

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2976

BENEZET CONSULTING LLC; TRENTON POOL; CAROL LOVE,

Appellants

v.

**SECRETARY COMMONWEALTH OF PENNSYLVANIA;
COMMISSIONER BUREAU OF COMMISSIONS ELECTIONS &
LEGISLATION,**

BRIEF FOR APPELLEES

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
ENTERED AUGUST 28, 2020

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STATEMENT OF JURISDICTION

This is a civil rights action brought pursuant to 42 U.S.C. § 1983, over which the district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

This appeal is from a final order, over which this Court has jurisdiction by virtue of 28 U.S.C. § 1291. The district court's order was entered on August 28, 2020, and the notice of appeal was filed on September 25, 2020.

STATEMENT OF ISSUES

The Pennsylvania Election Code's in-state witness requirement prohibits individuals who are not residents of Pennsylvania from verifying the signatures provided on nomination petitions for candidates seeking to be placed on the primary ballot of a major political party. 25 P.S. § 2869. The district court granted partial summary judgment in favor of Appellants Benezet Consulting LLC and Trenton Pool, holding that the in-state witness provision was unconstitutional as applied to them and enjoining its enforcement against them for the 2020 Republican Presidential Primary in Pennsylvania. However, the district court denied Appellants' request to declare the in-state witness requirement to be facially unconstitutional. The district court also denied Appellants' (a) request to permanently extend its order as to Appellants for all future elections and (b) its request to permanently extend its order to apply to all other out-of-state petition circulators which agree to be subject to the jurisdiction of Pennsylvania's courts.

The issue on appeal is:

Whether the district court erred in denying Benezet Consulting and Trenton Pool's request to have the enjoinder of Pennsylvania's in-state witness requirement (25 P.S. § 2869) as to them permanently extended to all future elections and all similarly situated individuals?

Appellants raised this issue in their second amended complaint (Doc. 25, 2/16/16, Request for Relief, at 46); motion for summary judgment (Doc. 44, 12/22/16); and motion to alter or amend judgment (Doc. 77, 2/10/20) (Appendix (A) 69-74). In a memorandum (Doc. 74; A7-A44) and order (Doc. 75; A4-A5) dated January 13, 2020, the district court held that Pennsylvania's in-state witness requirement was unconstitutional as applied to Benezet Consulting and Trenton Pool and that it was enjoined as to them for the 2020 Republican Primary. However, the district court did not extend its ruling to third parties or for elections held after 2020. In a memorandum (Doc. 87; A45-A59) and order (Doc. 88; A6) dated August 28, 2020, the district court denied Benezet Consulting and Trenton Pool's motion to amend or alter its judgment to extend its injunction to future elections beyond 2020 and apply its ruling to other parties similarly situated with them.

STATEMENT OF THE CASE

Benezet Consulting, LLC, is a Texas-based for-profit petition circulating company. Trenton Pool is a paid out-of-state petition circulator. (collectively, “Paid Circulators”) Paid Circulators commenced the present action by filing a complaint in the Middle District of Pennsylvania against Pedro Cortes,¹ in his official capacity as Secretary of the Commonwealth, and Jonathan Marks, in his official capacity as Commissioner for the Bureau of Commissions, Elections and Legislation (collectively, “Election Officials”). (Complaint (Doc. 1), 1/14/16) They subsequently filed an amended complaint (Doc. 4, 1/19/16) and then a second amended complaint (“SAC”) (Doc. 25, 2/16/16).

Paid Circulators raised challenges to the constitutionality of three related provisions of the Pennsylvania Election Code, all of which involve the collection of signatures for nomination petitions for major party candidates who wish to be placed on the primary ballot. These provisions require that: (i) the affidavit of circulator for a nomination petition be executed by a person who is a registered member of the party designated on the petition (such that out-of-state circulators must be accompanied by that individual in circulating nomination petitions) (25

¹ Cortes was succeeded by Acting Secretary Robert Torres (10/11/17-1/5/19), Secretary Kathy Boockvar (1/5/19-2/5/21), and now Acting Secretary Veronica Degraffenreid (2/8/21-present). Degraffenreid is automatically substituted as a party in her official capacity pursuant to F.R.A.P. 43(c)(2).

P.S. § 2869); (ii) a nomination petition be notarized (25 P.S. § 2869); and, (iii) registered party members sign only one nomination petition for major party candidates (25 P.S. § 2868). Only the first of these provisions is still at issue for purposes of this appeal.²

In Count I of the SAC, Paid Circulators alleged that Pennsylvania's in-state witness requirement as set forth in 25 P.S. § 2868 is facially unconstitutional under the First Amendment. (SAC at ¶¶ 75-83) In Count II of the SAC, Paid Circulators allege that the in-state witness requirement is unconstitutional as applied to them because it is not narrowly tailored to further a compelling government interest.³ (SAC at ¶¶ 84-92)

² After this case was initiated, the General Assembly eliminated the notarization requirement. Act 77 of 2019, P.L. 552 (Oct. 31, 2019). This rendered Counts III and IV of the SAC moot. (Mem. Op. (Doc. 74) at 29-30; A35-A36) Carol Love, a registered Republican from Pennsylvania who was added as a plaintiff in the second amended complaint (SAC at ¶23), alleged that the restrictions on the number of nomination petitions she could sign violated her rights under the First Amendment. (SAC at ¶¶ 53-56) (SAC Counts V and VI, ¶¶ 111-128) The district court granted summary judgment in favor of Election Officials and against Love, concluding that she had not demonstrated that she was significantly burdened by the restriction on the number of petitions she could sign and the restriction was proper as a measure which avoided ballot clutter and required candidates to show sufficient support to be placed on the ballot. (Mem. Op. (Doc. 74) at 32-33; A38-A39) Paid Circulators have not pursued this issue on appeal.

³ Counts III through X of the SAC raise issues regarding the notarization requirement for nomination petitions, the prohibition on electors signing more than one nomination petition,; claims that the in-state witness requirement, the

After discovery, the parties filed cross-motions for summary judgment. (Elections Officials' MSJ (DOC. 41), 12/22/16) (Paid Circulators' MSJ (DOC. 44), 12/22/16) The parties filed Statements of Facts, supporting briefs and supporting documents to substantiate their respective positions. (Elections Officials' SMF (DOC. 42), 12/22/16) (Paid Circulators' SMF (DOC. 46), 12/22/2016) (Elections Officials' Brief in support of SJ (DOC. 43), 12/22/16) (Paid Circulators' Brief in support of SJ (DOC. 45), 12/22/16) The parties subsequently filed reply briefs as well as briefs in opposition to the opposing motions for summary judgment. (Elections Officials' Brief in opposition to SJ (DOC. 53), 1/12/17; and Reply Brief (DOC. 55), 1/24/17) (Paid Circulators' Brief in opposition to SJ (Doc. 53), 1/12/2017; and Reply Brief (DOC. 57), 1/26/17)

In a memorandum (Doc. 74; A7-A44) and order (Doc. 75; A4-A5) dated January 13, 2020, the district court held that Pennsylvania's in-state witness requirement was not facially unconstitutional as it furthered a compelling state interest ("preventing fraud and maintaining the integrity of the election process") and Paid Circulators had failed to demonstrate that there was no set of

notarization requirement, and the prohibition on electors signing more than one nomination petition violate the Equal Protection Clause; and a claim that the in-state witness requirement violates the Commerce Clause by unduly burdening out-of-state petition circulators from conducting business in Pennsylvania. However, none of these are at issue in this appeal. Accordingly, Counts III through X of the SAC are not discussed further here.

circumstances under which the provision would be valid. Accordingly, the district court granted summary judgment to Election Officials on Count I. (Mem. Op. (Doc. 74) at 24-29; A30-35)

However, in regard to Paid Circulators' as applied challenge to the in-state witness requirement in Count II, the district court found that the requirement was not narrowly tailored where they were willing to submit themselves to the jurisdiction of Pennsylvania's courts. Relying on a number of cases that have held that requiring circulators to submit to the state's jurisdiction is a more narrowly tailored way to fulfill the state's interest in election security, the district court held that the requirement was unconstitutional as applied. (*Id.*)

Accordingly, the district court granted summary judgment to Paid Circulators on Count II. As a result, it ordered that Election Officials were enjoined from enforcing the in-state witness requirement as to Petition Circulators for the 2020 Republican Primary. However, the district court did not extend its ruling to third parties or for elections held after 2020. (Order (Doc. 75) at ¶ 4, 1/13/20; A4)

Paid Circulators then filed a motion to amend or alter its judgment to extend the injunction to future elections beyond 2020 and apply the district court's ruling to other parties similarly situated with them. (Doc. 77, 2/10/20; A69-A72) In a

memorandum (Doc. 87; A45-A59) and order (Doc. 88; A6) dated August 28, 2020, the district court denied Paid Circulators' motion.

This appeal followed. (Notice of Appeal (Doc. 89), 9/25/20; A1-A3)

STATEMENT OF FACTS

The relevant facts are summarized as follows. Benezet Consulting, LLC (“Benezet”) is a Texas company that is in the business of gathering signatures for Republican candidates for President of the United States who seek to access primary ballots. (Election Officials’ Statement of Material Facts (“SMF”) (Doc. 42) at ¶ 22) Benezet performed no signature gathering efforts for any election in the 2014 election cycle or the 2015 election cycle. (*Id.* at ¶ 9) For the 2016 election cycle, with the exception of its home state of Texas, the only signature collection by Benezet was for the presidential race. This was the first time that Benezet ever collected for any presidential race. (*Id.* at ¶ 10)

The Election Code requires in pertinent part that a circulator of nomination petitions “is a qualified elector of the Commonwealth, who is duly registered and enrolled as a member of the party designated in said petition.” 25 P.S. § 2869. While this provision requires that a nomination petition be certified by a resident of Pennsylvania, it does not prevent individuals from coming into Pennsylvania to participate in other campaign activities such as handing out leaflets for candidates, talking to people on the street about candidates, or carrying signs in support of candidates or issues relating to the election. (SMF ¶ 17)

Benezet uses independent contractors, who live in states other than Pennsylvania, to collect signatures. (SMF ¶ 54) The practice of using independent contractors is common in the “petitioning industry.” It relies extensively on transient workers with no fixed address. Generally, these companies use independent contractors that are paid to travel from state to state placing initiatives and candidates on the ballot. (SMF ¶ 52 & 54) As independent contractors, these individuals are free to collect signatures by whatever method he/she may choose. (SMF ¶ 53) They are generally paid on a per signature basis and, as a result, they are driven to get as many signatures as possible in the shortest time as possible so as to maximize earnings.⁴ (SMF ¶ 55)

In the 2016 election cycle, Benezet used some 30 to 40 people to collect signatures. (SMF ¶ 65) In the 2016 election cycle, Benezet collected signatures for Cruz, Paul, Santorum, and Trump in the following states: Cruz—Illinois, Indiana, Vermont, Rhode Island, Delaware, and Pennsylvania; Paul—Illinois and Indiana; Santorum—Indiana; Trump—Indiana. (SMF ¶ 67)

⁴ Trenton Pool is a resident of Texas and is a registered member of the Texas Republican Party. Pool is a professional signature collector. (SMF at ¶¶ 12-13) He has described himself as belonging to a “nomadic band of petition gatherers.” (SMF ¶ 64 (citing Pool Dep. at 111)) He has sought to work as a circulator in Pennsylvania, but has found that the in-state certification requirement to inhibit his ability to do so. He is willing to subject himself to the jurisdiction of Pennsylvania courts for purposes of investigating and/or prosecuting election fraud. (SAC ¶¶ 34-35)

In the 2016 election cycle, Benezet collected about 4,000 signatures for Republican Presidential candidate Cruz in Pennsylvania. (SMF ¶ 69) The affidavits of circulators on the nomination petitions for Republican Presidential candidate Cruz were signed by Pennsylvania residents and were notarized. Additionally, the collectors made sure that those who signed had not signed for another Republican candidate for President of the United States. (SMF ¶ 70)

Benezet also collected signatures for Democratic Presidential candidate Rocky De La Fuente. (SMF ¶ 71) In the 2016 election cycle, Benezet collected about 5,000 signatures for Democratic Presidential candidate De La Fuente in Pennsylvania. (SMF ¶ 74) In the 2016 election cycle, the affidavits of circulators on the nomination petitions for Democratic Presidential candidate De La Fuente were signed by Pennsylvania residents and were notarized. Additionally, the collectors made sure that those who signed had not signed for another Democratic candidate for President of the United States. (SMF ¶ 75)

For the majority of its signature gathering efforts, Benezet is paid on a per signature basis. Benezet prices the per signature rate such that it will make a profit. (SMF ¶¶ 47-48) Benezet has no employees who are signature collectors; instead, those who collect signatures for Benezet are independent contractors of Benezet. (SMF ¶ 50) As independent contractors, these individuals are free to

collect signatures for Benezet or any other signature collection company or for candidates or issues on their own. (SMF ¶ 51)

STATEMENT OF RELATED CASES

This case has not previously been before the Court. There are no pending or completed cases to which it is related.

SUMMARY OF ARGUMENT

Benezet Consulting, LLC, and Trenton Pool (“Paid Circulators”) are out-of-state paid circulators of nomination petitions for major party candidates seeking to be placed on the ballot in primary elections. Pennsylvania has an in-state witness rule (25 P.S. § 2869) that requires that the signatures on such petitions be verified by a resident of Pennsylvania. Paid Circulators filed suit in the district court, raising both a facial and an as applied challenge to the in-state witness rule. The district court denied the facial challenge, but granted the as applied challenge. As a remedy, the district court enjoined the enforcement of the in-state witness rule as to Paid Circulators through the 2020 election cycle. Paid Circulators then filed a motion to amend or alter the district court’s judgment to extend the injunction to future elections beyond 2020 and apply the district court’s ruling to all other parties similarly situated with them. The district court denied this request.

Paid Circulators did not appeal the denial of the facial challenge. Likewise, Election Officials did not appeal from the district court’s decision granting the as applied challenge. The only issue on appeal is brought by Paid Circulators who argue that the district court abused its discretion in refusing to broaden the injunction granted to them to others and to other election cycles. In short, Paid Circulators improperly seek to be granted permanent facial relief when they have not appealed the denial of their facial challenge.

Paid Circulators are tilting at windmills. The district court's decision is fully supported by the recognized standards governing as applied challenges. Injunctive relief should be no broader than necessary. Likewise, it is appropriate in providing a remedy for an as applied challenge to limit enjoinder against a particular plaintiff only. Nonetheless, Paid Circulators improperly attempt to resurrect their facial claim by having this Court grant it broad, facial relief despite the fact that this issue was not preserved on appeal.

Paid Circulators also fail to demonstrate that the district court erred by not extending relief to them beyond the 2020 election. Paid Circulators did not present evidence that would support granting a permanent injunction for elections beyond 2020. To grant the requested relief, the district court would have had to engage in unnecessary and unwarranted speculation regarding facts not in evidence.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED BENEZET CONSULTING AND TRENTON POOL'S REQUEST TO HAVE THE ENJOINMENT OF PENNSYLVANIA'S IN-STATE WITNESS REQUIREMENT (25 P.S. § 2869) AS TO THEM PERMANENTLY EXTENDED TO ALL FUTURE ELECTIONS AND ALL SIMILARLY SITUATED INDIVIDUALS.

A. Standard of Review.

The standard of review of the district court's decision granting a permanent injunction is an abuse of discretion. *N.A.A.C.P. v. North Hudson Regional Fire & Rescue*, 665 F.3d 464, 475 (3d Cir. 2011). A district court granting of an injunction pursuant to Fed.R.Civ.P. 65(d) must create a remedy that is “no broader than necessary to provide full relief to the aggrieved plaintiff.” *Belitskus v. Pizzingrilli*, 343 F.3d 632, 649 (3d Cir. 2003) (citing *McLendon v. Continental Can Co.*, 908 F.2d 1171, 1182 (3d Cir.1990)).

B. Paid Circulators are barred from obtaining broad, facial relief where they did not appeal from the denial of their facial challenge by the district court.

The issue in this appeal is quite narrow. The district court held that Pennsylvania's in-state witness requirement (25 P.S. § 2869) is unconstitutional as applied to Paid Circulators, Benezet Consulting and Trenton Pool. Election Officials have not filed an appeal in this case and that question is not now before the Court. Conversely, **the district court also held that the statute is not facially**

unconstitutional. In fact, the district court granted Election Officials’ motion for summary judgment on that claim and, significantly, Paid Circulators have not appealed from that determination either. Thus, that aspect of the district court’s decision is also not before this Court.

The only issue properly before the Court is whether the relief granted to Paid Circulators was within the discretion of the district court. Paid Circulators maintain that the district court erred in not extending the as-applied relief granted to them for the 2020 primary election to all future elections and to all others similarly situated.⁵ However, district courts are cautioned to grant injunctive relief “no broader than necessary to provide full relief to the aggrieved plaintiff.” *Belitskus v. Pizzingtilli*, 343 F.3d 632, 650 (3d Cir. 2003) (quoting *McLendon v. Continental Can Co.*, 908 F.2d 1171, 1182 (3d Cir.1990)). The appropriate

⁵ Paid Circulators also argue that Appellant Love, a Republican voter from Pennsylvania, has a First Amendment right to communicate with them and other petition circulators. (Appellants’ Brief at 35-36) As a result, they maintain that the injunction should be made permanent as to all out of state circulators willing to submit to the jurisdiction of the Pennsylvania courts. First, this argument is barred at the outset because Paid Circulators did not raise it in their issues presented. Second, Love’s right to free speech or to vote is not substantially burdened by Pennsylvania’s in state witness rule. She remains free to discuss her political views with anyone. The fact that paid circulators may not choose to speak with her if they cannot be paid for doing so does not diminish her rights under the First Amendment. Third, individual voters like Love do not have standing to challenge the in state witness rule on behalf of Paid Circulators. Moreover, Love would not be entitled to a permanent injunction under any circumstance where Paid Circulators would not be entitled to the same relief.

remedy for an as-applied challenge is to enjoin the statute's enforcement solely against a particular plaintiff. *See CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 624 (3d Cir.2013). It is not appropriate to effectively grant global relief to an entire class of individuals who are not before the court. Despite this caveat, Paid Circulators focus almost entirely on the merits of the unappealed decision denying their request to find the in-state witness rule facially unconstitutional. Paid Circulators further request that this Court improperly grant broad facial relief through the back door even though it is not supported by the uncontested decision below which found that they were only entitled to relief for an as applied violation.

The district court, in rejecting Paid Circulators' motion to amend the judgment to extend the injunction to all out-of-state circulators willing to submit to the jurisdiction of Pennsylvania's courts, concluded that Paid Circulators "ultimately request that this Court broaden the scope of its as-applied relief so to effectively grant facial relief . . . Such a request is an improper basis for Rule 59(e) relief." (Mem. Op. (Doc. 87) at 13; A57) As Paid Circulators have not appealed the denial of their claim that the in-state witness rule is facially unconstitutional, their argument that the district court erred in not granting facial relief is completely and irrefutably foreclosed.

C. The District Court acted properly in limiting the injunction to the plaintiffs and not extending it beyond the 2020 election.

The district court based its limited injunction on a well-developed factual record. Based on that record, it found that while an injunction was appropriate in the present case, the facts did not support the conclusion that other out-of-state circulators would submit themselves to Pennsylvania's jurisdiction in challenges to nomination petitions. In fact, in other litigation in Pennsylvania, other circulators had demonstrated an unwillingness to do so. (Mem. Op. (Doc. 87) at 11-12; A55-A56) While it undoubtedly would be more convenient for other circulators if the in-state witness rule was simply eliminated, Paid Circulators failed to prove that 25 P.S. § 2869 was facially unconstitutional and that such relief was appropriate. Again, we underscore the fact that Paid Circulators did not appeal that determination.

Paid Circulators did not introduce evidence that would support extending the injunction to third parties or beyond the 2020 election cycle. In their brief, they argue that 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. Brief for Appellants at 15. However, it is their burden to show that the facts not only support, but require the extended relief they ask for. They have entirely failed to

show that the facts support the relief they want or that the district court abused its discretion by limiting relief to the 2020 election cycle.⁶

⁶ The petition circulator business lacks stability. Independent contractors are used instead of regular employees. The record demonstrates that those who contract with Benezet and similar companies are generally transient and do not have fixed addresses. (SMF ¶¶ 52-53) This fully supports the conclusion that the district court could not determine, based on the facts proffered by Benezet and Pool, whether other paid petition circulators would in fact submit to the jurisdiction of Pennsylvania Courts, or whether the Paid Circulators in this case could make such a guarantee for others and for beyond the 2020 election. It would be highly speculative to predict who Benezet may use as circulators for the 2024 election and beyond. While the district judge found that Benezet's petition circulators had sufficiently shown that they would be made available to the jurisdiction of Pennsylvania's courts for the 2020 election, Benezet did not present evidence that established that the same would be true more than 5 years in the future.

CONCLUSION

For these reasons, the Court should affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Howard G. Hopkirk, Senior Deputy Attorney General, hereby certify as follows:

1. That I am a member of the bar of this Court.
2. That the text of the electronic version of this brief is identical to the text of the paper copies.
3. That the following virus detection program – SYBARI ANTIGEN Version 8.00.1470 – was run on the file and no virus was detected.

/s/ Howard G. Hopkirk

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CERTIFICATE OF SERVICE

I, Howard G. Hopkirk, Senior Deputy Attorney General, do hereby certify that I have this day served the foregoing Brief For Appellees, via electronic service, on the following:

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