 words, not including the cover of the brief, and pages containing the table of contents, tables of citations, proof of service and any addendum containing opinions.

I declare under penalty of perjury that the foregoing is true and correct.

Date: April 19, 2021

Respectfully Submitted,

/s/ Bruce L. Castor, Jr.

Bruce L. Castor, Jr.

Counsel for Intervenors

Dasha Pruett, Gregory Stenstrom  
and Leah Hoopes

FILE COPY

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA  
CIVIL DIVISION

DELAWARE COUNTY REPUBLICAN  
EXECUTIVE COMMITTEE

v.

BOARD OF ELECTIONS

NO.: CV-2020-007523

**ORDER**

Before the Court are two Petitions. The first is the Emergency Petition to Intervene of Candidate for Political Office, Dasha Pruett, and Observers Gregory Stenstrom and Leah Hoopes. The second is an Emergency Petition Against the Board of Elections for Contempt for Violating Judge Capuzzi's 11/4/2020 Order and for Violating Election Code Provisions Allowing Observers. For the reasons set forth in the Opinion below, both Petitions are **DENIED WITH PREJUDICE**.

**OPINION**

Without per adventure, the general election of 2020 was the most contentious, most impassioned and most disputed in modern history. While this Court is not oblivious to this, it is the duty of the judiciary to apply the rule of law free and clear of outside influences or the clamor that has arisen. A fair and impartial jurist who adheres to the Constitution of the United States and the Constitution of the Commonwealth of Pennsylvania in accordance the oath of law that binds the conscience is what is mandated and what is expected. It is through this lens that the Court has addressed the issues presented.

The essence of the Petitions are as follows: First Petitioners seek to intervene in the original matter as captioned above. Second, Petitioners seek to have the Board held in contempt for

allegedly violating the Court's order as follows: Petitioners claim that they were not granted full access to a rear room where mail-in and absentee ballots were being resolved; observers were not permitted to enter a rear locked area where ballots were stored; and observers were confined to a "pen" which did not allow meaningful access to observe/view the area where the sorting machine was in use. As a result, Petitioners seek the USB V cards that when inserted into the computer tabulated the votes and to enjoin the United States House of Representatives from seating Dasha Pruett's opponent. These claims lack a scintilla of legal merit.

At the very outset it is extremely important to highlight that the Delaware County Republican Executive Committee, which was the party that filed the original petition, has not raised an issue with the Board of Elections compliance with the Court's Order of November 4, 2020. Likewise, the Republican Executive Committee has not filed a response to the Petitions presently before the Court. Furthermore, each alleged factual averment within the petitions was known weeks before this 11<sup>th</sup> hour, pre-holiday filing of December 22, 2020 and, thus, did not constitute such an emergency that the Board of Elections not be given adequate time to research and respond accordingly.<sup>1</sup>

In order to place the current controversy in perspective and to appreciate the canvassing of ballots, it is necessary to set forth the election process of 2020, which, in this Commonwealth, was substantially different from prior elections. Following the general election of 2016, there was grave concern that foreign governments had interfered with the election process. There was further concern that these foreign governments or others could or may have hacked into the computerized voting systems employed in many jurisdictions. Additionally, some of these computerized

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<sup>1</sup> The time frame set forth in the Petitions was between November 3, 2020 and November 5, 2020, and whereas the Petitions were not filed until December 22, 2020, the Court deemed these not to be emergent and did mandate that the Board of Elections be given adequate time to respond.

systems lacked a paper trail that could be subject to audit, if needed or required, in order to validate the count. Finally, it was crystal clear that the expected voter turnout would far surpass recent elections. It is with this backdrop that Governor Wolf and the Legislature changed, altered, and/or modified the manner in which elections in the Commonwealth are conducted.

In 2018, U.S. Department of Homeland Security Secretary, Kirstjen Nielsen, called on all state and local election officials to make certain that by the 2020 presidential election every American votes on a system that produces a paper record or ballot that can be checked and verified by the voter and audited by election officials. The Pennsylvania Department of State informed all 67 counties that it must have voting machines that produce voter-verifiable records and meet 21<sup>st</sup> century standards of security, auditability and accessibility by December 31, 2019. As of June 2020, all Pennsylvania counties had complied. *See, Department of State website.*

In addition to absentee ballots, the Legislature significantly modified the election process by adding a provision which enabled any qualified elector to apply for a mail-in ballot without restriction or reason. *25 Pa. C.S. §3150.12 (a). See, Section 14 of Act 2019, October 31, P.L. 552, No. 77.*

#### **NO CASE OR CONTROVERSY IN WHICH TO INTERVENE**

The original petitioner was the Delaware County Republican Executive Committee. The original petitioner has not challenged this Court's original ruling and order, nor has it filed anything in response to the current petitioners' request to intervene. Therefore, there is nothing before this court that would require the intervention of a third-party.

*Pennsylvania Rule of Civil Procedure 2327* sets forth who may intervene. The Rule is as follows: "At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if:

- (1) The entry of judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
- (2) Such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or an officer thereof; or
- (3) Such person could have joined as an original party in the action or could have been joined therein; or
- (4) The determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

*Pursuant to Pa. R.C.P. 2329*, the court may refuse an application for intervention where the interest of the petitioner is adequately represented; or the petitioner has unduly delayed in making application for intervention. Here, the interests of the observers were more than adequately represented by the Delaware County Republican Executive Committee at the relevant time. Furthermore, the alleged violation occurred on November 5<sup>th</sup>, making this post-election application of December 22<sup>nd</sup> untimely. Thus, the denial.

Ironically, in the very action they wish to be part of, Petitioners' claim that the Delaware County Republican Executive Committee does not adequately represent their interest. As the transcript of the emergency hearing that was held the evening of November 4, 2020 demonstrates, the resolution of the controversy adequately addressed the claims of the original petitioner who stood in the shoes of the Republican observers and candidates. Additionally, the ruling by this court fully comported with the law as it pertained to observers and no appeal was taken of the order that was issued.

The third-party cannot latch onto the original petition. If the third-party truly believed there was a violation of this court's order, then it should have filed a new action under a separate docket number.

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The Order that Petitioners contend has been violated was issued on November 4, 2020. That Order specifically addressed the issue of when and where observers were permitted.

Once an order is issued, the Court of Common Pleas retains jurisdiction for thirty (30) days. During this thirty-day period, the court may modify or rescind the original order. *42 Pa. C.S. §5505*.

In the instant matter, the Petitioners could have challenged the manner in which the Board of Elections complied with the Order at the time they allege they were denied the opportunity to observe and requested a modification of the Order. As noted in the Petition, observer Stenstrom called this judge's chambers twice on November 5<sup>th</sup> and was advised by the judge's staff to obtain legal representation. This was not done.

It must also be noted that during this thirty-day period, the observers could have filed an appeal to the Commonwealth Court if they believed this Court's directive did not comport with election law. Again, this was not done.

### **DOCTRINE OF LACHES**

Petitioners' challenge violates the doctrine of laches given their utter failure to act with due diligence in commencing this action. Laches is an equitable doctrine that bars relief when a



complaining party is guilty of want of due diligence in failing to promptly institute an action in prejudice of another. *Stilp v. Hafer*, 718 A.2d 290, 292 (Pa. 1998).

A plain reading of the Petition for Sanctions sets forth allegations that occurred during the pre-canvassing and canvassing of election ballots. Assuming *arguendo*, that the allegations enjoyed even some smidgen of merit, the remedy rested at the time of the occurrence, not seven weeks after the canvassing was completed. This is the epitome of lack of due diligence.

### **INDISPENSIBLE PARTY**

An indispensable party is one whose rights are directly connected with and affected by the litigation that he must be a party of record to protect such rights. *Columbia Gas Transmission Corporation v. Diamond Fuel Company, et al.*, 464 Pa. 377, 346 A.2d 788 (Pa. 1975). It has long been established that unless all necessary and indispensable parties are parties to the action, the Court is powerless to grant relief. *Tigue v. Basalyga*, 451 Pa. 436, 304 A.2d 119 (Pa. 1973). Under Pennsylvania law, the failure to join an indispensable party implicates the trial court's subject matter jurisdiction. *Orvian v. Mortgage I.T.*, 118 A.3d 403 (Pa. Super. 2015).

Petitioners, in the *ad damnum* clause, seek an order, declaration and/or injunction enjoining the "winning" U.S. House of Representative candidate from exercising official authority. The Court takes judicial notice that the winning candidate was U.S. Representative Mary Gay Scanlon. Representative Scanlon has a direct interest in this matter, as it seeks to prevent her from exercising her duties in the House of Representatives. Therefore, Representative Scanlon is an indispensable party; yet, Petitioners never served her with process, thereby denying her the right to be heard. Furthermore, failure to do so deprives this court of subject matter jurisdiction.

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The identical issue before this court has been addressed by our Supreme Court. *IN RE: Canvassing Observation, Appeal of: City of Philadelphia Board of Elections*, 241 A.3d 339 (Pa. 2020) decided November 17, 2020. In advance of the election, the Philadelphia Board of Elections arranged workspace for its employees at the Philadelphia Convention Center for the pre-canvassing and canvassing of mail-in and absentee ballots.<sup>2</sup> Discreet sections of a designated area within the Convention Center were devoted to various aspects of the process.

Pursuant to the election code, designated observers were permitted to physically enter the Convention Center hall and observe the entirety of the process from behind a waist-high security fence that separated the observers from the work-space of Board employees. At 7:45 a.m. on the morning of the election, the Trump Campaign filed a suit challenging the location where observers could watch the process. A hearing was held at which time the attorney for the Campaign argued “that Section 3146.8(b) of the Election Code- which allows designated watchers or observers of a candidate to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded, 25 P.S. §3146.8(b) – requires that the observers have the opportunity to “meaningfully” see the process. In rejecting the argument, the trial court noted that Section 3146.8 contained no language mandating “meaningful observation”; rather, the court interpreted the section as requiring only that the observers be allowed to be “present” at the opening, counting and recording of the absentee or mail-in ballots.” *Id.* @ 343. The trial court also noted that Section 4146.8 provides for no further specific activities for the watchers to do other than to simply be present. The court went onto opine that, under this

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Later, on election day, the trial court denied the Campaign's request that the Board modify the work area to allow for closer observation of the on-going ballot canvassing. The Campaign immediately appealed to the Commonwealth Court, wherein Judge Fizzano-Cannon held a status conference on the night of November 4, 2020 and issued an order on the morning of November 5, 2020, which reversed the trial court. Judge Fizzano-Cannon's order directed the trial court to enter an order by 10:30 a.m. to require "all candidates, watchers, or candidate representatives to be permitted to observe all aspects of the canvassing process within 6 feet, while adhering to COVID-19 protocols." *Id.* 343, 344. In her opinion filed later that day, Judge Fizzano-Cannon found Section 3146.8(b) to be ambiguous and that in order for representatives to fulfill their reporting duty to their candidate, they are required to "have the opportunity to observe the process upon which they are to report, and so mere physical presence of the observers was insufficient to guarantee this "meaningful observation." *Id.* @ 344. The Board then filed an emergency petition for allowance of appeal with Supreme Court on the morning of November 5, 2020.

By Order dated November 9, 2020, the Supreme Court granted the Petition and set forth three issues, one of which was whether the Commonwealth Court erred in reversing the trial court. At the outset, the Court noted that because ballots were still being canvassed by the Board, the question was not moot and thus, ripe for determination.

The Supreme Court addressed the issue by stating that 3146.8(g)(1.1) requires only that an authorized representative"

“be permitted to *remain in the room* in which the absentee ballots and mail-in ballots are pre-canvassed (emphasis added) and Section 3146.8(g)(2) likewise mandates merely that an authorized representative “be permitted to *remain in the room* in which the absentee ballots and the mail-in ballots are canvassed. (emphasis added). While the language contemplates an opportunity to broadly observe the mechanics of the canvassing process, we note that these provisions do not set a minimum distance between authorized representatives and canvassing activities occurring while they “remain in the room.” The General Assembly, had it so desired, could have easily established such parameters; however, it did not. It would be improper for this Court to judicially rewrite the statute by imposing distance requirements where the legislature has, in the exercise of its policy judgment, seen fit not to do so. *See Sivick v. State Ethics Commission* \_\_Pa.\_\_, 238 A.3d 1250 (2020). Rather we deem the absence of proximity parameters to reflect the legislature’s deliberate choice to leave such parameters to the informed discretion of county boards of elections, who are empowered by Section 2642(f) of the Election Code to make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of ... elections officers.” *IN RE: Canvassing Observation, Appeal of: City of Philadelphia Board of Elections*, 349, 350.

In full accordance with the Supreme Court holding, the Delaware County Board of Elections was charged with establishing observation areas. Prior to the above Supreme Court ruling, this court entered an order which required the Board to allow for designated areas and times for observation activities which deviated from the areas established by the Board. The Board adhered to this order. Strikingly, at the time of the filing of this frivolous action, the issue now brought forth by the Petitioners had been adjudicated by the highest court in the Commonwealth, i.e., the Delaware County Board of Elections had full authority to establish observation areas as it deemed fit. Consequently, there is a total absence of legal merit in the Petitions.

#### **RULE OF PROFESSIONAL CONDUCT**

Petitioners, through counsel, pray the court hold the Board of Elections in contempt for disobeying the Order of November 4, 2020; hold the Board of Elections guilty of a misdemeanor for violation of provisions of the Election Code; require the Board of Elections to pay a \$1,000.00 sanction to Dasha Pruett; and sentence members of the Board of Elections to 1 year in prison.

*Rule 3.3.* requires Candor Toward the Tribunal. Pursuant to *Section 2*, a lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.


The above cited Supreme Court opinion was published on November 17, 2020. No where in the Petition, the accompanying memorandum of law, or Petitioner's Reply to Response of the Board of Elections does counsel for the Petitioners reference, let alone cite, this opinion which contains the controlling law. As one who obviously has invested significant time in crafting the legal positions of the client, due diligence mandated that counsel keep abreast of the legal landscape which was unfolding, and which was published on the Court's web site, and duly noted in newspapers of general circulation and *The Legal Intelligencer*. To neglect to exercise due diligence, when the claims made seek to alter or change the election canvassing process and the election results, is unconscionable and inexcusable. Consequently, this dereliction of duty has caused this court, court staff and the respondent to waste valuable time when the resultant ruling was preordained. While the Petitioners seek sanctions against the Board of Elections, they come before this court with unclean hands and they themselves are the ones whose conduct is contemptable.

### **CONCLUSION**

The Delaware County Board of Elections had the authority to establish observation areas in the facility where the pre-canvassing and canvassing of the absentee ballots and mail-in ballots was taking place. In response to a petition by the Delaware County Republican Executive Committee, this Court ordered the Board to allow for closer observation at specific locations and specific time intervals, as the case warranted. The Board fully complied with this order.

The Petitions herein are untimely and do not comport with the law. As our Supreme Court stated, it is the responsibility of the legislature to define distance parameters for positioning of observers and, absent these, the responsibility lies with county board of elections.

BY THE COURT:

  
John D. Capuzzi, Sr. J.  
1/12/21

Cc: Deborah Silver, Esquire  
Manly Parks, Esquire  
William Martin, Esquire

ORIGINAL

**IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA  
CIVIL DIVISION**

**DELAWARE COUNTY REPUBLICAN  
EXECUTIVE COMMITTEE**

**NO.: CV-2020-007523**

**v.**

**BOARD OF ELECTIONS**

**OPINION**

*Date: 2/17/21*

This is an appeal from this Court's Order entered on the 12<sup>th</sup> day of January 2021, wherein this Court denied both Petitions which are the subject of this appeal: the first, an Emergency Petition to Intervene of Candidate for Political Office, Dasha Pruett, and Observers Gregory Stenstrom and Leah Hoopes, and the second, an Emergency Petition Against the Board of Elections for Contempt for Violating Judge Capuzzi's 11/4/2020 Order and for Violating Election Code Provisions Allowing Observers. For the reasons set forth below, the denial of both Petitions should be affirmed on appeal.

**DISCUSSION**

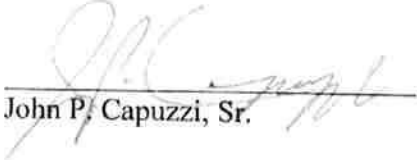
The Order of this Court entered on January 12, 2021<sup>1</sup> set forth a thorough and exhaustive analysis of the claims raised in both Petitions and the respective reasons why each Petition was untimely and did not comport with the law. For purposes of this appeal, this Court fully adopts the

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<sup>1</sup> The Order was officially docketed by the Office of Judicial Support on January 13, 2021.

factual basis and supporting conclusions set forth within that Order as its 1925(a) opinion. A copy of the Order is attached hereto as "Exhibit A."

BY THE COURT:

  
John P. Capuzzi, Sr. J.

Cc: William Martin, Esquire  
Manly Parks, Esquire  
Gregory Stenstrom  
Leah M. Hoopes



# EXHIBIT A

**ORIGINAL**

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CIVIL DIVISION**

**DELAWARE COUNTY REPUBLICAN  
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**v.**

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**NO.: CV-2020-007523**

**ORDER**

Before the Court are two Petitions. The first is the Emergency Petition to Intervene of Candidate for Political Office, Dasha Pruett, and Observers Gregory Stenstrom and Leah Hoopes. The second is an Emergency Petition Against the Board of Elections for Contempt for Violating Judge Capuzzi's 11/4/2020 Order and for Violating Election Code Provisions Allowing Observers. For the reasons set forth in the Opinion below, both Petitions are **DENIED WITH PREJUDICE**.

**OPINION**

Without per adventure, the general election of 2020 was the most contentious, most impassioned and most disputed in modern history. While this Court is not oblivious to this, it is the duty of the judiciary to apply the rule of law free and clear of outside influences or the clamor that has arisen. A fair and impartial jurist who adheres to the Constitution of the United States and the Constitution of the Commonwealth of Pennsylvania in accordance the oath of law that binds the conscience is what is mandated and what is expected. It is through this lens that the Court has addressed the issues presented.

The essence of the Petitions are as follows: First Petitioners seek to intervene in the original matter as captioned above. Second, Petitioners seek to have the Board held in contempt for

allegedly violating the Court's order as follows: Petitioners claim that they were not granted full access to a rear room where mail-in and absentee ballots were being resolved; observers were not permitted to enter a rear locked area where ballots were stored; and observers were confined to a "pen" which did not allow meaningful access to observe/view the area where the sorting machine was in use. As a result, Petitioners seek the USB V cards that when inserted into the computer tabulated the votes and to enjoin the United States House of Representatives from seating Dasha Pruett's opponent. These claims lack a scintilla of legal merit.

At the very outset it is extremely important to highlight that the Delaware County Republican Executive Committee, which was the party that filed the original petition, has not raised an issue with the Board of Elections compliance with the Court's Order of November 4, 2020. Likewise, the Republican Executive Committee has not filed a response to the Petitions presently before the Court. Furthermore, each alleged factual averment within the petitions was known weeks before this 11<sup>th</sup> hour, pre-holiday filing of December 22, 2020 and, thus, did not constitute such an emergency that the Board of Elections not be given adequate time to research and respond accordingly.<sup>1</sup>

In order to place the current controversy in perspective and to appreciate the canvassing of ballots, it is necessary to set forth the election process of 2020, which, in this Commonwealth, was substantially different from prior elections. Following the general election of 2016, there was grave concern that foreign governments had interfered with the election process. There was further concern that these foreign governments or others could or may have hacked into the computerized voting systems employed in many jurisdictions. Additionally, some of these computerized

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<sup>1</sup> The time frame set forth in the Petitions was between November 3, 2020 and November 5, 2020, and whereas the Petitions were not filed until December 22, 2020, the Court deemed these not to be emergent and did mandate that the Board of Elections be given adequate time to respond.

systems lacked a paper trail that could be subject to audit, if needed or required, in order to validate the count. Finally, it was crystal clear that the expected voter turnout would far surpass recent elections. It is with this backdrop that Governor Wolf and the Legislature changed, altered, and/or modified the manner in which elections in the Commonwealth are conducted.

In 2018, U.S. Department of Homeland Security Secretary, Kirstjen Nielsen, called on all state and local election officials to make certain that by the 2020 presidential election every American votes on a system that produces a paper record or ballot that can be checked and verified by the voter and audited by election officials. The Pennsylvania Department of State informed all 67 counties that it must have voting machines that produce voter-verifiable records and meet 21<sup>st</sup> century standards of security, auditability and accessibility by December 31, 2019. As of June 2020, all Pennsylvania counties had complied. *See, Department of State website.*

In addition to absentee ballots, the Legislature significantly modified the election process by adding a provision which enabled any qualified elector to apply for a mail-in ballot without restriction or reason. *25 Pa. C.S. §3150.12 (a). See, Section 14 of Act 2019, October 31, P.L. 552, No. 77.*

#### **NO CASE OR CONTROVERSY IN WHICH TO INTERVENE**

The original petitioner was the Delaware County Republican Executive Committee. The original petitioner has not challenged this Court's original ruling and order, nor has it filed anything in response to the current petitioners' request to intervene. Therefore, there is nothing before this court that would require the intervention of a third-party.

*Pennsylvania Rule of Civil Procedure 2327* sets forth who may intervene. The Rule is as follows: "At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if:

- (1) The entry of judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
- (2) Such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or an officer thereof; or
- (3) Such person could have joined as an original party in the action or could have been joined therein; or
- (4) The determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

*Pursuant to Pa. R.C.P. 2329*, the court may refuse an application for intervention where the interest of the petitioner is adequately represented; or the petitioner has unduly delayed in making application for intervention. Here, the interests of the observers were more than adequately represented by the Delaware County Republican Executive Committee at the relevant time. Furthermore, the alleged violation occurred on November 5<sup>th</sup>, making this post-election application of December 22<sup>nd</sup> untimely. Thus, the denial.

Ironically, in the very action they wish to be part of, Petitioners' claim that the Delaware County Republican Executive Committee does not adequately represent their interest. As the transcript of the emergency hearing that was held the evening of November 4, 2020 demonstrates, the resolution of the controversy adequately addressed the claims of the original petitioner who stood in the shoes of the Republican observers and candidates. Additionally, the ruling by this court fully comported with the law as it pertained to observers and no appeal was taken of the order that was issued.

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In the instant matter, the Petitioners could have challenged the manner in which the Board of Elections complied with the Order at the time they allege they were denied the opportunity to observe and requested a modification of the Order. As noted in the Petition, observer Stenstrom called this judge's chambers twice on November 5<sup>th</sup> and was advised by the judge's staff to obtain legal representation. This was not done.

It must also be noted that during this thirty-day period, the observers could have filed an appeal to the Commonwealth Court if they believed this Court's directive did not comport with election law. Again, this was not done.

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complaining party is guilty of want of due diligence in failing to promptly institute an action in prejudice of another. *Stilp v. Hafer*, 718 A.2d 290, 292 (Pa. 1998).

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### **CONCLUSION**

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The Petitions herein are untimely and do not comport with the law. As our Supreme Court stated, it is the responsibility of the legislature to define distance parameters for positioning of observers and, absent these, the responsibility lies with county board of elections.

BY THE COURT:

  
John V. Capuzzi, Sr. J.

Cc: Deborah Silver, Esquire  
Manly Parks, Esquire  
William Martin, Esquire

# Supreme Court of Pennsylvania

## Court of Common Pleas Civil Cover Sheet

Delaware

County

For Prothonotary Use Only:

Docket No:

TIME STAMP

The information collected on this form is used solely for court administration purposes. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

SECTION A

### Commencement of Action:

- ☐ Complaint ☐ Writ of Summons ☒ Petition  
☐ Transfer from Another Jurisdiction ☐ Declaration of Taking

Lead Plaintiff's Name:

Delaware County Republican Executive Committee

Lead Defendant's Name:

Delaware County Board of Elections

Are money damages requested? ☐ Yes ☒ No

Dollar Amount Requested: ☐ within arbitration limits  
(check one) ☐ outside arbitration limits

Is this a Class Action Suit? ☐ Yes ☒ No

Is this an MDJ Appeal? ☐ Yes ☒ No

Name of Plaintiff/Appellant's Attorney: John P. McBlain, Esquire

☐ Check here if you have no attorney (are a Self-Represented [Pro Se] Litigant)

SECTION B

**Nature of the Case:** Place an "X" to the left of the ONE case category that most accurately describes your **PRIMARY CASE**. If you are making more than one type of claim, check the one that you consider most important.

### TORT (do not include Mass Tort)

- ☐ Intentional  
☐ Malicious Prosecution  
☐ Motor Vehicle  
☐ Nuisance  
☐ Premises Liability  
☐ Product Liability (does not include mass tort)  
☐ Slander/Libel/ Defamation  
☐ Other:

### MASS TORT

- ☐ Asbestos  
☐ Tobacco  
☐ Toxic Tort - DES  
☐ Toxic Tort - Implant  
☐ Toxic Waste  
☐ Other:

### PROFESSIONAL LIABILITY

- ☐ Dental  
☐ Legal  
☐ Medical  
☐ Other Professional:

### CONTRACT (do not include Judgments)

- ☐ Buyer Plaintiff  
☐ Debt Collection: Credit Card  
☐ Debt Collection: Other

- ☐ Employment Dispute: Discrimination  
☐ Employment Dispute: Other

☐ Other:

### REAL PROPERTY

- ☐ Ejectment  
☐ Eminent Domain/Condemnation  
☐ Ground Rent  
☐ Landlord/Tenant Dispute  
☐ Mortgage Foreclosure: Residential  
☐ Mortgage Foreclosure: Commercial  
☐ Partition  
☐ Quiet Title  
☐ Other:

### CIVIL APPEALS

- Administrative Agencies  
☐ Board of Assessment  
☐ Board of Elections  
☐ Dept. of Transportation  
☐ Statutory Appeal: Other

- ☐ Zoning Board  
☐ Other:

### MISCELLANEOUS

- ☐ Common Law/Statutory Arbitration  
☐ Declaratory Judgment  
☐ Mandamus  
☐ Non-Domestic Relations  
☐ Restraining Order  
☐ Quo Warranto  
☐ Replevin  
☒ Other: Election Law Matter

Updated 1/1/2011

## **NOTICE**

**Pennsylvania Rule of Civil Procedure 205.5. (Cover Sheet) provides, in part:**

**Rule 205.5. Cover Sheet**

(a)(1) This rule shall apply to all actions governed by the rules of civil procedure except the following:

- (i) actions pursuant to the Protection from Abuse Act, Rules 1901 et seq.
- (ii) actions for support, Rules 1910.1 et seq.
- (iii) actions for custody, partial custody and visitation of minor children, Rules 1915.1 et seq.
- (iv) actions for divorce or annulment of marriage, Rules 1920.1 et seq.
- (v) actions in domestic relations generally, including paternity actions, Rules 1930.1 et seq.
- (vi) voluntary mediation in custody actions, Rules 1940.1 et seq.

(2) At the commencement of any action, the party initiating the action shall complete the cover sheet set forth in subdivision (e) and file it with the prothonotary.

(b) The prothonotary shall not accept a filing commencing an action without a completed cover sheet.

(c) The prothonotary shall assist a party appearing pro se in the completion of the form.

(d) A judicial district which has implemented an electronic filing system pursuant to Rule 205.4 and has promulgated those procedures pursuant to Rule 239.9 shall be exempt from the provisions of this rule.

(e) The Court Administrator of Pennsylvania, in conjunction with the Civil Procedural Rules Committee, shall design and publish the cover sheet. The latest version of the form shall be published on the website of the Administrative Office of Pennsylvania Courts at [www.pacourts.us](http://www.pacourts.us).

**IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA**  
**COVER SHEET - NOTICE OF FILING OF MOTION OR PETITION UNDER**  
**LOCAL RULES OF CIVIL PROCEDURE**

CASE CAPTION:

CIVIL CASE NO.

DELAWARE COUNTY REPUBLICAN EXECUTIVE COMM.

V.S. DELAWARE COUNTY BOARD OF ELECTIONS

NATURE OF MATTER FILED: (please check one)

☒ Petition Pursuant to Rule 206.1

☐ Response to Petition

☐ Motion for Judgment on the  
Pleadings Pursuant to Rule 1034(a)

☐ Motion Pursuant to Rule 208.1

☐ Response to Motion

☐ Summary Judgment  
Pursuant to Rule 1035.2

☐ Family Law Petition/Motion Pursuant to Rule 206.8

**FILING PARTY IS RESPONSIBLE FOR SERVICE OF THE RULE RETURNABLE  
DATE OR HEARING DATE UPON ALL PARTIES**

A motion or petition was filed in the above captioned matter on the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, which:

☐ Requires you, Respondent, to file an Answer within twenty (20) days of the above date to this notice, or risk the entry of an Order in favor of the Petitioner. Answers must be filed and time stamped by the Office of Judicial Support by 4:30 PM on the following date \_\_\_\_\_, \_\_\_\_\_.

☒ Requires all parties, to appear at a hearing/conference on the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, at \_\_\_\_ in Courtroom \_\_\_\_\_, Delaware County Courthouse, Media, Pennsylvania. At this hearing/conference you must be prepared to present all testimony and/or argument, and must ensure that your witnesses will be present.

☐ Was timely answered, thus requiring the scheduling of the following hearing in the above captioned matter on: \_\_\_\_\_, \_\_\_\_\_ at 10:00 AM in Courtroom \_\_\_\_\_.

At this hearing, all parties must be prepared to present all testimony and/or argument and **must ensure that their witnesses will be present.**

☐ Qualifies as an Uncontested Motion or Petition, and as such requires neither an answer from the Respondent nor the scheduling of a hearing in this matter.

☐ Has been assigned to Judge \_\_\_\_\_.

**FOR OFFICE USE ONLY**

Mailing date: \_\_\_\_\_

Processed by: \_\_\_\_\_

**IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY,  
PENNSYLVANIA**

**DELAWARE COUNTY REPUBLICAN  
EXECUTIVE COMMITTEE  
323 West Front Street  
Media, PA 19063**

**vs.**

**DELAWARE COUNTY  
BOARD OF ELECTIONS  
201 West Front Street  
Media, PA 19063**

**ELECTION LAW**

**NO.**

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**ORDER**

AND NOW, this \_\_\_\_ day of November, 2020, upon consideration of Petitioner's Emergency Petition For Relief Seeking Order Granting Access to Canvassing of Official Absentee Ballots and Mail-In Ballots, and any response thereto by Respondent, it is hereby ORDERED and DECREED that said Petition is **GRANTED**. Petitioner's duly appointed watchers and attorneys, and all other duly appointed and eligible watchers and attorneys, shall be permitted to meaningfully observe the pre-canvass, canvass, computation and provisional ballot process in all areas of Respondent's offices where such process occurs.

**BY THE COURT:**

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SWARTZ CAMPBELL LLC  
John P. McBlain, Esquire  
Attorney I.D. #65287  
115 North Jackson Street  
Media, PA 19063  
(610) 566-9222 *phone*  
(610) 566-7351 *facsimile*  
[jmcbldain@swartzcampbell.com](mailto:jmcbldain@swartzcampbell.com)

Attorney for Petitioner,  
Delaware County Republican  
Executive Committee

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IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY,  
PENNSYLVANIA

DELAWARE COUNTY REPUBLICAN  
EXECUTIVE COMMITTEE  
323 West Front Street  
Media, PA 19063

vs.

DELAWARE COUNTY  
BOARD OF ELECTIONS  
201 West Front Street  
Media, PA 19063

ELECTION LAW

NO.

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**EMERGENCY PETITION FOR RELIEF SEEKING ORDER  
GRANTING ACCESS TO CANVASSING OF  
OFFICIAL ABSENTEE BALLOTS AND MAIL-IN BALLOTS**

Petitioner, Delaware County Republican Executive Committee, hereby petitions this Honorable Court to issue an Order directing Respondent, Delaware County Board of Elections, to grant access to and permit Petitioner's watchers and attorneys to be present in all areas of the Board of Elections offices where pre-canvassing, sorting, opening, counting and recording of absentee and mail-in ballots is occurring or taking place for the returns of the November 3, 2020 General Election, and in support thereof avers as follows:

1. Petitioner is the Delaware County Republican Executive Committee, with a

business address of 323 West Front Street, Media, PA 19063. Petitioner is a political party and political body under the Pennsylvania Election Code, 25 Pa.C.S. §2501, *et seq.* (the “Election Code”) and has standing to seek and enjoy the relief herein requested.

2. Respondent is the Delaware County Board of Elections (the “Board”), a county board of elections for the County of Delaware with those powers and duties as set forth in the Pennsylvania Election Code. The Board of Elections has appointed various employees to act for it pursuant to 25 Pa.C.S. §2643.

3. Petitioner seeks the basic fairness and transparency to allow its watchers and attorneys be present and observe in a meaningful way the pre-canvassing, sorting, opening, counting and recording of absentee and mail-in ballots cast in the November 3, 2020 General Election, which right is guaranteed by the Pennsylvania Election Code, as hereafter described.

#### **ACTIONS OF THE RESPONDENT WHICH CAUSED THIS PETITION**

4. The 2020 General Election was conducted on November 3, 2020. The absentee and mail-in ballots cast by voters and delivered to Respondent in-person, by U.S. mail and by placement in “Election Drop Boxes” were all delivered to Respondent’s offices located at the Wharf office building, 2501 Seaport Drive, City of Chester, Delaware County, Pennsylvania (the “Wharf Office”).

5. Beginning at 7:00 a.m. on November 3, 2020, the Board began to “pre-canvass” (inspect for defects; compare voter name to signed name) absentee and mail-in ballots in accordance with 25 P.S. §3146.8. At the close of polls at 8 p.m., the Board began to “canvass” (sort, open, counting and recording) absentee and mail-in ballots. *Id.*

6. The pre-canvass and canvass of the absentee and mail-in ballots occurs at the Board’s Wharf Office. The Board’s Wharf Office is located on one floor of the building and

consists of various rooms; however, one wall essentially bisects the office to create an open front area (the "Front") and a rear area that appears to consist of various offices and work stations (the "Rear").

7. Petitioner has requested that various individuals be appointed as watchers of the election process as provided by the Election Code. Respondent has appointed the various individuals as watchers for the November 3, 2020 General Election. Candidates in said election have also requested the Board to appoint watchers, which requests have been granted relative to this petition.

8. Watchers appointed by Petitioner and various candidates did appear at the Wharf Office after polls closed on November 3, 2020 to be present and observe the opening, counting and recording of the absentee and mail-in ballots, in conformity with 25 P.S. §3146.8(b), and observe the pre-canvass of any ballots, in conformity with 25 P.S. §3146.8(g)(1.1).

9. The Board has established a "pen" for watchers to "observe" the pre-canvass and canvass of the ballots at the entrance of the Front but will not permit watchers or attorneys to leave this "pen" area to actually observe the pre-canvass and canvass of ballots.

10. Based upon descriptions of duties and activities provided to Petitioner and its attorneys by employees of the Board, there are various activities of the pre-canvass and canvass activities that are occurring in the Rear, which cannot be observed from the "pen" in the Front.

11. Petitioner's watchers, candidate watchers and their attorneys all pleaded with employees of the Board to allow for the observation of the pre-canvass and canvass activities in both the Front and the Rear throughout the evening hours of November 3, 2020 and into the morning hours of November 4, 2020, to no avail. The solicitor to the Board was present in the Wharf Office during this time but refused to discuss the issue of access, transparency and fairness

and instead mostly retreated to the Rear, out of sight.

12. The undersigned counsel was able to speak to the Chairman of the Board at the Wharf Office in the early morning hours of November 4, 2020 and the Chairman was very reasonable and considerate. After some discussion, the Chairman agreed that an inspection or view of the entirety of the Wharf Office where the pre-canvass and canvass activities were occurring could occur at 9:30 a.m. on November 4, 2020. This compromise was acceptable to the undersigned counsel and those watchers present.

13. Various watchers and the undersigned counsel did appear and were present at 9:30 a.m. in the Wharf office on November 4, 2020 for the inspection / view of the pre-canvass and canvass activities. However, the Board's employees refused to proceed with the inspection / view. Finally, at approximately 11:15 a.m. employees of the Board did begin the inspection / view with the undersigned counsel and various watchers for both the Democrat and Republican party and candidates. During all this time, pre-canvass and canvassing activities continued to occur.

14. A short time after the inspection / view began, the solicitor for the Board appeared from the Rear and commanded that the inspection / view end and that all watchers and attorneys must return to the "pen" area. The watchers and attorneys were only able to view some of the areas of the Front; the Board's employees informed the undersigned counsel that the Board solicitor forbade duly appointed watchers and their attorneys from observing the pre-canvass and canvass activities occurring in the Rear.

15. The Election Code permits the watchers and their attorneys to be present for all the pre-canvass and canvass activities. 25 P.S. §§ 2650, 3146.8.

16. The ballots and envelopes for such ballots are public records and must be held open for inspection in accordance with the rules established by the Election Code. 25 P.S. §§3146.9,

2648, 3150.17.

17. The general returns from the various election precincts which have been returned unsealed shall be open to public inspection at the office of the county board as soon as they are received from the judges of election. 25 P.S. §3152.

18. The refusal of any member of a county board of elections to refuse to permit a watcher or their attorney to observe the canvassing of returns is guilty of a misdemeanor upon such conviction. 25 P.S. §3506.

19. The Pennsylvania Election Code and the cases and decisions thereunder favor the election process, including the pre-canvassing and canvassing of votes, to be transparent and fair. Restricting the Petitioner's watchers, candidate watchers and their attorneys to "observe" these processes from the "pen" in the Front neither comports with the actual statutory requirements or the spirit of the various sections of the Election Code cited above, in that the watchers and attorneys are denied any meaningful opportunity to observe the activities occurring in the Front and, are completely prohibited from observing whatever the Board is doing in the Rear with the pre-canvass and canvass activities.

20. The Petitioners, its watchers and their attorneys have no desire to interfere with, disrupt or otherwise alter the pre-canvass and canvass activities. However, the restriction of watchers and attorneys to the "pen" in the Front precludes the watchers from observing even basic matters such as the number of ballots already canvassed; the number of ballots yet to be canvassed; the number of ballots set aside as defective; and how the Board makes any determinations about what votes will or will not count for this most important election.


21. The Petitioners believe that the Board will apply these same Draconian rules and restrictions not only to the pre-canvass and canvass process, but also to the computation of returns

and provisional ballots that is about to occur within the coming days.

WHEREFORE, Petitioner, Delaware County Republican Executive Committee, hereby prays that this Honorable Court issue a Rule to the Delaware County Board of Elections to Show Cause why an Order should not be entered granting Petitioner relief and allowing duly appointed watchers and attorneys to meaningfully observe the various election process activities from the Front and Rear of the Wharf Office.

Respectfully submitted,

SWARTZ CAMPBELL LLC

A handwritten signature in cursive script, reading "John P. McBlain". The signature is written in dark ink and is positioned above the printed name and title.

John P. McBlain, Esquire  
Counsel to Petitioner,  
Delaware County Republican  
Executive Committee

Date: November 4, 2020

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY,  
PENNSYLVANIA

DELAWARE COUNTY REPUBLICAN  
EXECUTIVE COMMITTEE  
323 West Front Street  
Media, PA 19063

vs.

DELAWARE COUNTY  
BOARD OF ELECTIONS  
201 West Front Street  
Media, PA 19063

ELECTION LAW

NO.


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VERIFICATION

The undersigned, having read the attached Petition verifies that the facts set forth therein are based on the undersigned's knowledge. The undersigned verifies that the factual averments are true and correct to the best of signer's knowledge, information, and belief. The undersigned understands that false statements herein are made subject to the penalties of 18 PA.C.S. Section 4904 relating to unsworn falsification to authorities.

Respectfully submitted,

SWARTZ CAMPBELL LLC

  
John P. McBlain, Esquire  
Attorney for Petitioner

Date: 11/4/2020

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IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY,  
PENNSYLVANIA

DELAWARE COUNTY REPUBLICAN  
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BOARD OF ELECTIONS  
201 West Front Street  
Media, PA 19063

ELECTION LAW

NO.

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CERTIFICATE OF SERVICE

I, John P. McBlain, Esquire, hereby certify that I have on the date below served a true and correct copy of the foregoing petition to the party stated below by hand delivering a copy to the office below.

Delaware County Board of Elections  
Election Bureau  
Delaware County Government Center  
201 West Front Street  
Media, PA 19063

Respectfully submitted,

SWARTZ CAMPBELL LLC



John P. McBlain, Esquire  
Attorney for Petitioner

Date:

11/4/2020



IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA

CIVIL DIVISION

DELAWARE COUNTY REPUBLICAN  
EXECUTIVE COMMITTEE

323 West Front Street  
Media PA, 19063

V.

DELAWARE COUNTY  
BOARD OF ELECTIONS  
201 West Front Street  
Media, PA 19063

ELECTION LAW  
NO:

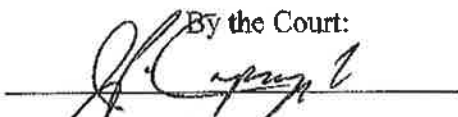
ORDER

AND NOW, to wit, this 4th day of November 2020, upon consideration of  
Petitioner's Emergency Petition or Relief Seeking Order Granting Access to Canvassing of  
Official Absentee Ballots and Mail-In Ballots, and the hearing held on November 4, 2020 wherein  
argument was heard from both Parties, it is hereby **ORDERED** and **DECREED** as follows:

1. Four Observers in total (2 observers from the Republican Party, or affiliated candidates, and 2 observers from the Democratic Party, or affiliated candidates,) are permitted to observe the resolution area at all hours while ballots are being resolved;
2. Two observers (1 representing the Republican Party, or affiliated candidates, and 1 representing the Democratic Party, or affiliated candidates,) are permitted to observe the sorting machine area at all times while the machine is in use. However, all observers shall stand back while the machine is in use due to safety concerns.
3. At two-hour intervals, two observers in total (1 representing the Republican Party, or affiliated candidates, and 1 representing the Democratic party, or affiliated candidates) are permitted to enter the ballot room, to examine the room; however, are not permitted to examine the physical ballots contained within the room, individually. They must be escorted by a member of the Election Board Staff with the time not to exceed five minutes each visit.

4. Any observer may not interference with the process, nor may any observer object to individual ballots.

By the Court:



JUDGE JOHN P. CAPUZZI, SR.