

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' REPLY BRIEF

Paul A. Rossi, Esq.
Counsel to Plaintiffs-Appellants
IMPG Advocates
316 Hill Street
Suite 1020
Mountville, PA 17554
717.961.8978
Paul-Rossi@comcast.net

TABLE OF CONTENTS

Table of Contents.....	2
Table of Authorities.....	3
I. Appellants’ Reply.....	4
II. Conclusion.....	11
Certificate of Bar Membership.....	13
Certificate of Font, Spacing & Word Count Compliance.....	14
Certificate of Service.....	15
Certification of Identical Compliance of Briefs.....	16
Certification of Virus Check.....	17

TABLE OF AUTHORITIES

Cases:

<i>Arsenault v. Way</i> , 3:16-cv-01854-PGS-DEA, Memorandum Opinion Granting Plaintiffs’ Motion for Summary Judgment (D. N.J., April 20, 2021).....	4
<i>Green Party of Pennsylvania v. Aichele</i> , 89 F.Supp. 3d 723 (E.D. Pa. 2015).....	8, 9

Statutes:

25 P.S. § 2869.....	<i>passim</i>
N.J. Stat. Ann. § 19:23-11.....	7

I. Appellants Reply

A. Introduction.

This is a simple appeal. Plaintiffs in this case established that the residency requirement of 25 P.S. § 2869 to circulate nomination petitions in Pennsylvania imposed a severe burden on rights guaranteed to Plaintiffs-Appellants under the First and Fourteenth Amendments to the United States Constitution and that the blanket residency requirement to circulate ballot access nomination petitions for primary election candidates was not narrowly tailored to advance the Commonwealth's legitimate interest in policing petition fraud when the Commonwealth can more narrowly protect its interests by requiring out-of-state petition circulators who are members of the same political party as their candidate, to submit to the jurisdiction of the Commonwealth of Pennsylvania for the purpose of any investigation, prosecution and/or service of process with respect to any petition circulated and filed in the Commonwealth by an out-of-state petition circulator. The Court below, while arriving at the correct decision on the merits, limited the relief to a single election cycle and only for Plaintiffs-Appellants. That novel, limited relief, is the only issue before this Court.

While Appellants established in this litigation that they were willing to execute any document required by the Commonwealth to submit to its jurisdiction, that does not establish that Appellant, and every other out-of-state petition

circulator, must now be required to trudge to the federal district courts of the Commonwealth of Pennsylvania each and every election cycle and seek their own injunctive relief against 25 P.S. § 2869. Having ruled that 25 P.S. § 2869 severely impairs rights guaranteed under the First and Fourteenth Amendments to the United States Constitution and is not narrowly tailored to advance the Commonwealth's interests – the proper remedy is a permanent injunction against the residency requirement as applied to out-of-state petition circulators and leave it to the Commonwealth of Pennsylvania to make a permanent fix applicable to every out-of-state petition circulator. This is what every other federal district and circuit court has accomplished in the adjudication of unconstitutional residency requirements over the past twenty-years.

B. Permanent As-Applied Relief is Not Facial Relief

Plaintiffs agree that as-applied relief is the appropriate relief in this action. 25 P.S. § 2869 is not unconstitutional with respect to out-of-state circulators who refuse to submit to the Commonwealth's jurisdiction. However, for out-of-state circulators willing to submit to the jurisdiction of the Commonwealth it is now established that 25 P.S. § 2869 is unconstitutional as-applied to all such petition circulators. Accordingly, Appellees continued slight of hand argument that Plaintiffs seek facial relief is clearly wrong. Appellees' Br. At pp. 14-18.

After Appellants filed their main brief in the instant appeal on February 26, 2021, Judge Sheridan of the United States District Court for the District of New Jersey issued, on April 20, 2021, a memorandum opinion and order in *Arsenault v. Way*, 3:16-cv-01854-PGS-DEA, granting Plaintiffs' motion for summary judgment and permanently enjoining New Jersey's cognate residency requirement for the circulation on ballot access nomination petitions for major party candidates that is the subject of this instant appeal. *See* Appellants' Supp. Appendix at p. 1. Trenton Pool, along with fellow professional petition circulator Alexander Arsenault and third-party presidential candidate Roque De La Fuente, challenged the same statutory residency requirement that is imposed by the Commonwealth of Pennsylvania in New Jersey in *Arsenault v. Way*. The New Jersey statute preventing out-of-state residents from circulating ballot access nomination petitions for candidates seeking the nomination of the Republican and Democratic parties is the same statutory provision that Plaintiffs successfully challenged on the merits in this action in the Commonwealth of Pennsylvania.

In both this action and in *Arsenault v. Way*, the out-of-state circulator Plaintiffs are members of the same political party as the candidates they seek to circulate primary election ballot access petitions and are willing to submit to the jurisdiction of the forum states for purposes of any investigation, prosecution and

service of process with respect to any ballot access petition they circulate and file in the forum state.

In *Arsenault v. Way*, Judge Sheridan found that:

the residency requirement of N.J. Stat. Ann. § 19:23-11 is unnecessarily restrictive and does not survive strict scrutiny. This ruling on the validity of the residency requirement does not affect the remainder of the provisions of the statute. While Plaintiffs have proposed alternative means by which the State can achieve its compelling interests, the State has discretion to craft other procedures that are less restrictive than the in-state residency requirement for circulators. Any such measures should be communicated to the parties on or before December 1, 2021.

Arsenault v. Way, 3:16-cv-01854 at slip op. p. 20; App. Supp. Appendix at p. 20.

Judge Sheridan’s order for New Jersey “to craft other procedures that are less restrictive than the in-state residency requirement for circulators” extends the as-applied relief for out-of-state residents who are members of the same political party as the candidate(s) for whom they wish to circulate petitions to all petition circulators willing to submit to the jurisdiction of New Jersey for investigation, prosecution and service of process. Accordingly, Judge Sheridan granted permanent injunctive relief in an as-applied adjudication and properly extended the ruling beyond the specific parties of the litigation through the court’s order for New Jersey to fix the problem consistent with the Court’s order – promulgate a form to permit out-of-state circulators to submit to the jurisdiction of the state. Accordingly, under the decision in *Arsenault v. Way*, those out-of-state circulators who execute the form to submit to New Jersey’s jurisdiction may circulate and

those who do not remain barred from circulating candidate petitions in New Jersey. That is the relief that every other federal district and circuit court has imposed in the multiple adjudications of unconstitutional residency bans set forth in Appellants' main brief – including the United States District Court for the Eastern District of Pennsylvania in *Green Party of Pennsylvania v. Aichele*, 89 F.Supp. 3d 723 (E.D. Pa. 2015) in ruling that Pennsylvania's cognate residency requirement for petition circulators for third-party candidates was unconstitutional where the Commonwealth's interests could be more narrowly protected by requiring out-of-state petition circulators to submit to the Commonwealth's jurisdiction. First, the relief granted in *Green Party of Pennsylvania* was not limited to a single election cycle as is the case in the instant appeal. The Commonwealth did not appeal the decision in *Green Party of Pennsylvania* alleging that the as-applied relief granted to the Plaintiffs in that case should have been limited to a single election cycle. Instead, the Commonwealth, itself, amended the circulator affidavit to require the out-of-state circulator to submit to the jurisdiction of the Commonwealth and issued notice that the ruling in *Green Party of Pennsylvania* would be extended to all circulators of third-party and independent candidate petitions – just as Judge Sheridan just ordered in New Jersey.

Accordingly, it remains pure sophistry to argue that as-applied relief as to all those, and only those, out-of-state circulators willing to submit to the

Commonwealth's jurisdiction for purposes of circulating major party candidate petitions constitutes facial relief. The as-applied relief granted in *Green Party of Pennsylvania v. Aichele* and *Arsenault v. Way* is appropriate as-applied relief and it is not the facial relief that Appellees must argue it is to prevail in this appeal.

C. Plaintiff Love Has Standing to Demand Her Right to Permanently Receive Speech From Out-of-State Circulators Who Submit to the Jurisdiction of the Commonwealth

Appellees' footnote #5 at page 17 of their brief alleges that Plaintiff Love is somehow disentangled from the instant action and appeal without standing and not part of the issue presented. First Appellees' assertions are made without any citation to authority. Simply stated, the unconstitutional residency ban prevents her from receiving the speech that she wants, and she has standing to demand that the Commonwealth not impair her right to have out-of-state petition circulators reach out to her and offer her to sign candidate petitions for her party's primary election. The limited relief appealed to this court continues the same impairment that caused her to join the litigation in the first instance. The permanent as-applied relief requested in this appeal makes her relief permanent just as much as for the other Appellants. Accordingly, Appellant Love is part of the same issue presented as for the other Appellants in this appeal. The fact that the district court largely focused on the circulators Plaintiff and not her individual rights is of no import. Since all Appellants, including Love prevailed on the merits, and the only issue is

the extent of the relief to be granted in this action, all Appellants are part of the same issue presented and all Appellants are asking for the same thing – permanent as-applied relief.

D. Appellees’ Relief Must be Made Permanent.

Quite frankly, if Appellees and the Commonwealth of Pennsylvania want Appellants’ legal counsel to swamp the federal district courts of this Commonwealth with endless litigation by each and every out-of-state petition circulator who want to submit to the Commonwealth’s jurisdiction so that they may circulate candidate petitions for Republican and Democratic party candidates (of which there are hundreds), and the associated attorney fees that will flow under 42 U.S.C. § 1988, so be it. While this Court should halt the coming tidal wave of litigation by making the as-applied relief applicable to all out-of-state circulators willing to submit to the jurisdiction of the Commonwealth so that they can join their party’s candidates to secure ballot access in Pennsylvania, what matters most to Appellants is that their relief, at minimum, is made permanent as to them.

Nothing in Appellees’ brief or the opinions below, suggest why Appellants in this action should be required to file a new action to circulate nomination petitions in Pennsylvania raising the same claim that they just prevailed on (after 4 years of litigation – an entire election cycle). Appellants have the right to have their legal status changed vis-à-vis 25 P.S. § 2869 on a permanent basis. Nothing

in Appellees' or the opinions below provide any basis for the single election relief granted (which, in fact, amount to no relief at all).

As stated in Appellants' main brief, no federal district or circuit has ever granted as-applied relief from an unconstitutional ballot access restriction for just a single election. Appellees' brief fails to cite a single case where as-applied relief from an unconstitutional ballot access restriction was limited to a single election cycle. Accordingly, at minimum, the relief below as-applied to just the Appellants should be made permanent.

II. Conclusion

Permanent as-applied relief is not facial relief. Accordingly, the lower court's relief should be amended to permanently enjoin 25 P.S. § 2869, first as to Appellants and also to all similarly situated out-of-state petition circulators who are members of the same political party as the candidate for whom they seek to circulate petitions and willing to submit to the jurisdiction of the Commonwealth of Pennsylvania. The injunction should be made permanent and the Commonwealth can fix whatever they need or want to fix to comply with the injunction and to prevent to need for any more litigation on this settled issue. Respectfully submitted,

Dated: May 17, 2021

s/ Paul A. Rossi

Paul A. Rossi

Counsel to Plaintiffs-Appellants

IMPG Advocates

316 Hill Street

Suite 1020

Mountville, PA 17554

717.961.8978

Paul-Rossi@comcast.net

CERTIFICATE OF BAR MEMBERSHIP

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

Dated: May 17, 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 1,872 words, using Times New Roman font.

Dated: May 17, 2021

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

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2021, I caused a true and correct copy of the foregoing document to be served upon the following via the Court's CM/ECF filing system:

Howard Hopkirk, Esq.
Sr. Deputy Attorney General
Commonwealth of Pennsylvania
Office of the Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1478

Dated: May 17, 2021

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

CERTIFICATION OF IDENTICAL COMPLIANCE OF BRIEFS

I hereby certify that the foregoing hard copy of “Appellants’ Reply Brief” and “Appellants’ Supplemental Appendix” is identical, except for signatures, to the reply brief filed electronically with this Court on May 17, 2021.

Dated: May 17, 2021

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

CERTIFICATION OF VIRUS CHECK

I hereby certify that a virus check was performed on the text of “Appellants’ Reply Brief” and “Appellants’ Supplemental Appendix” on May 17, 2021. Norton Anti-Virus 2020, fully updated, was used to scan the text of the foregoing reply brief and attached supplemental appendix.

Dated: May 17, 2021

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