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IN THE SUPREME COURT OF PENNSYLVANIA

No. 133 MM 2020

PENNSYLVANIA DEMOCRATIC PARTY *et al.*,

Petitioners,

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA *et al.*,

Respondents.

REPUBLICAN PARTY OF PENNSYLVANIA'S APPLICATION FOR PARTIAL STAY OF SEPTEMBER 17, 2020 JUDGMENT

PORTER WRIGHT MORRIS & ARTHUR LLP
Kathleen A. Gallagher
PA I.D. #37950
Russell D. Giancola
PA I.D. #200058
6 PPG Place, Third Floor
Pittsburgh, PA 15222
Phone: (412) 235-4500

JONES DAY
John M. Gore *
E. Stewart Crosland *
51 Louisiana Avenue, N.W.
Washington, DC 20001
Phone: (202) 879-3939

**Pro hac vice application forthcoming*

Counsel for Intervenor-Respondent The Republican Party of Pennsylvania

Intervenor-Respondent the Republican Party of Pennsylvania ("RPP") supports and seeks to uphold free and fair elections on behalf of all Pennsylvanians.

For that reason, RPP respectfully asks the Court for a partial stay of its September 17, 2020 judgment, pending disposition of RPP's forthcoming stay application and petition for writ of certiorari to the U.S. Supreme Court. There is no dispute that, even under the Court's judgment, voters are required to cast and mail their ballots by 8:00 p.m. on Election Day. *See* Majority Opinion ("Maj. Op.") 37 n. 26, 63. The Court's judgment, however, creates a serious likelihood that Pennsylvania's imminent general election will be tainted by votes that were illegally cast or mailed *after* Election Day.

In particular, the Court's judgment mandates that a ballot "that lack[s] a postmark or other proof of mailing, or for which the postmark or other proof of mailing is ineligible" and is received by election officials "on or before 5:00 p.m. on November 6, 2020 . . . will be presumed to have been mailed by Election Day unless a preponderance of the evidence demonstrates that it was mailed after Election Day." *Id.* at 37 n. 26, 63. Thus, under the Court's presumption, a ballot lacking an intelligible postmark or other proof of mailing (hereinafter, a "non-postmarked ballot") would be counted even if it were cast or mailed after Election Day, except in the extraordinarily rare case where proof of the untimely casting or mailing could be adduced. *See id.* at 37 n. 26, 63.

RPP has a "substantial case on the merits" that this presumption is preempted by federal law and violates the U.S. Constitution. *Commonwealth v. Melvin*, 79 A.3d 1195, 1200 (Pa. 2013). After all, earlier this year, the U.S. Supreme Court stayed a judgment that extended Wisconsin's implied postmark deadline for absentee ballots because a judicial order "[e]xtending the date by which ballots may be cast by voters [until] after the scheduled election day fundamentally alters the nature of the election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020).

Moreover, absent a stay, RPP will suffer "irreparable injury" because it will lose the right to seek review in the U.S. Supreme Court and, once the general election has come and gone, cannot receive a remedy for election results tainted by illegal and untimely votes counted in violation of federal law and the General Assembly's plain directives. *Melvin*, 79 A.3d at 1200. And issuance of a stay will *prevent* "harm" to other parties and to the public interest because it will preserve the integrity of the imminent general election in which millions of Pennsylvanians will cast their votes for President, U.S. Representative, State Attorney General, State Senator, and State Representative. *Id.*

Because time is of the essence, RPP respectfully requests that the Court expedite its decision on this Application and enter an administrative stay to preserve the status quo pending such a decision. Moreover, if the Court needs further briefing

to resolve this Application, RPP requests that the Court set Wednesday, September 23, as the deadline for parties to file any oppositions to this Application and Thursday, September 24, for RPP to file any reply brief. In all events, RPP respectfully requests that the Court issue a decision on the Application no later than Friday, September 25.

As explained more fully below, the Court should grant a stay.

BACKGROUND

In relevant part, the Court's judgment extends the deadlines enacted by the General Assembly for voters to mail, and election officials to receive, absentee and mail-in ballots. As the Court acknowledged, Act 77 contains "no ambiguity" on these deadlines: it expressly requires absentee and mail-in ballots to be received in the office of the county board of elections by 8:00 p.m. on Election Day. Maj. Op. 33 (quoting 25 P.S. § 3150.16(c)). Act 77 therefore necessarily requires such ballots to be mailed and postmarked before Election Day. The Court's judgment nonetheless extends the deadline for voters to mail their ballots to 8:00 p.m. on Election Day and for the office of the county board of elections to receive ballots to 5:00 p.m. three days later, Friday, November 6. *See id.* at 37 n. 26, 63.

The Court's judgment also decrees that even non-postmarked ballots received by the November 6 deadline are "presumed" to have been timely mailed by Election Day. *Id.* at 37 n. 26, 63. This presumption has no effect on any ballot a voter delivers

in person. Any such ballot must still be received in the office of the county board of elections by the close of the polls at 8:00 p.m. on Election Day. *See* 25 P.S. §§ 3146.6, 3150.16. The presumption also has no effect on ballots received by election officials by mail before 8:00 p.m. on Election Day because any such ballot necessarily was cast and mailed before then. Rather, the presumption requires election officials—in the absence of evidence that virtually never exists—to count non-postmarked ballots received after Election Day and before the Court-imposed November 6 received-by deadline. *See* Maj. Op. 37 n. 26, 63.

RPP now seeks a stay of that presumption pending disposition of its request for further review in the U.S. Supreme Court.

ARGUMENT

The Court's presumption that non-postmarked ballots received within 3 days after Election Day are valid "fundamentally alters the nature of the election" because it "[e]xtends the date by which ballots may be cast by voters [until] after" Election Day. *Republican Nat'l Comm.*, 140 S. Ct. at 1207. Indeed, the Court's presumption opens the door to illegally and untimely cast or mailed ballots being counted in, and tainting the results of, the imminent general election in which millions of Pennsylvanians will exercise their right to vote. RPP has a "substantial case on the merits" that the presumption violates federal law and the U.S. Constitution. *Melvin*, 79 A.3d at 1200. Moreover, RPP will suffer "irreparable injury" absent a stay, and

a stay will promote the "public interest" and prevent harm to other parties because it will preserve the integrity of the general election. *Id.* The Court should stay the presumption. *See id.*; *see also Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

I. RPP HAS A SUBSTANTIAL CASE ON THE MERITS THAT THE COURT'S PRESUMPTION VIOLATES FEDERAL LAW AND THE U.S. CONSTITUTION

The Court should grant a stay because RPP has a "substantial case on the merits" that the Court's presumption is preempted by federal law and violates the U.S. Constitution. *Melvin*, 79 A.3d at 1200; *Hollingsworth*, 558 U.S. at 190.

First, as the Court recognized, a trio of federal statutes designate a uniform nationwide federal Election Day. *See* Maj. Op. 31–32 (citing 3 U.S.C. § 1; 2 U.S.C. §§ 1, 7). These statutes "mandate[] holding all elections for Congress and the Presidency on a single day throughout the Union." *Foster v. Love*, 522 U.S. 67, 70 (1997). Thus, as RPP has explained, those statutes "preempt[] any counting in federal elections of ballots that were not cast or mailed by Election Day, including ballots that lack a postmark and are received after Election Day." RPP Supplemental Brief ("Supp. Br.") 27; *see also id.* at 27–29; *Foster*, 522 U.S. at 69; *Ex parte Siebold*, 100 U.S. 371, 384 (1879). The Court's presumption therefore "ceases to be operative" because it purports to permit the counting in federal elections of non-postmarked ballots that have been both received and actually cast after Election Day. *Foster*, 522 U.S. at 69; *see also* Supp. Br. 27–29.

The Court suggested that RPP's preemption argument "seemingly ignores the fact that tabulation of ballots received after Election Day does not undermine the existence of a federal Election Day." Maj. Op. 32 n. 23. This suggestion is incorrect and misses the point. RPP has not addressed whether "tabulation of ballots" cast and mailed *before or on* Election Day but "received after Election Day" is preempted. *Id.* To the contrary, RPP has demonstrated that federal law preempts "any counting in federal elections of *ballots that were not cast or mailed by Election Day*, including ballots that lack a postmark and are received after Election Day." Supp. Br. 27 (emphasis added). At a minimum, RPP has raised a "substantial case on the merits" of that question. *Melvin*, 79 A.3d at 1200.

Second, the U.S. Constitution's Elections Clause directs that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed by *the Legislature thereof*," subject to directives of Congress. U.S. CONST. art. I, § 4, cl. 1 (emphasis added). Likewise, the Constitution's Electors Clause directs that "[e]ach State shall appoint, in such Manner as *the Legislature thereof* may direct," electors for President and Vice President. U.S. CONST. art. II, § 1, cl. 2 (emphasis added).

The Electors Clause in particular "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment of electors. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). "Thus, the

text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance." *Bush v. Gore*, 531 U.S. 98, 112–13 (2000) (Rehnquist, J., concurring). "A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question," including when such departure is carried out by the state judiciary. *Id.* at 113. "[W]ith respect to a Presidential election," state courts must be "mindful of the legislature's role under Article II in choosing the manner of appointing electors." *Id.* at 114.

There is a substantial case on the merits that the Court's departure from the General Assembly's Election Day received-by deadline in Act 77—despite its recognition that Act 77 contains "no ambiguity" regarding that deadline, Maj. Op. 33 (quoting 25 P.S. § 3150.16(c))—violates the Elections and Electors Clauses. It belongs to the General Assembly, not this Court, "exclusively to define the method" of appointing electors and conducting federal elections in the Commonwealth. *McPherson*, 146 U.S. at 27. Such a "significant departure" as extending the received-by deadline and adopting a presumption under which illegally and untimely cast or mailed ballots nonetheless may be counted "raises a federal constitutional question" and a substantial issue on the merits. *Bush*, 531 U.S. at 112–13 (Rehnquist, J., concurring).

The Court's departure from Act 77's plain text was particularly "significant" and unwarranted here, *id.* at 112, because the record does not support extending the

received-by deadline. Quite to the contrary, the record *forecloses* granting that relief. In the first place, the General Assembly was well aware of the COVID-19 pandemic and alleged postal delays when it amended the Election Code through Act 12 earlier this year. The General Assembly addressed the COVID-19 pandemic through a number of measures in Act 12, including postponement of the primary election, but elected to leave the received-by deadline in place. *See* Pa. S.B. 422, 2020 P.L. 41, No. 12 (enacted Mar. 27, 2020). The General Assembly's unwavering commitment to the Election Day received-by deadline further underscores the deadline's "independent significance" under the Elections and Electors Clauses. *Bush*, 531 U.S. at 112–13 (Rehnquist, J., concurring).

Moreover, President Judge Leavitt's proposed findings of fact and conclusions of law in *Crossey v. Boockvar*—which this Court did not mention in its decisions in *Crossey* or in this case—demonstrate that alleged postal delays provide no basis for extending the received-by deadline for the 2020 General Election. *See* Proposed Finding of Fact at 26–27 ¶ 11–13, *Crossey v. Boockvar*, No. 266 MD 2020 (Pa. Commw. Ct. Sept. 4, 2020); *see also* Supp. Br. 8–11, 25. Judge Leavitt's findings comport with the USPS' own public statements that it is prioritizing delivery of, and is prepared to timely deliver, all election mail across the country. *See* Decl. of Angela Curtis, *NAACP v. Boockvar*, No. 364 MD 2020 (Pa. Commw. Ct. Aug. 28, 2020); Maj. Op. 30–31; Supp. Br. 9–11. The record thus further

confirms that this Court's "departure" from the Election Day received-by deadline is "significant" and of constitutional dimension. *Bush*, 531 U.S. at 112 (Rehnquist, J., concurring).

Finally, to the extent the Court was concerned about a "conflict between the Election Code and the current USPS delivery standards," Maj. Op. 37, such a concern does not justify extending the General Assembly's Election Day received-by deadline and adopting the Court's presumption regarding non-postmarked ballots. Instead, even if the "conflict between the Election Code and the current USPS delivery standards" amounted to a constitutional violation warranting judicial relief, *id.*—and it does not—the Court should have upheld the received-by deadline and adopted the narrower remedy of altering the deadline for voters to apply for absentee or mail-in ballots. *See, e.g.*, Concurring and Dissenting Opinion (Donohue, J.) ("Donohue Op."); Concurring and Dissenting Opinion (Story, C.J.).

That narrower remedy would "best effectuate" the General Assembly's "clear legislative intent" in Act 77 and Act 12 to ensure that "a timely vote could be cast before the only meaningful milestone, Election Day." Donohue Op. 9–10. In other words, the Election Day received-by deadline bears particular "independent significance," and the Court's choice to adopt the more intrusive remedy extending that deadline over the less intrusive remedy leaving it in place constitutes a "significant departure from the legislative scheme" in violation of the Elections and

Electors Clauses. *Bush*, 531 U.S. at 112–13 (Rehnquist, J., concurring). The Court should grant a stay.

II. THE EQUITIES WEIGH STRONGLY IN FAVOR OF A STAY

The equities also weigh strongly in favor of granting a stay. *First*, RPP would suffer "irreparable injury," *Melvin*, 79 A.3d at 1200, because without a stay, its request for review in the U.S. Supreme Court will become moot and it will forever lose its ability to obtain such review. Absentee and mail-in voting are about to commence in Pennsylvania, and Election Day is only 43 days away. The U.S. Supreme Court likely will not resolve RPP's request for review even by Election Day. And once the election has come and gone, it will be impossible to repair election results that have been tainted by illegally and untimely cast or mailed ballots. This likely mootness is classic irreparable harm and "'perhaps the most compelling justification'" for a stay. *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers); *accord Chafin v. Chafin*, 568 U.S. 165, 178 (2013) ("When . . . the normal course of appellate review might otherwise cause the case to become moot, issuance of a stay is warranted.").

Second, the "issue[]" presented is "precisely whether the votes that have been ordered to be counted" under the Court's non-postmarked ballot presumption are "legally cast vote[s]" under federal law and the U.S. Constitution. *Bush v. Gore*, 531 U.S. 1046, 1046–47 (2000) (Scalia, J., concurring). "The counting of votes that

are of questionable legality . . . threaten[s] irreparable harm" not only to RPP, its voters, and its supported candidates, but also to all Pennsylvanians and even "the country, by casting a cloud upon . . . the legitimacy of the election." *Id.* at 1047. A stay should be "granted" for this reason alone. *Id.* (per curiam op.).

Third, an injunction barring the State "from conducting this year's elections pursuant to a statute enacted by the Legislature"—where no party has shown those statutes to be constitutional—"would seriously and irreparably harm the State," the General Assembly, and its voters. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Indeed, in other words, it "serves the public interest" to "giv[e] effect to the will of the people by enforcing the laws that they and their representatives enact." *Thompson v. DeWine*, 959 F.3d 804, 812 (2020).

Fourth, no party would be "substantially harmed" by a stay. *Melvin*, 79 A.3d at 1200. There is no evidence in the record of any voter who will be unable to vote if the received-by deadline remains in place without the Court's presumption. Moreover, to the extent election officials and voters need "clarity," Maj. Op. 37, such clarity is equally available if a stay is granted or if the remedy of changing the application deadline rather than the received-by deadline had been adopted. The desire for "clarity" therefore provides no basis for denying a stay on a record devoid of evidence that any voter faces a violation of the right to vote—and, to the contrary,

full of evidence that an extension of the received-by deadline duly enacted by the General Assembly is unnecessary.

Finally, in fact, a stay *prevents* "harm" to voters and the public that otherwise would result from the Court's judgment. *Melvin*, 79 A.3d at 1200. The U.S. Supreme Court has repeatedly warned that courts should not make last-minute changes to election-administration rules and has described changes "weeks" before an election as too late. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006); *Husted v. Ohio State Conference of N.A.A.C.P.*, 573 U.S. 988 (2014). Such last-minute changes by court order can engender widespread "voter confusion," erode public "[c]onfidence in the integrity of our electoral process," and create an "incentive to remain away from the polls." *Purcell*, 549 U.S. at 4–5.

Those risks are especially acute here, where the U.S. Supreme Court already has made clear that stays are appropriate to restore postmark deadlines and to prevent a "fundamental[] alter[ation] [of] the nature of the election" through judicial "[e]xten[sion] [of] the date by which ballots may be cast by voters [until] after the scheduled election day." *Republican Nat'l Comm.*, 140 S. Ct. at 1207. Indeed, it will only exacerbate any lack of "clarity," Maj. Op. 37, and heighten the risks of "voter confusion" and an erosion of public confidence, *Purcell*, 549 U.S. at 4–5, if the Court declines to stay its judgment but the U.S. Supreme Court later grants a stay. *See Republican Nat'l Comm.*, 140 S. Ct. at 1207; *Merrill v. People First of*

Ala., No. 19A1063 (U.S. July 2, 2020) (staying, nine days before the election, a preliminary injunction entered 29 days before the election).

CONCLUSION

The Court should grant a stay.

Dated: September 21, 2020

Respectfully submitted,

/s/ Kathleen A. Gallagher
Kathleen A. Gallagher
PA I.D. #37950
Russell D. Giancola
PA. I.D. #200058
PORTER WRIGHT MORRIS
& ARTHUR LLP
6 PPG Place, Third Floor
Pittsburgh, PA 15222
(412) 235-4500
kgallagher@porterwright.com
rgiancola@porterwright.com

John M. Gore *
E. Stewart Crosland *
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Phone: (202) 879-3939
jmgore@jonesday.com
scrosland@jonesday.com

Counsel for Intervenor-Respondent the Republican Party of Pennsylvania

**Pro hac vice application forthcoming*

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Kathleen A. Gallagher
Counsel for Intervenor-Respondent
the Republican Party of Pennsylvania

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2020, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

/s/ Kathleen A. Gallagher
Kathleen A. Gallagher
Counsel for Intervenor-Respondent
the Republican Party of Pennsylvania

IN THE SUPREME COURT OF PENNSYLVANIA

PENNSYLVANIA DEMOCRATIC PARTY, *et al.*, Petitioners, v. KATHY BOOCKVAR, IN HER CAPACITY AS SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, *et al.*, Respondents.	Case No. 133 MM 2020

PROPOSED ORDER

AND NOW, this ___ day of _____, 2020, upon consideration of the Republican Party of Pennsylvania's Application for Partial Stay of September 17, 2020 Judgment, it is hereby ORDERED, ADJUDGED, AND DECREED that the Application is GRANTED.

The Court hereby stays the first paragraph of footnote 26 on page 37 of the majority opinion, which states:

> We likewise incorporate the Secretary's recommendation addressing ballots received within this period that lack a postmark or other proof of mailing, or for which the postmark or other proof of mailing is illegible. Accordingly, in such cases, we conclude that a ballot received on or before 5:00 p.m. on November 6, 2020, will be presumed to have been mailed by Election Day unless a preponderance of the evidence demonstrates that it was mailed after Election Day.

The Court hereby also stays the clause on page 63 of the majority opinion, which states:

> ballots received within this period that lack a postmark or other proof of mailing, or for which the postmark or other proof of mailing is illegible, will be presumed to have been mailed by Election Day unless a preponderance of the evidence demonstrates that it was mailed after Election Day;

BY THE COURT:

_____