UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 20-2976

BENEZET CONSULTING, LLC, TRENTON POOL & CAROL LOVE

Plaintiffs-Appellants,

v.

KATHY BOOCKVAR & JONATHAN MARKS

Defendants-Appellees

Appeal from the Final Orders of the
United States District Court for the Middle District of Pennsylvania
Dated January 13, 2020 & August 28, 2020
Civil Action 1:16-cv-00074

APPELLANTS' OPENING BRIEF & APPENDIX VOLUME I

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I SUBJECT MATTER & APPELLATE JURISDICTION

This is an appeal from a final order of the United States District Court for the Middle District of Pennsylvania granting in part, denying in part, Plaintiffs' Motion for Summary Judgment. App. Vol. I, Notice of Appeal at pp. A-1 to A-3; App. Vol. I, Order, at pp. A-4 to A-5; App. Vol. I, Memorandum Opinion at pp. A-7 to A-44. Federal courts have subject matter jurisdiction over this action as it presents a question of federal constitutional law. The district court possessed jurisdiction over Plaintiffs-Appellants' federal constitutional claims under the First and Fourteenth Amendments to the United States Constitution in this action pursuant to 28 U.S.C. §§1331, 1343(a)(3) and 42 U.S.C. §1983. This Court has appellate jurisdiction pursuant to 28 U.S.C. §§1291(1) and 1294.

II. ISSUES PRESENTED

1. The district court properly held that the residency requirement to circulate nomination petitions in the Commonwealth of Pennsylvania was unconstitutional as applied to petition circulators who were members of the same political party as the candidate named on the nomination petition and who were also willing to submit to the jurisdiction of the Commonwealth of Pennsylvania for the purpose of any investigation and/or prosecution of Pennsylvania election laws resulting from petitions they subsequently filed with Defendants. The district

court, however, inexplicably limited the as applied relief to the named Plaintiffs in this action and for only the 2020 PA GOP presidential primary. The district court refused to grant relief from the unconstitutional residency requirement on a permanent basis to all similarly situated persons, including the Plaintiffs-Appellants in this action! No federal district or appellate court has ever limited as-applied relief from unconstitutional ballot access restrictions to just a single election cycle. Accordingly, the sole question presented in this appeal is did the district court commit reversible error in limiting as applied relief from an unconstitutional residency requirement imposed on circulators of nomination petitions who are members of the same political party as the candidate named on the nomination petition and who are willing to submit to the jurisdiction of the Commonwealth of Pennsylvania to just the named plaintiffs in this action and/or just for the 2020 Pennsylvania Republican presidential primary.

Suggested Answer: Yes.

Issue Raised in the Record at: Motion to Amend/Correct Judgment of the Court, App. Vol. II at pp. A-69 to A-82.

III. RELATED CASES AND PROCEEDINGS

This case has not been before this Court. There are no related proceedings.

IV. CONCISE STATEMENT OF THE CASE

A. RELATED FACTS

Section 2869 of the Pennsylvania Election Code requires that circulators of nomination petitions (the election petition used by major party candidates to secure access to their party's primary election ballot) be qualified electors of the Commonwealth who are duly registered and enrolled as a member of the party designated on the petition. App. Vol. I at p. A-10; Attachment 25 P.S. § 2869.

Plaintiff Benezet Consulting, LLC ("Benezet") is a Texas limited liability company, of which Plaintiff Pool is the only member and is involved in the business of gathering signatures for political campaigns. App. Vol. I at p. A-11. Benezet's business specifically deals with "political consulting, ballot access and signature gathering." App. Vol. I at p. A-11. Plaintiff Pool is a registered Republican in the state of Texas. App. Vol. I at p. A-11. Plaintiff Love is a registered Republican who resides in the Commonwealth of Pennsylvania. App. Vol. I at p. A-11. Benezet took part in signature-gathering efforts in Pennsylvania as part of the 2016 presidential election. App. Vol. I at p. A-11. In doing so, Benezet hired signature gatherers as independent contractors, consistent with past practice. App. Vol. I at p. A-11. Benezet's circulators move around the country as needed to meet individual state deadlines and its contractors are paid on a per signature basis. App. Vol. I at pp. A-11 to A-12.

In 2016, Benezet entered into a contract to gather signatures for: (1) Ted Cruz for his candidacy for the 2016 Republican Party nomination for United States president; (2) Donald Trump for his candidacy for the 2016 Republican Party nomination for United States president; and (3) Rocky De La Fuente for his candidacy for both the Democratic nomination and as an independent candidate for president. App. Vol. I at p. A-11.

As a direct result of the In-State Witness Requirement, Benezet is required to charge candidates a higher rate per signature collected than in other states because Plaintiff Pool "had to pay witnesses to work with his professional circulators in Pennsylvania." App. Vol. I at p. A-12. The requirement imposes additional problems for signature collection drives because of issues relating to the work performance of certain witnesses, as well as their availability. App. Vol. I at p. A-12. Benezet experienced difficulty in "find[ing] enough witnesses to circulate nomination petitions" in three out of five congressional districts and the lack of Pennsylvania in-state witnesses caused Cruz delegates [not to] make it onto the 2016 primary election ballot. App. Vol. I at pp. A-12 to A-13. Additionally, Benezet experienced issues with a particular Pennsylvania in-state witness who "extorted additional money from Pool after the signatures had been gathered" and "threaten[ed] not to execute the affidavit unless he was paid more money." App. Vol. I at p. A-13. Also, some in-state witnesses failed to show up to work and

some circulators will not work in states that require in-state witnesses. App. Vol. I at p. A-13. Benezet "would have brought in more circulators for the 2016 presidential nominating petitions" were it not for the In-State Witness Requirement.

Plaintiff Love, who has signed at least 1 nomination petition for a local Republican candidate in Pennsylvania prior to 2016, was willing to sign a nominating petition in 2016 and was expected to sign a petition circulated by Benezet, but was not afforded an opportunity to do so because Benezet was not able to secure an in-state witness to travel with Pool to Lancaster County to secure Love's signature on a nomination petition. App. Vol. II at pp. A-65 to A-66, Tr. at 21:5-22; 24:2 – 25:11.

B. PROCEDURAL HISTORY

Plaintiffs Benezet Consulting, LLC (Benezet) and Trenton Pool ("Pool") initiated this action by filing a complaint against Defendants: (1) Pedro A. Cortes ("Cortes"), in his official capacity as the Secretary of the Commonwealth of Pennsylvania, and substituted pursuant to Rule 25(d) of the Federal Rules of Civil Procedure with Kathy Boockvar after she was appointed Secretary of State after Cortes resigned; and, (2) Jonathan Marks ("Marks"), in his official capacity as Commissioner for the Bureau of Commissions, Elections and Legislation (referred to together herein as "Defendants") on January 14, 2016, challenging specific

provisions of Pennsylvania's Election Code (the "Election Code"), in connection with Pennsylvania's primary election for President of the United States. App. Vol. I at p. A-7. Plaintiffs filed a motion for temporary restraining order which the lower court denied on January 27, 2016. Plaintiffs filed an amended complaint on February 16, 2016 naming Carol Love ("Love"), a registered Republican residing in Mountville, Pennsylvania who wanted to sign a nomination petition circulated by Plaintiff Trenton Pool for the 2016 Pennsylvania presidential primary but was prevented from doing so because Plaintiff Pool is a Republican residing in the State of Texas, as an additional plaintiff. App. Vol. I at p. A-8; App. Vol. II at pp. A-65-66, Tr. 20:19-21:22; 24:2-18.

Plaintiffs filed a second amended complaint on February 16, 2016. App. Vol. II at p. A-85, ECF Doc. No. 25. In Plaintiffs' second amended complaint, Plaintiffs request declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and seek to prohibit Pennsylvania state officials from enforcing the state residency requirement for witnesses of nomination petition circulation under Section 2869 (the "In-State Witness Requirement"). App. Vol. I at p. A-8. Nomination petitions are circulated to collect the required number of signatures to place the name of a major party candidate in his/her party's primary election ballot. App. Vol. I at p. A-9. Counts I and II of Plaintiffs' second amended complaint allege the In-State Witness Requirement violates the First and Fourteenth Amendments to the United

States Constitution both facially and as applied to Plaintiffs. App. Vol. I at p. A-8. Adjudication of Counts III through X of Plaintiffs' second amended complaint are not the subject of this instant appeal.

Upon completion of discovery, the parties filed cross-motions for summary judgment on December 22, 2016. On May 17, 2018, Plaintiffs filed "Plaintiffs' First Notice of Supplemental Authority" alerting the lower court of the opinion issued by the United States Court of Appeals for the Third Circuit in *Wilmoth v. Secretary of State of New Jersey*, No. 17-1925 reversing and remanding the New Jersey District Court's dismissal of identical claims as to Counts I and II of Plaintiffs' second amended complaint, instructing that strict scrutiny applied to review of residency requirements to circulate election petitions. On August 29, 2018, Defendants filed a motion for leave to file a supplemental brief addressing an opinion issued by the United States Court of Appeals for the Third Circuit in *De La Fuente v. Cortes*, No. 17-3778, on August 7, 2018, which the lower court granted on September 14, 2018. Accordingly, Defendants filed a supplemental brief in support of their motion for summary judgment on September 28, 2018, to which Plaintiffs filed a brief in response on October 12, 2018. Defendants filed a reply brief in October 26, 2018. App. Vol. I at p. A-9.

On January 13, 2020, the lower court issued an opinion and memorandum granting in part, denying in part Defendants and Plaintiffs' cross-motions for

summary judgment. App. Vol. I at p. A-4. The Court held that Plaintiffs' claims were justiciable and that Plaintiffs have standing to pursue their claims. App. Vol. I at p. A-23. The Court ordered the residency requirement for circulators of nomination petitions was unconstitutional as applied to plaintiffs. App. Vol. I at p. A-4. The lower court, however, limited relief to just the circulation of nomination petitions by Plaintiffs in the 2020 Republican presidential primary. App. Vol. I at p. A-4. On February 10, 2020, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, Plaintiffs filed a motion to amend or alter the judgment of the Court requesting that the Court's as applied relief be made permanent as to Plaintiffs. App. Vol. II at p. A-69. The lower court denied Plaintiffs motion to amend the judgment of the court on August 28, 2020. App. Vol. I at pp. A-7; A-45. Plaintiffs timely filed a Notice of Appeal on September 25, 2020. App. Vol. I at p. A-1.

Defendants-Appellees did not file a cross-appeal contesting the lower court's adjudication of Count II of Plaintiffs' second amended complaint. Accordingly, only Plaintiffs' instant appeal of the extent of the limited as applied relief granted on Count II of Plaintiffs' second amended complaint is before this Court.

C. RULINGS PRESENTED FOR REVIEW

Plaintiffs appeal the lower court's order and memorandum opinion granting Count II of Plaintiffs' second amended complaint on January 13, 2020, ECF document numbers 74 and 75, only insofar as the as applied relief granted was

limited to the circulation of nomination petitions by Plaintiffs Benezet and Pool in the 2020 presidential primary election – and nothing more. App. Vol. I at pp. A-4 to A-5; A-7 to A-44. Plaintiffs also appeal the lower court's order and memorandum opinion denying Plaintiffs' motion to amend or alter the judgment of the court on August 28, 2020, ECF documents 87 and 88. App. Vol. I at pp. A-6; A-45 to A-59.

V. SUMMARY OF ARGUMENT

The lower court properly followed the consensus that has developed among federal district and appellate courts that blanket residency and voter registration requirements imposed on circulators of election petitions are unconstitutionally broad when out-of-state circulators can be required to instead submit to the jurisdiction of the state for purposes of any post-filing investigation and/or prosecution of election law violations related to the circulation of election petitions by out-of-state petition circulators. The lower court erred, however, in limiting Plaintiffs' as applied relief to a single election, the 2020 Pennsylvania Republican presidential primary election. The lower court's limited relief is not supported by any fact either established in the record or established by the court's own findings of fact (findings of fact which Appellants' do not refute). In fact, nothing in the record focused on the 2020 Pennsylvania primary election, the lower court just spontaneously crafted the requested injunctive relief to be limited to the 2020 PA

GOP presidential primary, without and basis for the limitation in the Court's memorandum opinion granting the limited as applied relief.

Instead, the lower court amazingly seems to confuse permanent as applied injunctive relief as a form of facial relief. Permanent as applied relief in the context of this action is not the same as facial relief. Plaintiffs agree as applied relief is the proper relief for all out-of-state circulators willing to submit to the jurisdiction of the Commonwealth to be able to circulate nomination petitions for candidates of their own political party. Out-of-state circulators unwilling to submit to the jurisdiction of the Commonwealth, or who are not members of the same political party as the candidate, are properly excluded from the court's as applied injunctive relief from the residency requirement imposed on circulators of nomination petitions by 25 P.S. §2869. Accordingly, the requested permanent as applied relief is not facial relief as suggested by the lower court in its memorandum opinion denying Plaintiffs' motion to amend or alter the judgment of the court.

Because there is such a clear consensus among federal courts that state imposed voter registration and residency requirements both severely impair rights guaranteed under the First and Fourteenth Amendments to the United States Constitution and are not narrowly tailored to advance any recognized interest of the state, it is improper to force Plaintiffs (and all of the other hundreds of out-of-

state professional petition circulators who are intent in securing the same injunctive relief for the upcoming presidential primary contests in 2024 and beyond) to relitigate the same claims every election cycle – the same reason why there exists an exception to the mootness doctrine routinely applied to election law challenges to prevent the same parties from having to relitigate the same claims over and over.

Except in response to unique temporal emergency situations, such as the COVID-19 restrictions put in place to staunch the spread of the Wuhan novel coronavirus in 2020 which severely impaired the timely collection of certain petition signatures for candidate ballot access in some states, no federal court has, in routine cases, limited as applied injunctive relief to a single election cycle to remedy unconstitutional ballot access restrictions under the First and Fourteenth Amendments to the United States Constitution. Unless reversed by this Court, the lower court's limited as applied relief to a single election cycle will shortly trigger a deluge of litigation by hundreds of out-of-state professional petition circulators seeking to secure injunctive relief for the 2024 PA presidential primary in the federal district courts within the Commonwealth – all of whom are awaiting the outcome of this appeal before they shortly file their actions to secure relief in time for the 2024 election cycle.

Furthermore, all registered party members within the Commonwealth are entitled to permanent injunctive relief so that they will be free to receive the

interactive political speech offered to them by their fellow out-of-state party members willing to circulate nomination petitions to them and to engage in speech and to band together for common political goals.

Accordingly, this Court should reverse the lower court's limitation of its as applied injunctive relief to just the circulation of nomination petitions by Plaintiffs in the 2020 PA GOP presidential primary election and order permanent as applied relief to permit Plaintiffs to circulate nomination petitions in all future GOP presidential primary elections so long as they remain party members and submit to the jurisdiction of the Commonwealth of Pennsylvania for all relevant purposes.

VI. STANDARD OF REVIEW

This Court exercises plenary, *de novo*, review of questions of law. The court below established an entirely new legal standard in limiting as applied relief to the named Plaintiffs-Appellants for just one election cycle, the 2020 presidential primary election. Furthermore, the lower court misconstrued permanent as applied relief as some sort of facial relief, which is an incorrect statement of law. The failure of the district court to grant permanent as applied relief to all similarly situated individuals as Plaintiffs-Appellants (including the Plaintiffs-Appellants in this action) is a question of law over which this Court exercises plenary review.

ARGUMENT

A. The District Court Properly Held Pennsylvania's Requirement that Circulators of Nomination Petitions Must Be Registered Voters of the Commonwealth of Pennsylvania Unconstitutional As Applied to Out-of-State Circulators Who Are Members of the Same Political Party as the Candidate Named on the Nomination Petition and Willing to Submit to the Jurisdiction of the Commonwealth of Pennsylvania.

In 1988, the United States Supreme Court held in *Meyer v. Grant*, 486 U.S. 414 (1988), that a ban on paying petition circulators was unconstitutional reasoning that the circulation of a ballot access involves interactive communication between the circulator and the potential signer which the Court described as "core political speech" meriting the highest protections under the First Amendments such that any restriction which decreased the pool of available circulators was subject to struct scrutiny analysis. The Court in *Meyer* explained:

> We fully agree with the Court of Appeals' conclusion that this case involves a limitation on political expression subject to exacting scrutiny. The First Amendment provides that Congress "shall make no law…abridging the freedom of speech, or of the press; or the right of people to peaceably assemble, and to petition the Government for a redress of grievances." The Fourteenth Amendment makes that prohibition applicable to the State….
>
> The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal any why its advocates support it. Thus, the circulation of a petition

> involves the type of interactive communication concerning political change this is appropriately described as "core political speech."
>
> The refusal to permit appellees to pay petition circulators restricts political expression in two ways. First, it limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion….
>
> That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protections….That [the statute] leaves open "more burdensome" avenues of communication, does not relieve its burden on First Amendment expression. The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.

Meyer, 486 U.S. at 420-24 (internal citations omitted).

Following its analysis in *Meyer*, the Supreme Court in *Buckley v. American Const. Law Found., Inc.*, 525 U.S. 182 (1999), upheld the Tenth Circuit Court of Appeals' decision holding the requirement in Colorado that petition circulators be registered voters unconstitutional as the requirement reduced the number of persons available to carry the message advanced by the petition sponsors and reduced the number of hours that could be worked and limited the number of persons the circulators could reach without impelling cause. *Buckley*, 525 U.S. 193-197. In *Buckley*, the Court approved the Tenth Circuit's analysis that:

> The Tenth Circuit reasoned that the registration requirement placed on Colorado's voter-eligible population produces a speech diminution of the very kind produced by the ban on paid circulators at issue in *Meyer*.

> We agree. The requirement that circulators be not merely voter eligible, but registered voters, it is scarcely debatable given the uncontested numbers decrease the pool of potential circulators as certainly as that pool is decreased by the prohibition of payment to circulators. Both provisions 'limi[t] the number of voices who will convey[the initiative proponents'] message' and, consequently, cut down "the size of the audience [proponents] can reach.' *Meyer*, 486 U.S. at 422, 423; *see Bernbeck v. Moore*, 126 F.3d 1114, 1116 (8th Cir. 1997) (quoting *Meyer*); *see also Meyer*, 486 U.S. at 423 (stating, further, that the challenged restriction reduced the chances that initiative proponents would gather signatures sufficient in number to qualify for the ballot, and thus limited proponents' 'ability to make the matter the focus of statewide discussion').
>
> Colorado acknowledges that the registration requirement limits speech, but not severely, the State asserts, because 'it is exceptionally easy to register to vote.' The ease with which qualified voters may register to vote, however, does not lift the burden on speech at petition circulation time. Of course there are individuals who fail to register out of ignorance or apathy. But there are also individuals for whom, as the trial record shows, the choice not to register implicates political thought and expression….
>
> The State's dominant justification appears to be its strong interest in policing lawbreakers among circulators. Colorado seeks to ensure that circulators will be amenable to the Secretary of State's subpoena power, which in these matters does not extend beyond the State's borders. The interest in reaching law violators, however, is served by the requirement, upheld below, that each circulator submit an affidavit setting out, among several particulars, the 'address at which he or she resides, including the street name and number, the city or town, [and] the county.' The address attestation, we note, has an immediacy, and corresponding reliability, that a voter's registration may lack. The attestation is made at the time a petition section is submitted; a voter's registration may lack that currency.

Buckley. 525 U.S. at 194-96.

Using the same analysis employed by the United States Supreme Court in *Meyer* and *Buckley*, state residency requirements for petition circulators have been held unconstitutional by every Court of Appeals to consider the issue where out-of-state petition circulators can be required to submit to the jurisdiction of the subject state for purposes of the state's subpoena power for any post-filing investigation and/or prosecutions. The United States Court of Appeals for the Fourth Circuit, perhaps articulated the current state of the law on the unconstitutionality of out-of-state circulator bans best:

> As the law has developed following the Supreme Court's decisions in *Meyer* and *Buckley*, a consensus has emerged that petitioning restrictions like the one at issue here are subject to strict scrutiny analysis. *See*, *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008) (applying strict scrutiny to overturn Oklahoma prohibition on nonresident circulators of initiative petitions); *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008) (declaring unconstitutional, as failing strict scrutiny, Ohio ban on nonresidents circulating nominating petitions); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) (invalidating, pursuant to strict scrutiny analysis, Arizona deadline and residency provisions relating to nominating petitions and circulator-witnesses). The Ninth Circuit in *Brewer* recited the general rule that "the severity of the burden the election law imposes on the plaintiff's rights dictates the level of scrutiny applied by the court." *Brewer*, 531 F.3d at 1034 (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)… The triumvirate of 2008 decisions in *Savage*, *Blackwell*, and *Brewer* demonstrate a general agreement among our sister circuits that residency restrictions bearing on petition circulators and witnesses burden First Amendment rights in a sufficiently severe fashion to merit the closest examination….
> [….]
> The more substantial question, and the crux of this appeal, is whether the Commonwealth's enactment banning all nonresidents from witnessing nominating petitions – a measure we presume to be effective in combatting fraud – is, notwithstanding its efficacy, insufficiently

> tailored to constitutionally justify the burden it inflicts on the free exercise of First Amendment rights. *See*, *Krislov v. Rednour*, 226 F.3d 851, 863 (7th Cir. 2000) ("[W]e must take into account…other, less restrictive means [the state] could reasonably employ[, though it] need not use the least restrictive means available, as long as its present method does not burden more speech than is necessary to serve compelling interests." (citations omitted). The Board insists that the integrity of the petitioning process depends on 'state election officials access to the one person who can attest to the authenticity of potentially thousands of signatures," access made more difficult, perhaps, if the witness resides beyond the subpoena power of the state.
>
> The plaintiffs counter that the Commonwealth could compel nonresidents, as a condition of witnessing signatures on nominating petitions, to enter into a binding legal agreement with the Commonwealth to comply with any civil or criminal subpoena that may issue. Indeed, "[f]ederal courts have generally looked with favor on requiring petition circulators to agree to submit to jurisdiction for purposes of subpoena enforcement, and the courts have viewed such a system to be a more narrowly tailored means than a residency requirement to achieve the same result." *Brewer*, 531 F.3d at 1037 (citing inter alia, *Chandler v. City of Arvada*, 292 F.3d 1236, 1242-44 (10th Cir. 2002); *Krislov*, 226 F.3d at 866 n.7. More recently, in *Savage*, the Tenth Circuit reiterated that "requiring non-residents to sign agreements providing their contact information and swearing to return in the event of a protest is a more narrowly tailored option." 550 F.3d at 1030. According to the Board, ostensible consent to the extraterritorial reach of the Commonwealth's subpoena power does not guarantee the requisite access, because nonresident witnesses must yet be located and retrieved, perhaps by extradition or rendition. There are few guarantees in life, however, and it is hardly an iron-clad proposition that a similarly situated resident witness will be amenable to service and comply with a lawfully issued subpoena.

Libertarian Party of Virginia v. Judd, 718 F.3d 308, 316-18 (4th Cir. 2013).

Following the Fourth Circuit's opinion in *Libertarian Party of Virginia* detailing the broad consensus that has developed among federal courts holding that

strict scrutiny applies to bans on out of state circulators and that the blanket ban is not narrowly tailored to advance a state's legitimate interests, other courts have followed the federal court consensus. In *Green Party of Pennsylvania v. Aichele*, 89 F.Supp. 3d. 723 (E.D. Pa. 2015) Judge Dalzell preliminarily enjoined enforcement of the ban on out-of-state circulators for third party candidate nominating petition based on the Fourth Circuit's analysis that out-of-state circulator bans impose a severe burden to First Amendment speech triggering strict scrutiny analysis and holding that a blanket out of state ban on out-of-state circulators was not narrowly tailored to advance the state's important interests when the state court could more narrowly require out-of-state circulators to accept the state's jurisdiction for any post-filing process. *Green Party of Pennsylvania*, 89 F.Supp. 3d. at 739-40. Thereafter, Judge Dalzell ordered the out-of-state ban unconstitutional and permanently enjoined the Pennsylvania circulator ban for circulators of nomination papers. Judge Dalzell found the out-of-state circulator ban "sharply limits the reach of the Green Party plaintiffs' message" and "the Green Party plaintiffs have, like their Virginia colleagues, offered to subject out-of-state circulators to the jurisdiction of Pennsylvania courts 'for the express purpose of any investigative and/or judicial procedure with respect to any alleged violation(s) of Pennsylvania election law.'" *Id*. at 742. Judge Dalzell's ap applied relief was permanent, meaning it was not limited to any one election cycle.

Counsel for the Secretary of State did not appeal the decision in *Green Party of Pennsylvania v. Aichele* to this Court.

In *Libertarian Party of Connecticut v. Merrill*, 2016 WL 10405920 (D. Conn., Jan. 26, 2016) Judge Hall held Connecticut's out-of-state circulator ban for third party candidate nominating petitions unconstitutional, finding the out-of-state circulator ban to severely impair plaintiff's First Amendment rights, that strict scrutiny applied, and that the ban was not narrowly tailored to protect the state's important interests. *Libertarian Party of Connecticut* at *5-8. Shortly thereafter, Judge Hall issued a temporary restraining order against Connecticut's out-of-state circulator ban for circulators of major party nominating petitions. *Wilmoth v. Merrill*, 2016 WL 829866 (D. Conn. Mar. 1, 2016). Following the district court's temporary restraining order, the State of Connecticut settled the action agreeing to permanently refrain from enforcing Connecticut's out-of-state circulator ban for circulators of major party candidate nominating petitions.[1] Also in 2016, in *OpenPittsburgh,Org v. Wolosik*, 2016 WL 7985286 (W.D. Pa. Aug. 9, 2016) the United States District Court for the Western District of Pennsylvania, issued a preliminary injunction against Pennsylvania's out-of-state ban on circulators of referendum petitions to amend Home Rule Charters that govern certain

[1] Appellants' counsel in this action was counsel for the Plaintiff in *Wilmoth v. Merrill* and has first-hand knowledge of the settlement terms in that action.

Pennsylvania municipalities. Judge Hornak found the out-of-state circulator ban imposed a severe restriction on protected First Amendment speech, strict scrutiny applied, and the ban was not narrowly tailored to advance the Commonwealth's interest when out-of-state circulators could more narrowly submit to the jurisdiction of the Commonwealth rather than the unconstitutional blanket ban on out-of-state circulators. *Id*. at *1-3. Judge Hornak's preliminary injunction was not limited to the Plaintiffs in that action nor to Plaintiff's 2016 petition drive.

The Third Circuit finally had occasion to review out-of-state circulator bans in 2018, when it reversed a New Jersey district court grant of a motion to dismiss challenging New Jersey's out-of-state circulator ban for circulators of major party candidate nominating petitions. The Third Circuit held that out-of-state circulator bans severely impair First Amendment speech which triggered strict scrutiny analysis. *Wilmoth v. Secretary of State of New Jersey*, 731 Fed. Appx 97, 101-105 (3rd Cir., Apr. 19, 2018). In its unpublished opinion, the Third Circuit panel explained that: "Our *Anderson-Burdick* inquiry in the instant case is quite straightforward. Since the turn of the century, 'a consensus has emerged' that laws imposing residency restrictions upon circulators of nomination petitions "are subject to strict scrutiny analysis." *Id*. citing *Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 316-17 (4th Cir, 2013); *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1030-31 (10th Cir. 2008); *Nader v. Blackwell*, 545 F.3d 459, 475-76 (6th Cir.

2008); *Nader v. Brewer*, 531 F.3d 1028, 1038 (9th Cir. 2008) *see also Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616-17 (8th Cir. 2001) (applying strict scrutiny review to North Dakota's proscription against nonresident initiative-petition circulators, but concluding that the State had satisfied its burden of proving the law was narrowly tailored to advance North Dakota's compelling interest in preventing fraud).[2] *Wilmoth*, 731 Fed. Appx at 102.

Accordingly, Judge Kane's memorandum opinion ruling Pennsylvania's ban on out-of-state circulators for major party candidate nomination petitions was unconstitutional as applied to Plaintiffs, out-of-state party members willing to submit to the jurisdiction of the Commonwealth, follows the overwhelming consensus of federal decisions that blanket voter registration and residency requirements for petition circulators impose severe impairments of core political speech protected under the First and Fourteenth Amendments to the United States Constitution and are not narrowly tailored to advance a state's compelling interest to protect against petition fraud. *See Benezet Consulting, LLC v. Boockvar*, 433 F.Supp. 3d 670 (M.D. Pa. 2020). It is no wonder, then, that Defendants-Appellees

[2] *Initiative & Referendum Inst. v. Jaeger* was the first case seeking to extend the legal analysis of *Meyer* and *Buckley* to out-of-state circulator bans and the courts in *Jaeger* were presented with a fact pattern different from the case at bar. In *Jaeger*, (unlike this action and every action that followed *Jaeger*) the plaintiffs did not provide evidence that the out-of-state circulators were willing to submit to the jurisdiction of North Dakota for any post-filing judicial process.

chose not to appeal the lower court's adjudication of Count II of Plaintiffs-Appellants' second amended complaint.

B. Permanent As-Applied Relief is Not Facial Relief.

Plaintiffs-Appellants cannot fathom that a federal district judge could possibly confuse permanent as applied relief to facial relief. As applied relief is routinely permanent – but never facial. *See e.g.*, *On Our Terms '97 PAC v. Secretary of State of State of Maine*, 101 F.Supp. 2d 19, 26 (D. Maine 1999) (holding a compensation ban based on the number of signatures collected unconstitutional as applied to plaintiffs "and others similarly situated"). Plaintiffs agree that facial relief is not warranted in this action. Given the Commonwealth's acknowledged compelling interest in policing against potential acts of petition fraud or other violations of the Pennsylvania Election Code, the residency requirements are not unconstitutional to individuals who refuse to submit to the jurisdiction of the Commonwealth to permit the Commonwealth to exercise personal jurisdiction over out-of-state circulators as part of any investigation and/or prosecutions related to petitions filed by them in Pennsylvania. Accordingly, as applied relief is appropriate – relief that should be extended permanently firstly to Plaintiffs, and secondarily, to all out-of-state petition circulators who are members of the same political party indicated on the nomination petition and also willing (like Plaintiffs in this action) to submit to the

Commonwealth's personal jurisdiction. Such permanent as applied relief recognizes that out-of-state individuals who are not party members and/or unwilling to submit to the jurisdiction of the Commonwealth can (consistent with the constitution) be excluded from circulating nomination petition in Pennsylvania

C. No Federal Court Has Limited Relief from Unconstitutional Ballot Access Restrictions to a Single Election Cycle.

With the obvious unique exception of the recent extensions and relief granted in 2020 as a result of the difficulties in timely securing signatures on ballot access petitions against the backdrop of COVID-19 related restrictions, no federal court has ever limited relief from unconstitutional ballot access restrictions to a single election cycle. This is not surprising. Ballot access restrictions, baked into the various state election codes, are fairly static with respect to their impact on First Amendment speech. The impact of election code provisions which impose a severe burden on protected speech in one election will have the same impact on all similarly situated individuals in all future elections unless amended through the legislative process. There is no instance where a federal court has limited relief from an unconstitutional impairment on political speech on the off-chance, hope or prayer that a state legislature will take the hint and fix the offending statutory text to provide full protection in future elections. Federal injunctive relief is meant to provide complete relief, and protection from, offending legislative enactments – federal injunctive relief does not serve the purpose of a passive-aggressive missive

to state legislatures to amend offending election statutes. Accordingly, a ballot access restriction which is litigated to conclusion, as is the case in the instant action, and found unconstitutional will have the same deleterious impact on Plaintiffs' speech, and all similarly situated individuals, in future elections as the in the controversy giving rise to the litigation which resulted in the ruling that a ballot access restriction is unconstitutional under the First Amendment. Accordingly, as applied relief, has never been limited to a single election cycle. This Court need look no further than the cognate litigation in *Green Party of Pennsylvania v. Aichele,* 89 F.Supp. 3d 723 (E.D. Pa. 2015), where the court permanently enjoined the residency requirement for the circulators of nomination papers (petitions to place third party and independent candidates on the general election ballot). Judge Dalzell did not limit the injunctive relief in *Green Party of Pennsylvania* to the next or a single election cycle. Furthermore, the Commonwealth of Pennsylvania *sue sponte*, extended the as applied relief granted in *Green Party of Pennsylvania* to all third party and independent candidates – not just to the specific parties[3] who litigated that case to conclusion on the merits. Therefore, it makes no sense, and

[3] The Green Party of Pennsylvania and the Libertarian Party of Pennsylvania, along with individual out-of-state petition circulators, litigated *Green Party of Pennsylvania* to conclusion on the merits. Other Pennsylvania third parties, most notably the Constitution Party of Pennsylvania and the Pennsylvania Alliance Party were Plaintiffs in *Green Party of Pennsylvania*. No independent presidential candidates joined in the *Green Party of Pennsylvania* action.

not justified from any fact established in the record or found by the lower court or any other known legal principal to limit the as applied injunctive relief granted in this action to just the 2020 Republican presidential primary. The lower court's opinion makes no finding of fact which would support limiting Appellants' relief to the 2020 presidential primary election cycle. No fact was established in the record or found by the lower court that Appellants only intended to circulate nomination petitions in Pennsylvania for the 2020 presidential primary election. No fact was established in the record or found by the lower court that the unconstitutional impact of the residency requirement imposed by 25 P.S. § 2896 was limited to the circulation of nomination petitions for the 2020 PA GOP presidential primary. No facts, no evidence support the lower courts' limit on Plaintiffs' as applied relief. The record is so devoid of any fact or cognizable legal argument in support of the lower court's limited relief that it can be viewed that the lower court abused its discretion (though not the standard in this appeal) in limiting the relief to which Plaintiffs are entitled after litigating their claims to conclusion over a span of time in excess of four years.

D. Plaintiffs Should Not Be Required to Re-Litigate the Same Issue Every Election Cycle.

Plaintiff Pool, and Pool's contractors through their engagement with Plaintiff Benezet, are professional petition circulators engaged in the full-time circulation of election petitions, including Pennsylvania. Defendants established

no testimony, and the lower court made no finding of fact, that Plaintiffs Pool and Benezet only sought relief from the offending residency requirement for circulators for the 2020 Republican primary election. In fact, at the time the record was established in late 2016, no effort was made to create any record as to who Plaintiffs would seek to circulate petitions for in 2020, because at that time it was still 4 years out from the next presidential election. Accordingly, the 2020 presidential election cycle, no less that the 2024, 2028, 2032, 2036, 2040 was not the object of fact finding or building the record. Plaintiffs' standing was properly established through their past petitioning actions and intent to continue to circulate petitions in Pennsylvania and the direct harm caused by 25 P.S. § 2869 on out-of-state petition circulators such as Plaintiffs and the ability of the lower court to provide full redress of Plaintiffs' constitutional claims. 2020 had no role in the adjudication of Plaintiffs' claims until the Court, out-of-left field, limited Plaintiffs' as applied relief to the 2020 Republican presidential primary election.

The lower court's limiting of Plaintiffs' injunctive relief from 25 P.S. § 2869 to the 2020 Pennsylvania Republican presidential primary election forces Plaintiff to relitigate the same claims for the 2024, 2028, 2032, 2036, 2040 (etcetera) Republican presidential primary elections. While no one has argued this case is mooted by the passage of the most recent election cycle, the "capable of repetition yet evading review exception" to the mootness doctrine was developed to prevent

the necessity of a plaintiff from having to relitigate the same claims over and over again, as is now the case with the lower court's order limiting as applied relief to the 2020 Pennsylvania Republican presidential primary election. *Rosario v. Rockefeller*, 410 U.S. 752 n. 5 (1973) (case was not moot although date of primary had passed and plaintiffs were eligible to participate in the election where their case was capable of repetition yet evading review); *Patriot Party of Allegheny County v. Allegheny County Dept. of Elections*, 95 F.3d 253, 257 (3rd Cir. 1996) This exception to the mootness doctrine is applicable where a challenged situation is likely to recur and the same complaining party would be subjected to the same adversity. *In re Associated Press*, 162 F.3d 503, 511 (7th Cir. 1998). Accordingly, the lower court's order from which Plaintiffs appeal impose the very conditions that the exception to the mootness doctrine was developed to prevent – preventing the same party, subjected to the same injuries, from having to relitigate the same claims for future elections.

E. Judicial Economy Militates in Favor of Appellants' Appeal.

Appellants' forgoing arguments in support of permanent as applied relief enjoining the residency requirements of 25 P.S. § 2869 for party members willing to submit to the jurisdiction of the Commonwealth will advance judicial economy. This is a more antiseptic way of letting the court understand that a flood of litigation will need to be unleashed in Pennsylvania federal district courts if the

instant appeal is not granted. Not only Plaintiffs to this action, but several hundred out-of-state professional petition circulators, standing in the same shoes of Plaintiffs, will need to shortly file new challenges to the residency requirement imposed by 25 P.S. § 2869 in order to secure injunctive relief in time for the 2024 Republican and Democratic presidential primary elections. Appellants' counsel will need to shortly file these actions as the litigation in this case spanned nearly 4 years (as the limited relief granted was only ordered a month before the 2020 nomination petition circulation period began), as Plaintiffs filed their lawsuit in January, 2016. Based on the lower court's decision to limit Plaintiffs' as applied relief not just to Plaintiffs, but also to the 2020 PA GOP presidential primary, several hundred out-of-state professional circulators understand they need to file their own litigation if they hope to be relieved from the unconstitutional impairments of 25 P.S. § 2869. Appellants' counsel has advised them to wait for resolution of this appeal before they file their own actions. Admittedly, while Appellants' counsel's economic bottom line will be flowing in black ink if Appellants' appeal is not granted, as an endless stream of nearly guaranteed successful Section 1983 litigation will ensue, Appellants' and Appellants' counsel would be perfectly satiated with resolving this issue once and for all in the Commonwealth of Pennsylvania. There are, after all, other states left to tackle.

Accordingly, granting Appellants' appeal will dramatically reduce the impending case load of the district courts within this state challenging the residency requirement of 25 P.S. § 2869 for hundreds of professional petition circulators seeking to secure an equal footing for the 2024, 2028, 2032, 2036 and 2040 (just for starters) PA Republican and Democratic presidential primary elections.

F. Plaintiff Carol Love is Entitled to Permanent Relief on Count II of Plaintiffs' Second Amended Complaint.

The lower court completely ignores the right of registered voters and party members, such as Plaintiff Love, to receive the speech offered by Plaintiffs Benezet and Pool. As explained in Section A, above, the United States Supreme Court recognizes the collection of petition signatures to involve interactive speech, of which Plaintiff Love, and all other registered voters qualified to sign a nomination petition, are participants and beneficiaries. Even if, somehow, the lower court imagined out-of-whole cloth that Plaintiffs Benezet and Pool only needed injunctive relief for the 2020 PA GOP presidential primary (and no such facts are in the record), Plaintiff Carol Love is still entitled to permanent relief as she, and all other registered Republicans and Democrats, are entitled to receive speech from out-of-state circulators who are members of their own party willing to submit to the jurisdiction of the Commonwealth. Plaintiff Love, and all other similarly situated voters, are entitled to the opportunity to sign nomination

petitions offered to them by such out-of-state petition circulators. Accordingly, the as applied injunctive relief ordered as to Count II of Plaintiffs' second amended complaint must be made permanent for out-of-state petition circulators willing to submit to the jurisdiction of the Commonwealth so they may engage in interactive political communication with their party members in Pennsylvania, and the Pennsylvania party members can engage in protected speech with their fellow out-of-state party members so that they can join together to advance common political goals.

CONCLUSION

Accordingly, Plaintiffs-Appellants respectfully request that this Court reverse the limited as applied relief granted to Plaintiffs by the lower court enjoining the unconstitutional residency requirement for circulators of nomination petitions imposed by 25 P.S. § 2869 to just the 2020 presidential primary election. This Court should Order the as applied relief enjoining enforcement of the residency requirement of 25 P.S. § 2869 for circulators of nomination petitions to be permanent relief for plaintiffs and/or all out-of-state petition circulators who are members of the same political party indicated on the nomination petition and who are also willing to submit to the jurisdiction of the Commonwealth of Pennsylvania for any post-filing investigation of election law violations related to any petitions filed by any such circulator.

REQUEST FOR ATTORNEY FEES AND COSTS OF APPEAL

Pursuant to 42 U.S. §1988, Plaintiffs-Appellants respectfully request an award of reasonable attorney fees and costs resulting from the instant appeal in the event Plaintiffs-Appellants prevail in their appeal to this Court.

Respectfully submitted,

Dated: February 26, 2021

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CERTIFICATE OF BAR MEMBERSHIP

I certify that I am a member in good standing of the Bar of this Court.

Dated: February 26, 2021

s/ Paul A. Rossi
Paul A. Rossi, Esq.
Counsel to Plaintiffs-Appellants

CERTIFICATE OF FONT, SPACING & WORD COUNT COMPLIANCE

I certify that the foregoing brief was prepared in proportionately spaced, 14-point type and contains 8,233 words, using Times New Roman font.

Dated: February 26, 2021

s/ Paul A. Rossi
Paul A. Rossi, Esq.
Counsel to Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2021, I caused a true and correct copy of the foregoing document to be served upon the following via United States Postal Service first class mail:

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Dated: February 26, 2021

s/ Paul A. Rossi
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CERTIFICATION OF IDENTICAL COMPLIANCE OF BRIEFS

I hereby certify that the foregoing hard copy of "Appellants' Opening Brief" and "Appendix Volume I" is identical, except for signatures, to the opening brief filed electronically with this Court on February 26, 2021. I also hereby certify that the hard copies of "Appellants' Opening Brief" and "Appendix Volume I" served upon Appellees' legal counsel is identical to the hard copy of same filed with this Court.

Dated: February 26, 2021

s/ Paul A. Rossi
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CERTIFICATION OF VIRUS CHECK

I hereby certify that a virus check was performed on the text of "Appellants' Opening Brief" and "Appendix Volume I" on February 26, 2021. Norton Anti-Virus 2020, fully updated, was used to scan the text of the foregoing brief and Appendix Volume I.

Dated: February 26, 2021

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