

IN THE
Supreme Court of the United States

JOSEPH B. SCARNATI III, PRESIDENT PRO TEMPORE, AND
JAKE CORMAN, MAJORITY LEADER OF THE PENNSYLVANIA SENATE,

Applicants,

v.

PENNSYLVANIA DEMOCRATIC PARTY, ET AL.,

Respondents.

REPUBLICAN PARTY OF PENNSYLVANIA,

Applicant,

v.

KATHY BOOCKVAR, SECRETARY
OF PENNSYLVANIA, et al.,

Respondents

On Application to Stay the Mandate of the
Supreme Court of Pennsylvania

RESPONSE OF LUZERNE COUNTY BOARD OF ELECTIONS
TO EMERGENCY APPLICATIONS FOR A STAY

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INTRODUCTION

The Luzerne County Board of Elections (“Board”) is a named Respondent in each of the matters captioned above, along with a host of others, including the Secretary of the Commonwealth of Pennsylvania, and similar boards of election throughout the State. While the Secretary will address the Emergency Applications in full, the Board has an interest in drawing attention to an aspect of the pending questions which has particular relevance to its work in assuring the execution of free and fair elections within its jurisdiction, and protection of the franchise. In addressing this issue, the Board opposes the requests for a stay and supports the Secretary’s other arguments advanced, and resolution requested, which are likewise in opposition to these requests.

In each of the above-captioned Applications, the Petitioners take great issue with the decision of the state Supreme Court in addressing the COVID-19 pandemic and its impact on the right to vote in Pennsylvania. Of particular interest to the Board is Petitioners’ challenge to the Supreme Court’s order that mail-in ballots received up to three days after Election Day (November 3, 2020) must nonetheless be counted. According to Petitioners, this effort to protect the franchise is somehow violative of federal law, particularly with regard to the issue of whether the ballots are returned with legible postmarks indicating mailing on or before Election Day. *See, e.g.*, Scarnati Petitioners’ Application at 9; Republican Party Petitioners’ Application at 36. What each set of petitioners fails to recognize is that the judicial remedy crafted by the Supreme Court is wholly consistent with federal law, and in

other contexts has been implemented by federal courts for years as a means to protect the right to vote.

ARGUMENT

I. EXTENSION OF DEADLINES FOR RECEIPT OF MAIL-IN BALLOTS IN A TIME OF PUBLIC HEALTH EMERGENCY IS CONSISTENT WITH THE STATUTORY SCHEME USED IN ANOTHER CONTEXT, I.E., TO PROTECT THE RIGHT TO VOTE OF UNIFORMED AND OTHER CITIZENS NOT IN COUNTRY AT THE TIME OF AN ELECTION

As duly constituted governmental bodies tasked with conducting and overseeing primary, municipal, special, and general elections in Pennsylvania, election boards, such as the present Respondent, have for decades been responsible for fulfilling the mandate imposed on them by Congress through the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). 52 U.S.C. §§ 20301-20311.

“The UOCAVA delineates, *inter alia*, the process and procedure in which overseas voters and voters in the uniformed services receive absentee ballots for federal elections.” *Pennsylvania Democratic Party v. Boockvar*, ---A.3d---, No. 133 MM 2020, 2020 WL 5554644, at *2, fn.5 (Pa. Sept. 17, 2020). This statute not only acts to protect voting rights of those outside the geographic boundaries of the United States, but also imposes strict duties on states to effectuate this protection. Among the tasks which have devolved upon the states (and in Pennsylvania, upon the relative boards of election) are requirements such as transmitting absentee ballots in federal elections to overseas and military electors in a manner so as to receive same in time that they may be counted. *See, e.g.*, 52 U.S.C. § 20302(a)(8)(A);

20304(b)(1). “As adopted in Pennsylvania, the UOCAVA provides that military and overseas ballots will be counted if received by the county board by ‘5:00 p.m. on the seventh day *following* the election,’ which this year will be November 10, 2020. 25 Pa.C.S. § 3511.” *Id.*, at 12, fn.19 (emphasis added).

In order to enforce the provisions of UOCAVA, “[t]he Attorney General [of the United States] may bring a civil action in an appropriate district court for such declaratory or injunctive relief as may be necessary ... “ 52 U.S.C.A. § 20307(a). Over the last two decades, the Department of Justice has taken such action in at least three dozen cases brought against various states including those where state mechanisms threatened to prevent late ballots from being counted.

<https://www.justice.gov/crt/cases-raising-claims-under-uniformed-and-overseas-citizen-absentee-voting-act> (last visited Oct. 5, 2020).¹ What is apparent in these cases is the willingness of courts to fashion remedies to protect the ballot which mirror the remedies at issue here.

For example, in *United States v. Arizona*, No. 18-CV-00505 PHX-DLR (D. Ariz. Feb. 15, 2018), the state did not forward ballots to UOCAVA voters in time for them to be returned by election day as was required by state law.² In order to prevent their disenfranchisement, the Court required ballots to be counted which were received up to ten days *after* election day if they were executed and sent on or before that day. In the above-cited *United States v. Pennsylvania, supra*, the Court

¹ Pennsylvania has been subject to litigation pursuant UOCAVA in the past. *See, e.g., United States v. Pennsylvania*, 04-CV-830 (M.D. Pa. 2004).

² As noted, Pennsylvania provides a week-long “window” for receipt of UOCAVA ballots.

likewise ordered “[c]ounty boards of elections to accept absentee ballots cast for federal office” in the primary election of 2004 twenty days *after* election day, “notwithstanding the deadline prescribed by” statute, which at the time, was the Friday *before* election day.

In fact, despite Petitioners’ disdain for the accommodation imposed by the Pennsylvania Supreme Court in these matters, judicial extension of state deadlines for receipt of validly cast ballots is not at all unusual:

Numerous courts have entered consent orders or decrees extending a State's deadline for receipt of validly-cast absentee ballots. *See, e.g., United States v. New York*, 1:09-cv-335 (N.D. N.Y. Mar. 26, 2009) (ordering 6-day extension to ballot receipt deadline and corresponding adjustments to other state law deadline); *United States v. Michigan*, No. L 88-208 CA5 (W.D.Mich. July 29, 1988) (10-day extension of ballot receipt deadline); *United States v. Idaho*, No. 88-1187 (D. Idaho May 21, 1988; entered May 23, 1988) (10-day extension of ballot receipt deadline); *United States v. Oklahoma*, No. CIV-88-1444 P (W.D.Okla. Aug. 22, 1988) (10-day extension of ballot receipt deadline); *United States v. New Jersey*, No. 90-2357(JCL) (D.N.J. June 5, 1990) (10-day extension of ballot receipt deadline); *United States v. Colorado*, No. 90-C-1419 (D.Colo. Aug. 10, 1990) (10-day extension of ballot receipt deadline); *United States v. New Jersey*, No. 92-4203 (D.N. J. June 2, 1992) (14-day extension of ballot receipt deadline); *United States v. Michigan*, No. 1:92-CV-529 (W.D.Mich. Aug. 3, 1992) (20-day extension of ballot receipt deadline); *United States v. Georgia*, No. 1:04-CV-2040-CAP (N.D.Ga. July 16, 2004) (3 business day-extension).

United States v. Cunningham, No. CIV. A. 3:08CV709, 2009 WL 3350028, at *10 fn.3 (E.D. Va. Oct. 15, 2009).

Consistent with these decisions and (similar to the present matters) in the face of the COVID-19 pandemic’s impact on last spring’s primary election, the U.S. District Court for the Western District of Wisconsin similarly extended the deadline for receipt of absentee ballots for three days after election day. *Democratic Nat’l Comm. v. Bostelmann*, 451 F. Supp. 3d 952 (W.D. Wis. 2020). In doing so, and

acknowledging the dramatic circumstance posed by COVID, the Court recognized that the equities favored extension: “Finally, this relief is more generally in the public interest, which favors permitting as many qualified voters to vote as possible.” *Id.*, at 977.

Against this backdrop, it is clear that not only were the remedies imposed by the Supreme Court below appropriate, they were completely consistent with the role of courts in protecting the cherished right to vote. “In some cases, and this is one, if federally-guaranteed voting rights are to be protected, the court must act.” *United States v. Alabama*, 857 F. Supp. 2d 1236, 1242 (M.D. Ala. 2012)(internal citations omitted). This duty is no less incumbent on the state judiciary and was no less carried out by the state Supreme Court than it was by the host of federal courts cited above. While the ballots in question presently are not otherwise protected by OACAVA, they are no less precious. Adding a modest three day extension for receipt of mail-in ballots in the face of both a global pandemic and impediments to postal delivery as recognized by the court below is not only valid, it is mandated.

**II. ACCEPTING LATE MAIL-IN BALLOTS WITHOUT
POSTMARK IS CONSTITUTIONALLY VALID, CONSISTENT
WITH IMPLEMENTATION OF UOCAVA, AND EQUALLY
APPLICABLE TO ALL BELATED MAIL-IN BALLOTS IN A
TIME OF PUBLIC HEALTH EMERGENCY**

Petitioners in both matters take further exception to the state Supreme Court’s refusal to require that mail-in ballots received by 5:00 p.m. on November 6, 2020, three days after Election Day, have legible postmarks. While Petitioners’

argument seems to suggest that such a remedy is unheard of, it is in fact completely consistent with the operation of UOCAVA, is part of Pennsylvania's UOCAVA statutory structure, and has been exacted as a franchise-protecting remedy by other courts.

For example, in *Cunningham, supra.*, in the face of a UOCAVA violation, the court ordered an extension for receipt of mail-in ballots which was so lengthy as to negate any issue relative to postmark. The same was true in *United States v. Pennsylvania, supra.*, where the time of the extension was such that postmarks would be irrelevant. In a number of UOCAVA cases, such as *United States v. Georgia, supra.*, the courts make no mention at all of (nor show any concern with) postmarks in extending ballot receipt deadlines.

Further, in *Bostelmann, supra.*, one of the first COVID-related election cases, the district court addressed the postmark issue squarely and rejected any effort to ratify the legitimacy of a ballot through this postal service mechanism:

Similarly, the court will *not* add a postmarked-by date requirement; it is simply moving the statutory absentee receipt deadline. No persuasive evidence suggests that further altering statutory requirements will impose tangible benefits or harms, and indeed the amicus briefs from various local governments suggest that an extension of the deadline would be heartily welcomed by many local officials.³

Bostelmann, supra., at 977 (emphasis in the original).

Nevada universalizes this element of voter protection, declaring:

If an absent ballot is received by mail not later than 5 p.m. on the third day following the election and the date of the postmark cannot be determined, the

³ Just as the Wisconsin local officials supported the *Bostelmann* court's remedy, so also does the present Board "heartily welcome" the similar remedies fashioned by the Pennsylvania Supreme Court.

absent ballot shall be deemed to have been postmarked on or before the day of the election.

NV Rev.Stat. § 293.317(2).

This is consistent with Pennsylvania's scheme for implementing UOCAVA, which states:

If, at the time of completing a military-overseas ballot and balloting materials, the voter has declared under penalty of perjury that the ballot was timely submitted, the ballot may not be rejected on the basis that it has a late postmark, an unreadable postmark or no postmark.

25 Pa.C.S. § 3511(b).

This statute is Pennsylvania's tool to capture the UOCAVA species of valid ballots and accept them after election day, whether they do or do not have legible, readable or coherent postmarks. This has been implemented for years without insult to any constitutional or federal electoral statutory norm. To suggest that an identical mechanism implemented by the state Supreme Court for the protection of *all* mail-in ballots during a deadly pandemic is somehow constitutionally suspect lacks all credibility, and only serves to further threaten the right to vote beyond that imposed by COVID.

Through Act 77, 25 P.S. §§ 3150.11-3150.17, Pennsylvania broadened the realm of mail-in voting. The model which Pennsylvania has employed in implementing its responsibilities under UOCAVA is equally applicable to Act 77 mail-in ballots in the face of the current public health threat. COVID changes every aspect of life, but it must not interfere with the franchise. Deadlines and postal service markings cannot overtake the interest of Pennsylvania in protecting the franchise. In balancing statutory requirements with the fundamental right to vote,

the Pennsylvania Supreme Court, as did the *Bostelmann* court, applied the principle of “aequitas prima est,” and recognized that the equities substantially favored the latter. In light of the present circumstances, this decision was manifestly correct.

CONCLUSION

For the foregoing reasons, the applications for stay should be denied.

Respectfully submitted,

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