Litigation in a Fishbowl: Mark A. Aronchick on the 2020 Pennsylvania Election Lawsuits

By Rochelle M. Fedullo and Jonathan Aronchick

MARK A. ARONCHICK, an iconic and nationally respected Philadelphia lawyer and a past Chancellor of the Philadelphia Bar Association, is a go-to litigator in "bet the company" and high-impact public policy litigation. Aronchick had a leading role in representing various governmental interests in 2020 Pennsylvania election litigation and shared his experiences and insights in a conversation with The Philadelphia Lawyer.

Shelli Fedullo: The legal issues aside, describe the dynamics, the idiosyncrasies, and the "personality" of the 2020 Pennsylvania election litigation.

Mark A. Aronchick: To set the table, there were about 25 different lawsuits involving sometimes the Trump campaign, sometimes the Democratic Party, sometimes interests related to either one of those in federal and state court. Some of them were purely legal questions that didn't really need much of a record and some of them needed a fairly extensive record. Overarching, all of those cases had the feature of being litigated in a fishbowl. Even the smaller cases were being watched very closely by a whole variety of interested parties—public interest groups, citizens groups, the press, the parties themselves. And things had to be done much more quickly than they usually are in regular litigation. Another feature was the number of interests—some of the cases had 12, maybe 15 interveners with their own different interests. The lawsuits were against 67 counties in Pennsylvania, in addition to the Commonwealth, and so there was a lot of coordination that had to be done. And more, this was the most important issue that was being litigated, not just in Pennsylvania, but everywhere regarding the 2020 election.

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There was also a heightened urgency to get it right. The interest that we represented—the governmental interest—was a non-partisan interest that did not have a voice in the supercharged political environment surrounding the litigation. They are doing the people's work, and they really cannot pick sides. Those are the ones that are representing the government to make sure that everyone recognizes these are non-partisan interests, the true patriots really, the people who are making the elections work for everybody.

SF. Give us a 30,000-foot view of the legal issues.

MA: The lion's share of legal issues surrounded the mail-in balloting statute. No-excuse mail-in balloting was passed at the end of 2019, and the 2020 elections were the first time it was being used. On top of it, it was being implemented during the pandemic. The legal issues were, by and large, surrounding implementation in unusual circumstances. That meant there were detailed issues; the election code is two volumes long.

In the mail-in ballot regime, there were questions about whether one could return votes in drop boxes, rather than just the U.S. mailboxes. Could different counties set up drop boxes? There were questions about whether if people did not return their ballot in the secrecy envelope, so-called "naked ballots," could they still be counted? There were questions about whether the details on the declaration on the outer envelope, if they weren't filled out completely, what did that mean? Were they material problems in counting somebody's ballot?

There were significant questions about what was the status of observers in the counting of the mail-in votes, where were they allowed to be, and what were they allowed to look at. There were other questions about the status of poll watchers, which are different than observers. Could they come from out of the county or do they have to be watchers recruited and qualified just from within the particular county? There were very important issues when the Postal Service said that they were not going to be able to deliver mail-in the same timeframes that they used to, the timeframes that were understood when the statute was passed. Could you accept ballots that were postmarked by Election Day, but came in because of postal delays in the days after Election Day? Could they be accepted and counted?

There were other questions about whether it was required to match signatures on the outer envelope to the signature on the registration cards when people registered to vote. Signature matching was a big issue, because of the volume of the votes and whether the statute ever really required that. Then there were levels of constitutional issues. If different counties followed slightly different procedures, was that an equal protection problem? At what level would differential procedures amount to an equal protection problem?

Significant questions were raised about when could the Pennsylvania Supreme Court interpret the state statute? Was there any problem in their doing it under federal statutes and the Constitu-

tion? In other words, was robust judicial review allowed at the state supreme court level? Or could they only be resolved by state legislators? Later, we had other constitutional questions about the certification of the electoral slates. Can the certification be stopped and challenged at the state level after the time passed for election contests? Could they still, nevertheless, make these challenges?

SF. What was your personal experience in handling "fishbowl" litigation with national interest?

MA: Well, I'm a big believer that most litigation is driven by facts. Every once in a while, you get these purely legal questions, but they're really fact driven. A lot of the personality surrounding the bigger cases weren't just the ones after the election. We had some big ones that nobody was paying attention to in the summer before the election.

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There were two *Trump v. Boockvar* cases in federal court. One was filed at the end of June/early July in Western District, Pennsylvania before Judge Ranjan. The one that people talk about was the one that was filed after the election, that wound up in front of Judge Brann. The one before the election, I think was more consequential in many ways. That was at a time when Trump was declaring that his election was going to be stolen, following the mail-in balloting in the primary where 50% of the balloting was by mail during the pandemic. He then recognized that a lot of the mail-in ballot votes were breaking more Democratic than Republican.

The *Trump v. Boockvar* case in the summer, brought by a good law firm, Porter Wright, raised things they thought were going to be wrong about the mail-in ballot in anticipation of the election. They had a big section about what was going to be the susceptibility of fraud, paralleling much of the rhetoric coming from the president. There was a lot of discovery on a very compressed timeframe. Drop boxes, they said, violated the state statute.

Judge Ranjan wanted to know what the Pennsylvania Supreme Court thought about some of these state law issues. There were expedited King's Bench petitions to the Pennsylvania Supreme Court to see how some of these state statutory issues would be analyzed. There was a lot of back and forth with the state courts and the federal court. Judge Ranjan issued an opinion that resolved those issues. He plowed through the proposed fraud allegations and said that none of them held up. There was nothing that they proved. That case was important to set the stage for administering the general election because the state's procedures now were approved judicially.

Trump v. Boockvar number two was what became the Giuliani case, which was to say, "oh, now that we've had the election, it really was all rife with fraud" until Giuliani said to the federal judge that he wasn't actually pleading fraud. He was talking about fraud everywhere he could, but he wasn't pleading it. The personality of these cases was to demonstrate that mail-in balloting was a good thing, and it could work, and that people could rely on it during a pandemic. They didn't have to go running to the polls and expose themselves.

SF: We have the theme of "bad things happen in Pennsylvania" along with the narrative of a stolen election Yet, as you said, Giuliani conceded there was no fraud. How did this all play out?

MA: Well, the first version of it playing out was the *Trump v. Boockvar* case filed after the election, raising issues that it was legal to have observers on the perimeter of the room where votes were being counted and not roam around the floor. It challenged what the statute allowed them to observe and that people who had defects on the ballots that they sent in, if there was time for them to be called and come in and cure them, that they could do that before the ballots were opened up.

Giuliani made this into a big story about how observers are blocked away from anything that's important and that the government is allowing people to change their ballots, which wasn't true at all. He stated that he had evidence that everybody went to sleep on Election Day when Trump was ahead on the machine vote and then carted in fraudulent and manufactured ballots, stealing the vote from the president. This was just a big fairytale, and a bad one.

The importance of the Giuliani case was that this was the first court that he went to peddle his stories. It was a controlled environment, meaning he had to answer the judge's questions with candor. As a result of Giuliani's abject failure to establish anything that was really a problem with the election at all, there was a national mood shift, like, "Oh, here's their big chance to go to court and do their thing, and they flopped." It went from "I wonder what they're talking about to, a-ha, now we know what they're talking about, and it's a bunch of nonsense." Now, the time to file real election contests under the state code passed. They never filed one. Now, it was time to certify the votes. The litigation took a totally different turn at that point.

Now, they were coming in with several lawsuits after the governor certified the election results to try to argue that whole mail-in voting statute was unconstitutional. The big suit that

Texas filed against a bunch of states arguing that they have chosen electors unconstitutionally so they cannot be sat with Texas electors had no chance whatsoever to win. That category of cases struck me as decidedly different. These were cases, I think, to make a lot of noise publicly to try to push and pressure legislators to convene and pass their own slates simply to try to disrupt the rest of the normal processes. Fortunately, the court stood up to them, and threw them all out.

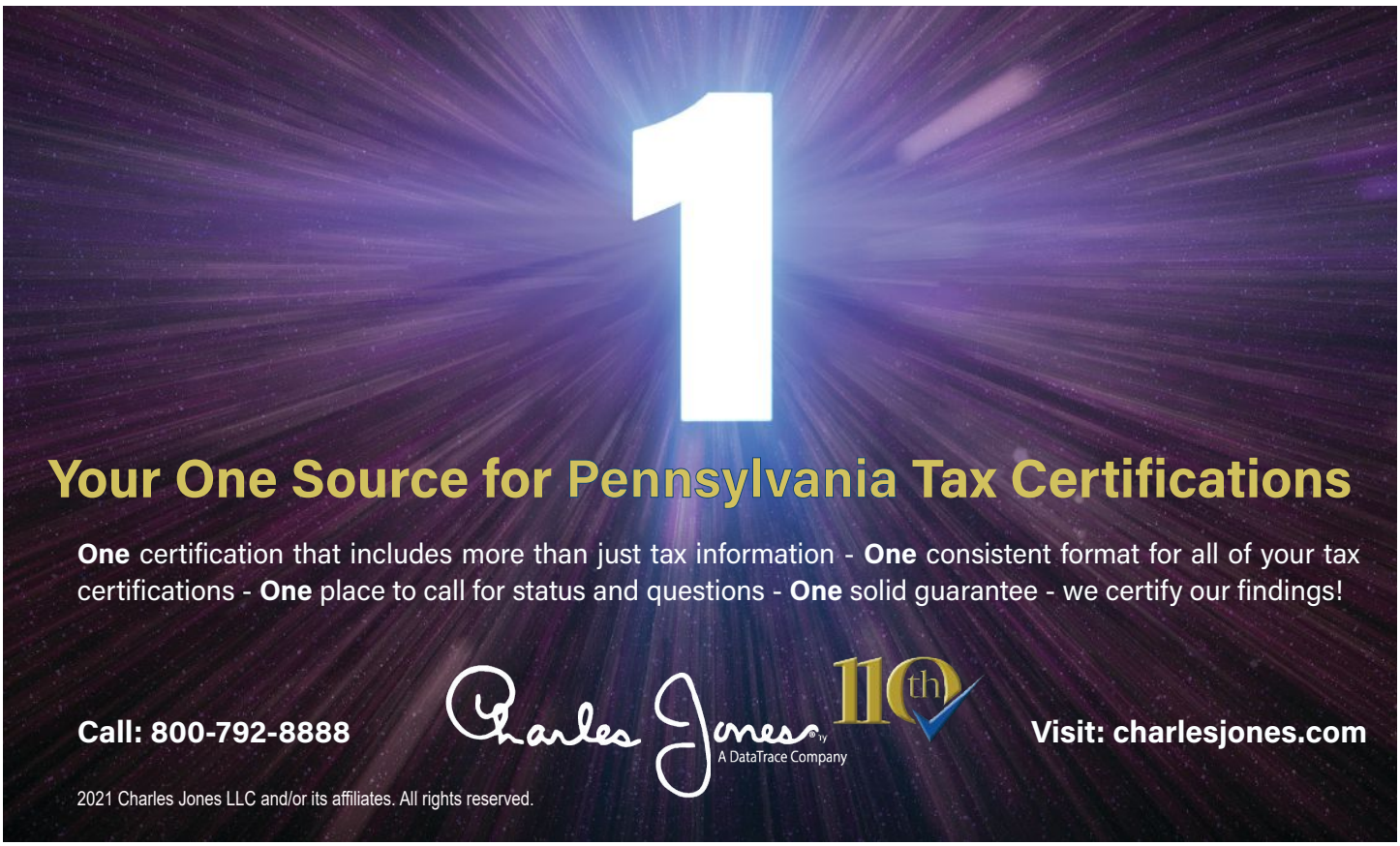
I think those cases serve as more of a political point, which is that the interests align with Trump or related in some fashion were raising similar issues. Even though they've lost those cases, it built a political momentum of sorts, where we're now having about a dozen different hearings in Harrisburg run by the Republican majority. There are about a dozen different legislative hearings looking to correct, or to amend, the mail-in voting statute because of supposed irregularities. Many of these factual arguments are being re-litigated in state hearings but without the same rules and the same guard rails that you have when you actually litigate.

It would be a shame if robust mail-in voting was limited in Pennsylvania. It works very, very well in the states that have had it and increases citizen participation. We had the highest voter turnouts in this election that we've ever had in Pennsylvania, mostly because there was easier access to voting.

Jonathan Aronchick: Looking at the mail-in ballot question from a legal perspective, touching on the abstention arguments raised, what is your perspective, especially in the Wisconsin case, about the status of the Anderson-Burdick standard regarding these issues? That principle is that a state decides its election rules and deadlines for mail-in ballots, and it's not the federal judiciary's place to step in.

MA: You put your finger on the central point that was behind the rejection of much of the litigation. They were exactly right. They were trying to federalize under vague notions of equal protection and due process issues uniquely left to the state courts to resolve. Yes, in Wisconsin, you're dead right, and that became an important precedent that we advanced here in Pennsylvania.

In both of the *Trump v. Boockvar* cases and several others, the courts made rulings basically in some combination of the following: lack of standing, which was a persistent problem that the challengers had, and abstention. Abstention became big. Federal courts questioned what was the proper recognition of federal judges about their jurisdiction. In Pennsylvania, I think there were five Supreme Court rulings in the space of three months on important aspects of the mail-in voting statute that then figured strongly in the federal court rulings.



JA: You have had experience with the Florida election case 20 years ago. Were there any lessons learned from that experience or similar issues that you felt played out again, two decades later, in this case?

MA: Two things come to mind quickly. One was that was also a fishbowl. The media was waiting to seize on any little possible thing to write a story about it. My experience was in the case called the butterfly ballot case. There was intense attention just on Palm Beach County, not the whole state of Florida. It was just staggering, the number of helicopters that were hovering in the air, news helicopters, looked like scenes from *Apocalypse Now*. It is difficult to manage your message and what you're there to do as a lawyer with that intense press interest.

The other was a different lesson. In the butterfly ballot case, the centerpiece was that Palm Beach County laid out a ballot that was confusing and people were voting for Pat Buchanan who intended to vote for Al Gore based on the way the arrows were pointing to the boxes on the ballot. There were a bunch of statisticians that did an independent analysis in real-time and said that they concluded something like 2,500 ballots for Buchanan were actually for Gore. That would have been enough for the whole state of Florida as it turned out. The court never really wanted to have a hearing because the problem that the judge said was, "Do you want me to just declare 2,500 votes moved from Pat Buchanan to Al Gore?" That echoed in this case when Giuliani essentially argued "just take 670,000 mail-in votes and eradicate them as a remedy because they were voted when our rights were violated."

> "It is extremely hard to invalidate an election and voters' votes, and it should be."

It is extremely hard to invalidate an election and voters' votes, and it should be. There are procedures under the election code called election contests that are set up with high standards and bonds. No one on the Trump campaign or related interests invoked the election contest procedures because they knew they couldn't meet that high bar.

JA: Aside from being a battleground state, why do you think that one of the first full-court presses from the opposing side was in Pennsylvania?

MA: I think they thought that the mail-in balloting statute was new here and that they had a virgin legal territory that they could plow and try to challenge, and to make arguments that given the right circumstances would succeed. I think that's part one.

I think part two is that people were thinking the whole election was going to come down to Pennsylvania. At some point along the way, Pennsylvania loomed very large. It's a split-governed state. We have a Republican legislature, senate; we have a Democrat governor. I think that they felt it was going to come down to the wire. I think that they thought this was the big prize, that if they could limit mail-in voting, they could produce numbers that would be a victory.

I don't think they ever thought they were going to lose Arizona and Georgia. I think they thought, "Well, we can afford to lose Wisconsin, but if we hold Pennsylvania, we can put something together and hold this whole thing." When our Pennsylvania Supreme Court ruled their arguments invalid, they started attacking the Pennsylvania Supreme Court. They should have realized that their main effort in the summer in front of Judge Ranjan failed, they didn't even appeal it.

SF: Earlier you talked about the "true-patriots," the non-partisan interests dedicated to making elections work for all of us. How do you see our role as lawyers in the face of a persistent narrative that still questions the integrity of the 2020 election?

MA: Our role is to proclaim to everyone how the rule of law worked and how the independent judiciary worked. As lawyers, we fight against any attacks or challenges about how the courts didn't do their duty and the rule of law didn't work. I think that's our voice. We're not politicians.

We can't go running into the state legislature and beg them not to change the mail-in voting because it's better for people to be able to have the option. We can do that as citizens. We should stand up if part of the reason why they want to change is that they think the election was stolen and the rule of law didn't work.

That's where I think we come in. When you're doing high-impact litigation, litigation that has public policy overtones, it's sometimes hard for lawyers to remember to stay in their lane. You have to be mindful what you're asking the court to do, and what you might also be asking your legislature to do indirectly. There's an intertwining between the two.

JA: After going through this litigation, do you see areas in Pennsylvania or federal law where there needs to be some reform to election law to prevent these types of cases or to secure the public confidence in the election process?

MA: In my view, one of the biggest reforms that is necessary involves the county boards. They run the election, and the county boards are not allowed to start processing or even just opening and separating mail ballots from the outer envelopes until Election Day.

There ought to be a change where the county boards, particularly in high volume mail-in voting elections, can start opening—at least starting to process—prior to Election Day. That would

allow everybody to see the results very rapidly. On election night, you could see the results of both the mail and the machine voting and not have the problem that we had where because people thought the mail-in votes took longer to count, it gave arguments for the other side to say, "I wonder what they're doing; they're bringing in boxes of votes, and something is happening."

The other is, I think, to give all the counties money. It doesn't take a lot to have high-speed processing machines. There should be a procedure for people to correct minor defects so that their votes count, and that takes a little bit of investment in equipment and clarification in the legislation that would allow a fully developed procedure to resolve minor defects.

There also ought to be some kind of procedure that allows votes coming in just after Election Day that have evidence of being voted by Election Day to count. Since we already count them for military and overseas voters, why not expand that to all voters? The courts have allowed it, but there ought to be some legislation that memorializes it.

SF: As the "dust settles" on the 2020 Pennsylvania election litigation, any other take-aways?

MA: While it's certainly fair game to criticize what Giuliani did in court, I think that all lawyers who are involved for all interests along the way should be recognized and applauded for trying to advance their particular parties' and interest groups' interests in connection with this litigation. I think to the extent that there are any lawyers who feel that somehow the Giuliani approach spilled over on them, I don't think it's fair.

We had a lot of people fighting worthy battles, even the people who lost, and the public should not feel that somehow, they deserve the same kind of public reaction that Giuliani got for what he did. They fought what they thought were good battles. Finally, we can't say enough about our state and federal judges—how they expeditiously performed with thorough opinions and with good grace. When the dust settles, they and the election workers deserve a lot of credit for what they did in their respective lanes. ■

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