
IN THE SUPREME COURT OF THE UNITED STATES

REPUBLICAN PARTY OF PENNSYLVANIA,

Petitioner,

v.

KATHY BOOCKVAR, SECRETARY OF THE COMMONWEALTH OF
PENNSYLVANIA, ET AL.,

Respondents.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Pennsylvania**

**OPPOSITION OF THE PENNSYLVANIA DEMOCRATIC PARTY
RESPONDENTS TO PETITIONER'S MOTION FOR EXPEDITED
CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI AND
FOR EXPEDITED MERITS BRIEFING AND ORAL ARGUMENT**

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent Pennsylvania Democratic Party states that it has no parent corporation and that there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

With just over a week remaining before Election Day, the Republican Party of Pennsylvania (“RPP”) has returned to this Court with an extraordinary request: it seeks a definitive merits ruling *before* Election Day that would change the rules governing mail-in ballots, after this Court declined just last week to disturb those very rules. Those rules are significant: a large percentage of Pennsylvania citizens—perhaps even half of all voters—plan to vote by mail. But even on the extraordinarily hurried schedule that RPP proposes, a ruling from this Court could not realistically issue until the eve of the election. By then, it will be too late for many Pennsylvania voters who have relied on the existing rules to adjust to any change in the rules that this Court might impose. Some will have voted already, only to learn that they may have cast their votes too late. And at a time when COVID-19 cases are surging, voters who fall within a high “at risk” category (such as older voters), or voters who judge that it is safer or more appropriate to vote by mail, will be left at this late date with only the choice of voting in person.

Just six days ago, after considering the matter for two weeks, this Court declined to grant precisely the relief that RPP seeks here. See *Scarnati v. Boockvar*, No. 20A53 (Oct. 19, 2020); *Republican Party of Pa. v. Boockvar*, No. 20A54 (Oct. 19, 2020). There is no conceivable reason why this Court should reverse course and agree now—mere days before Election Day—to RPP’s rash and unseemly request that it intervene in the electoral process in such a disruptive and unfair way. With the ability to provide meaningful pre-election clarity to voters and election officials now gone, this Court’s election-eve intervention would only guarantee confusion and

disruption. And it would do so without anything close to a real need for such precipitous action. It is far from clear how many ballots—those received between 8:00 p.m. on November 3 and 5:00 p.m. on November 6—will even be at issue, and indeed no reason to assume that it will be a sufficiently large number to change the result. This Court should therefore deny RPP’s extraordinary and unjustified request for expedition. At this late date, the Court should allow Pennsylvania to hold its federal elections under the existing rules. See *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (*per curiam*).

ARGUMENT

1. Less than one week ago, this Court declined to stay the Pennsylvania Supreme Court’s decision regarding the state-law procedures that would govern the counting of ballots mailed by but received after Election Day. RPP now asks this Court to reconsider that determination—indeed to go further and grant it *permanent* relief by reversing the Pennsylvania Supreme Court on the merits. But RPP does not identify *any* change in the facts or law in the intervening days, much less the sort of extreme changed circumstances that would warrant the extraordinary relief it seeks. Nor does it identify any other legitimate basis for revisiting the Court’s decision.

On September 28, 2020, RPP, joined by two Pennsylvania state legislators, asked this Court to stay the Pennsylvania Supreme Court’s decision to prevent that decision from going into effect before the election. See *State Legislators Application* (No. 20A53); *RPP Application* (No. 20A54). RPP argued that if the election were permitted to proceed without a stay, RPP would “suffer irreparable injury,” and it urged the Court to treat its stay motion as a petition for certiorari and to grant

certiorari. 20A54 RPP Application 3 & n.1, 19; see also *id.* at 3 (seeking expedited consideration of the application in light of the “imminence of the general election”); *id.* at 36 (arguing that its “request for certiorari will become moot” absent a stay). On October 5, recognizing the importance of providing certainty to voters and election officials alike, the Pennsylvania Democratic Party Respondents (“PDP”) acquiesced in certiorari and urged the Court to issue a summary ruling—provided that the ruling issue sufficiently in advance of Election Day to give Pennsylvania’s citizens ample notice of the rules that would govern when and how mail-in ballots would be counted. See PDP Response 9-13.

On October 19, 2020, the Court denied the stay applications. See *Scarnati v. Boockvar*, No. 20A53 (Oct. 19, 2020); *Republican Party of Pa. v. Boockvar*, No. 20A54 (Oct. 19, 2020). The effect of that decision was unmistakably clear: the Court declined to disturb Pennsylvania’s voting procedures before Election Day. Yet RPP now asks this Court to issue permanent relief that this Court declined to grant even on an interim basis just six days ago. RPP’s sole asserted justification for that remarkable request is the “imminence of the general election,” Mot. 2—but RPP made that same assertion, in those very words, in its original stay application, RPP Application 3. Whatever may have been the case weeks ago, there is no sound basis for this Court to intervene now.

2. Indeed, the only circumstance that has actually changed—27 days have passed since RPP’s initial stay application, and Election Day is now *only 9 days away*—necessitates denying RPP’s requested relief. Having left the Pennsylvania

Supreme Court's decision in effect, it is simply too late to change course now. A summary ruling now would severely and irreparably disrupt Pennsylvania's elections on the eve of Election Day—and this Court's decision could have implications for other States as well.

In response to RPP's initial stay application, the Pennsylvania Democratic Party Respondents agreed on October 5th that expedited merits consideration was warranted—because at that time, the Court could have issued a decision far enough before the election to offer officials the opportunity to inform all voters in Pennsylvania of what they need to do to ensure their votes are counted. See PDP Response 9-12. Now the opposite is true: rather than provide pre-election clarity, a merits decision from this Court would create intolerable disruption and profound unfairness. RPP's proposal contemplates that briefing will be complete on October 28, 2020, and that this Court would issue a summary decision on the merits in the following days. Motion 2. Under the best of circumstances, such a decision would issue just a few days before Election Day.

In Pennsylvania, such late intervention would create severe disruption if this Court were to agree with RPP's contentions. Since the Pennsylvania Supreme Court ruled in September, state election officials have informed millions of Pennsylvania voters about the extended mail-in ballot receipt deadline, and untold numbers of citizens have relied on that guidance. This Court then left that deadline in place in its orders denying a stay, reinforcing the understanding that both voters and officials now have about the deadline for the receipt of ballots: the deadline is November 6,

not November 3. To understand the severe consequences of a precipitous decision reversing the Pennsylvania Supreme Court and changing the rule, it is necessary only to consider why the Pennsylvania Supreme Court granted the relief it did in the first place.

The General Counsel of the U.S. Postal Service unequivocally informed the Secretary of the Commonwealth that in light of postal service delays, voters should mail their ballots “at least one week” before any received-by deadline in order to ensure they would be timely received. PDP Response 5; App., *infra*, at A-2. The justices of the Pennsylvania Supreme Court *unanimously* agreed that the deadline for requesting mail-in ballots (October 27) and the deadline for their receipt by the Commonwealth (November 3) were so close together that voters who properly requested their ballot before the deadline set by law could be disenfranchised. PDP Response 8. The dissenting justices simply would have adopted a different remedy: they would have moved up the October 27 deadline for requesting mail-in ballots. That approach is no longer available. Even under RPP’s unreasonably expedited proposed schedule, this Court would rule on October 28 at the earliest. As a result, granting RPP’s requested relief would require this Court to rule, less than a week before Election Day, that the ballot received-by deadline is three days earlier than Pennsylvania’s voters have been led to believe—November 3, not November 6.

But by the time of any such order, it will be too late, according to the Postal Service, for all voters who have not yet mailed their ballots to ensure that their ballot is received by Election Day. What is more, many Pennsylvania citizens presumably

are planning to vote by mail because they reasonably believe it the best and safest choice for them in this pandemic. They will thus have to decide whether to mail their ballots on a date that the Postal Service has said is likely too late to ensure that the ballot arrives by Election Day, or forgo participation. Even worse, if this Court were to issue a decision in RPP's favor late next week, a considerable number of voters will have *already* voted by mail and will now be told, retroactively, that their vote may have been submitted too late.

For their part, Pennsylvania election officials would be forced to develop new systems to ensure that, as to ballots that arrive after Election Day but before November 6, only votes for state elections, not federal elections, count in the final tally. PDP Response 12. And the Commonwealth would face the impossible task of educating voters about new election rules in the days before Election Day, after weeks of giving contrary guidance. See *id.* at 11.

In addition, an election-eve intervention by this Court could have implications beyond Pennsylvania. For instance, a decision accepting RPP's arguments against Pennsylvania's rebuttable presumption concerning mailed ballots lacking a postmark could call into question state laws that permit mailed ballots cast by those who serve our nation in the armed forces overseas to arrive after Election Day and that treat such ballots as valid even if they lack a postmark. See *id.* at 21. A decision could also raise significant questions for other States about the permissible scope of state-court judicial review of election laws, at a time when state courts have already engaged in such review in the run-up to the election (and have done so for decades). And it could

have implications for the application of a number of longstanding state constitutional provisions governing federal elections, leaving states with major gaps in their election codes that could not plausibly be filled with only days to spare before Election Day. See *id.* at 29-30.

These concerns—the need to avoid severe last-minute disruptions in voting rules and the importance of proceeding cautiously in view of potential implications for other jurisdictions—are precisely why this Court routinely refuses to change the rules of any election when it is fast approaching. See, *e.g.*, *Purcell*, 549 U.S. at 4-5. Yet RPP is asking this Court to do just that, on grounds that could have sweeping implications not only for Pennsylvania but for elections *across the country*, just days before Election Day.

3. RPP's request is particularly unjustified because this Court's intervention may not be necessary at all. RPP has asked the Pennsylvania Supreme Court to order Pennsylvania to segregate the ballots received after Election Day. The Pennsylvania Democratic Party Respondents agree that counting the ballots on a segregated basis is appropriate, so long as the counting is done in a manner consistent with the expedited timeline required to comport with the automatic recanvass and certification provisions of Pennsylvania law. Assuming the ballots are segregated, RPP cannot contend that there is any need for this Court to issue a decision before the election.

Moreover, RPP seeks to prevent the counting of ballots received within a narrow window: those votes that are cast by Election Day, but are received between

8:00 p.m. on November 3 and 5:00 p.m. on November 6. Even assuming there were a legal basis for refusing to count those votes—and there is not—there is no reason to assume that the number of ballots received in that 69-hour window would be large enough to be decisive in the races for President and House of Representatives. If these votes are unlikely to bear on the outcome of any race, there will be no need for this Court to grant certiorari and decide this case—especially given the difficult jurisdictional and merits issues the Court would need to resolve (see pp. 8-9, *infra*). In other words, the extraordinary summary disposition that RPP seeks is plainly unnecessary now—and it may never be necessary.

4. Finally, with Election Day now nine days away, the importance and gravity of the questions presented in this case weigh powerfully against the extraordinarily hurried adjudication that RPP demands. Were RPP to prevail, its challenge might cast doubt on myriad election rules contained in state constitutions and enforced by state courts. See PDP Response 16, 18, 21, 29-30. Accepting RPP's constitutional challenge would also require overturning a century of practice and repudiating at least two of this Court's recent decisions. See *id.* at 27 (citing *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787 (2015)); RPP Cert. Petition 26 (requesting that the Court overrule *Arizona*). And it could enmesh this Court in untold disputes over matters of state law. Not least, this Court would have to confront potentially substantial questions as to RPP's Article III standing—an issue that has not been fully briefed, see PDP Response 13-14, and that itself could have significant

implications beyond this case. It is unthinkable that such weighty issues would be fully briefed and conclusively decided in just a few days—while at the same time subjecting the voters of Pennsylvania to severely unfair treatment and imposing new and significant burdens on the election officials who are charged with conducting this election.

CONCLUSION

The Court should deny expedited consideration of RPP’s petition for certiorari.

Dated: October 25, 2020

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Respectfully submitted,

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APPENDIX

THOMAS J. MARSHALL
GENERAL COUNSEL
AND EXECUTIVE VICE PRESIDENT



July 29, 2020

Honorable Kathy Boockvar
Secretary of the Commonwealth of Pennsylvania
302 North Capitol Building
Harrisburg, PA 17120-0001

Dear Secretary Boockvar:

Re: Deadlines for Mailing Ballots

With the 2020 General Election rapidly approaching, this letter follows up on my letter dated May 29, 2020, which I sent to election officials throughout the country. That letter highlighted some key aspects of the Postal Service's delivery processes. The purpose of this letter is to focus specifically on the deadlines for requesting and casting ballots by mail. In particular, we wanted to note that, under our reading of Pennsylvania's election laws, certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service's delivery standards. This mismatch creates a risk that ballots requested near the deadline under state law will not be returned by mail in time to be counted under your laws as we understand them.

As I stated in my May 29 letter, the two main classes of mail that are used for ballots are First-Class Mail and USPS Marketing Mail, the latter of which includes the Nonprofit postage rate. Voters must use First-Class Mail (or an expedited level of service) to mail their ballots and ballot requests, while state or local election officials may generally use either First-Class Mail or Marketing Mail to mail blank ballots to voters. While the specific transit times for either class of mail cannot be guaranteed, and depend on factors such as a given mailpiece's place of origin and destination, most domestic First-Class Mail is delivered 2-5 days after it is received by the Postal Service, and most domestic Marketing Mail is delivered 3-10 days after it is received.

To account for these delivery standards and to allow for contingencies (e.g., weather issues or unforeseen events), the Postal Service strongly recommends adhering to the following timeframe when using the mail to transmit ballots to domestic voters:

- **Ballot requests:** Where voters will both receive and send a ballot by mail, voters should submit their ballot request early enough so that it is received by their election officials at least 15 days before Election Day at a minimum, and preferably long before that time.
- **Mailing blank ballots to voters:** In responding to a ballot request, election officials should consider that the ballot needs to be in the hands of the voter so that he or she has adequate time to complete it and put it back in the mail stream so that it can be processed and delivered by the applicable deadline. Accordingly, the Postal Service recommends that election officials use First-Class Mail to transmit blank ballots and allow 1 week for delivery to voters. Using Marketing Mail will result in slower delivery times and will increase the risk that voters will not receive their ballots in time to return them by mail.

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- **Mailing completed ballots to election officials:** To allow enough time for ballots to be returned to election officials, domestic voters should generally mail their completed ballots at least one week before the state's due date. So, if state law requires ballots to be returned by Election Day, voters should mail their ballots no later than Tuesday, October 27.

Under our reading of your state's election laws, as in effect on July 27, 2020, certain state-law requirements and deadlines appear to be incompatible with the Postal Service's delivery standards and the recommended timeframe noted above. As a result, to the extent that the mail is used to transmit ballots to and from voters, there is a significant risk that, at least in certain circumstances, ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned in time to be counted.

Specifically, it appears that a completed ballot must be received by Election Day to be counted. If that understanding is correct, we accordingly recommend, as noted above, that voters who choose to mail their ballots do so no later than Tuesday, October 27. However, it further appears that state law generally permits voters to request a ballot as late as 7 days before the November general election. If a voter submits a request at or near that deadline, and the ballot is transmitted to the voter by mail, there is a significant risk that the voter will not have sufficient time to complete and mail the completed ballot back to election officials in time for it to arrive by the state's return deadline. That risk is exacerbated by the fact that the law does not appear to require election officials to transmit a ballot until 48 hours after receiving a ballot application.

To be clear, the Postal Service is not purporting to definitively interpret the requirements of your state's election laws, and also is not recommending that such laws be changed to accommodate the Postal Service's delivery standards. By the same token, however, the Postal Service cannot adjust its delivery standards to accommodate the requirements of state election law. For this reason, the Postal Service asks that election officials keep the Postal Service's delivery standards and recommendations in mind when making decisions as to the appropriate means used to send a piece of Election Mail to voters, and when informing voters how to successfully participate in an election where they choose to use the mail. It is particularly important that voters be made aware of the transit times for mail (including mail-in ballots) so that they can make informed decisions about whether and when to (1) request a mail-in ballot, and (2) mail a completed ballot back to election officials.

We remain committed to sustaining the mail as a secure, efficient, and effective means to allow citizens to participate in the electoral process when election officials determine to utilize the mail as a part of their election system. Ensuring that you have an understanding of our operational capabilities and recommended timelines, and can educate voters accordingly, is important to achieving a successful election season. Please reach out to your assigned election mail coordinator to discuss the logistics of your mailings and the services that are available as well as any questions you may have. A list of election mail coordinators may be found on our website at: <https://about.usps.com/election-mail/politicaelection-mail-coordinators.pdf>.

We hope the information contained in this letter is helpful, and please let me know if you have any questions or concerns.

Sincerely,



Thomas J. Marshall