

IN THE
Supreme Court of the United States

JIM BOGNET, *et al.*,

Petitioners,

v.

VERONICA DEGRAFFENREID, ACTING SECRETARY OF THE
COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Respondents,

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit**

**BRIEF OF LUZERNE COUNTY BOARD OF ELECTIONS
IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the General Assembly of Pennsylvania, in exercising its authority under U.S. Const. art. II, § 1, adopted a “[m]anner” for appointment of presidential electors which included recognition that the Pennsylvania Supreme Court was empowered to grant equitable relief in the face of an unprecedented emergency so as to protect the franchise by allowing valid and timely cast mail-in ballots to be counted if received up to three days after Election Day.

PARTIES TO THE PROCEEDINGS

Petitioners are Jim Bognet, Donald K. Miller, Debra Miller, Alan Clark and Jennifer Clark.

Respondents are Veronica Degraffenreid, Acting Secretary of the Commonwealth of Pennsylvania (replacing original Respondent Kathy Boockvar), Adams County Board of Elections, Allegheny County Board of Elections, Armstrong County Board of Elections, Bedford County Board of Elections, Berks County Board of Elections, Blair County Board of Elections, Bucks County Board of Elections, Butler County Board of Elections, Cambria County Board of Elections, Carbon County Board of Elections, Centre County Board of Elections, Chester County Board of Elections, Clarion County Board of Elections, Clinton County Board of Elections, Columbia County Board of Elections, Delaware County Board of Elections, Dauphin County Board of Elections, Elk County Board of Elections, Erie County Board of Elections, Fayette County Board of Elections, Franklin County Board of Elections, Greene County Board of Elections, Huntington County Board of Elections, Indiana County Board of Elections, Jefferson County Board of Elections, Lackawanna County Board of Elections, Lancaster County Board of Elections, Lawrence County Board of Elections, Lebanon County Board of Elections, Lehigh County Board of Elections, Luzerne County Board of Elections, Mercer County Board of Elections, Monroe County Board of Elections, Montgomery County Board of Elections, Montour County Board of Elections, Northampton County Board of Elections, Northumberland County Board of Elections, Perry County Board of Elections, Philadelphia County Board of Elections, Pike County Board of Elections, Potter County Board of Elections, Snyder County Board of Elections, Susquehanna County Board of Elections, Tioga County Board of Elections, Union County Board of Elections, Venango County Board of Elections, Washington County Board of Elections, Wayne County Board of Elections, Westmoreland County Board of Elections, and York County Board of Elections, and Democratic National Committee.

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COUNTERSTATEMENT OF THE CASE

Petitioners challenge the decision of the Pennsylvania Supreme Court which extended the deadline for receipt of validly cast mail-in ballots from 8:00 P.M. on Election Day to 5:00 P.M. on November 6, 2020 (three days later). Since this decision is wholly consistent with the “manner” for selection of presidential electors chosen by the Pennsylvania legislature (the General Assembly), certiorari should be denied.

In October of 2019, the General Assembly passed legislation which amended the Election Code of Pennsylvania. Act of Oct. 31, 2019, P.L. 552, No. 77 – Pennsylvania Election Code-Omnibus Amendments, <https://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2019&sessInd=0&act=77> (last visited March 14, 2021). This legislation (commonly referred to as Act 77) was, as with any bill passed by the General Assembly,¹ submitted to the Governor, who signed it into law on October 31, 2019. *Id.* Among its several provisions, what is most relevant to the present matter is Act 77’s change to Pennsylvania’s

¹ See Pa. Const. art. IV, § 15

usual requirements regarding absentee voting by now allowing submission of mail-in ballots “excuse-free”. *See* 25 P.S. §§ 3150.11-3150.17. Act 77 also establishes timelines for receipt of the newly-authorized mail-in ballots (along with traditional “excuse-based” absentee ballots), namely, these ballots “must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.” 25 P.S. § 3150.16. Notably extracted from these provisions were those ballots sent from overseas pursuant to the Uniform Military and Overseas Voters Act (UMOVA), 25 Pa.C.S. § 3501, *et seq.*, which allows for ballots cast prior to the Election Day deadline to be counted if received by the county boards up to one week later. 25 Pa.C.S. § 3511.²

Act 77 was adopted before the COVID-19 pandemic imposed extensive burdens on all aspects of society.

The General Assembly addressed the pandemic’s potential impact on the electoral process with passage of Act 12, which addressed postponement of the primary election of 2020 to a later Spring date, and

²This provision fulfills Pennsylvania’s duty under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. §§ 20301-20311.

consolidated voting precincts. Act of Mar. 27, 2020, P.L. 41, No. 12 - Pennsylvania Election Code-Omnibus Amendments, <https://www.legis.state.pa.us/cfdocs/Legis/LI/uconsCheck.cfm?txtType=HTM&yr=2020&sessInd=0&smthLwInd=0&act=12> (last visited March 15, 2021). This Act did not alter receipt deadlines for mail-in ballots. *Id.*

In July of 2020, the Democratic Party of Pennsylvania invoked Commonwealth Court's original jurisdiction, seeking declaratory and injunctive relief against then-Secretary of the Commonwealth Kathy Boockvar. The Democratic Party raised concerns over the potentially significant increase in mail-in voting for the November 2020 election due to COVID restrictions, coupled with doubts that the United States Postal Service (USPS) would be able to timely deliver those ballots to county boards of election (such as the instant Respondent) on time. Against this backdrop, the Democratic Party sought a seven day extension for receipt of mail-in ballots, identical to the deadline for ballots submitted pursuant to UMOVA.

Before Commonwealth Court issued a decision, the Democratic Party sought and was granted transfer of the matter to the

Pennsylvania Supreme Court pursuant to that court's authority to exercise extraordinary jurisdiction over "any matter pending before any court ... of th[e] Commonwealth involving an issue of immediate public importance ...". 42 Pa.C.S. § 726.

The Supreme Court issued its decision on September 17, 2020, rejecting the requested seven day extension, but accepting then-Secretary Boockvar's suggestion that a three day extension was appropriate. As such, and at issue here, the Supreme Court directed that "ballots mailed by voters via the United States Postal Service and postmarked by 8:00 p.m. on Election Day, November 3, 2020, shall be counted if they are otherwise valid and received by the county boards of election on or before 5:00 p.m. on November 6, 2020." *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 386 (Pa. 2020). The Court further directed that "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." *Id.*

Two challenges to the Pennsylvania Supreme Court's decision and order were pursued in this Court, which included several efforts to stay the order prior to Election Day and expedite review. *See Republican Party of Pennsylvania v. Boockvar*, No. 20-542; *Scarnati v. Boockvar*, No. 20-574 (hereinafter "RPP"). Each of these efforts were denied. *Id.*³ While the RPP matters were pending, the present Petitioners (four registered voters and a candidate for U.S. House of Representatives) instituted their action in the United States District Court for the Western District of Pennsylvania, essentially challenging the same Pennsylvania Supreme Court decision based on essentially the same arguments as the RPP petitioners. The District Court denied Petitioners' request for temporary restraining order and preliminary injunction on October 29, 2020, only five days before Election Day.

Petitioners were unsuccessful on appeal to the United States Court of Appeals for the Third Circuit (which also declined to expedite review and decide the matter prior to Election Day). Thereafter, Petitioners sought certiorari review at this Court. The present brief is submitted in opposition.

³ Justice Alito later ordered all county boards of election to segregate ballots received within the timeframe outlined by the Pennsylvania Supreme Court. *Id.*

REASONS FOR DENYING THE WRIT

- I. The merits of Petitioners' argument make this case an unworthy candidate for this Court's review since the method of selecting presidential electors chosen by the General Assembly allows for the type of emergency relief which the Pennsylvania Supreme Court granted here.**

At their core, the issues raised by Petitioners are the same as those which this Court has already declined to review in the RPP cases. *See Republican Party of Pennsylvania v. Degraffenreid*, --U.S.--, 141 S.Ct. 732 (2021)(Thomas, J., dissenting from the denial of certiorari; Alito, J., joined by Gorsuch, J., dissenting from the denial of certiorari).⁴ While several justices dissented from the denial of certiorari in those cases, *id.*, there is nothing in the present matter which should result in anything but a similar denial.

The question of whether a state legislature is constitutionally siloed in deciding the "manner" by which presidential electors are selected seems central to the RPP dissents. It is also foundational to Petitioners'

⁴ In the interest of economy, the present Respondent adopts the reasoning of the Third Circuit below on the issue of standing. Further, since Petitioners' claims related to equal protection, as well as the boundaries which *Purcell v. Gonzalez*, 549 U.S. 1 (2006) places on pre-election litigation, are each dependent on a finding that the Pennsylvania Supreme Court's decision was constitutionally unsound, the present brief focuses exclusively on the vitality of that decision. Present Respondent is repeating, to a large extent, its brief in opposition filed in the RPP matters.

argument. Whatever the merits of this discussion, it is inapplicable to the present matter. Indeed, nothing in the Pennsylvania Supreme Court's decision is inconsistent with the General Assembly's exercise of its Article II, § 1 power, whether that power is "plenary," *Bush v. Gore*, 531 U.S. 98, 104, (2000), or part of the Commonwealth's exercise of its "own governmental processes," *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 816 (2015). As noted *infra*, Pennsylvania's "manner" of selecting presidential electors includes a distinct role for the judiciary when equitable relief is summoned.

While Act 77 broadened the possible number of voters who could take advantage of its no-excuse mail-in ballot option, the COVID-19 pandemic potentially expanded that possibility to unmanageable numbers. With the feared inability of USPS to timely deliver those ballots to county election boards such as the present Respondent, the Pennsylvania electoral process faced grave uncertainty. But such a circumstance is not unlike any number of other emergent situations which threaten to disrupt elections. Accordingly, Pennsylvania has legislatively constructed mechanisms by which electoral emergencies can be addressed and voters' rights protected through judicial action.

That is exactly what happened in this case.

Petitioners' position is hitched to the argument that since the Constitution "leaves it to the [state] legislature *exclusively* to define the method of appointment" of presidential electors, a state judiciary's interpretation of that "method" is afforded no particular deference and is subject to review by this Court. *See Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring)(emphasis added; internal citation omitted). While the *Bush per curiam* opinion recognized the "plenary" authority of state legislatures "to select the manner for appointing electors," 531 U.S. at 104, the broad power to second guess a state judicial interpretation of its own state's electoral scheme suggested by Chief Justice Rehnquist's concurring opinion has never been adopted by the Court. Even if it were, nothing in the Pennsylvania Supreme Court decision, nor in the authority of that court to issue its decision, is inconsistent with the "manner" chosen by the General Assembly for selection of electors. On the contrary, since this "manner" embraces all aspects of the state's electoral process, including judicial oversight and provision for emergency judicial action in order to protect the franchise,

there is nothing constitutionally questionable about the Pennsylvania Supreme Court's decision.

Petitioners seem to say that regardless of what legislation the General Assembly adopts to effectuate the "manner" of elector selection, the Pennsylvania Supreme Court is somehow not permitted to definitively interpret that legislation even if assigned that role by the legislature itself. It is respectfully submitted that, in this regard, Petitioners are misguided.

For example, in the present case, the essential issues arise solely from Act 77 and the deadlines it imposed on mail-in ballots.⁵ These deadlines were universal and applied to all ballots, not merely those aimed at selecting presidential electors. There is nothing in Act 77 which differentiates one contest from another, but instead merely establishes rules for mail-in ballot application and receipt across the electoral landscape. Regarding the November 3, 2020 election, voters faced not only the presidential contest, but also races for U.S. House of

⁵ As noted *supra*, prior to Act 77, the only "mail-in" ballots Pennsylvania allowed were absentee ballots which were accompanied by a valid "excuse," i.e., declaration of expected absence from the voter's home jurisdiction. While Act 77 provides for no-excuse mail-in voting, it also retains the concept of traditional absentee balloting. As these distinctions are not relevant to the present argument, reference in this brief to "mail-in" ballots refers to both species.

Representatives, state House and Senate, and the state “row” offices of attorney general, auditor general and treasurer. Along with these state and federal offices, some quite local initiatives were also on the ballot.⁶

What is most telling then is that the “manner” chosen by the General Assembly for selection of presidential electors was not a “stand-alone” provision but instead was fully incorporated into existing state law and procedure for conduct of elections of all kind, whether impacting the highest public office or the smallest municipality. By its own definition, Act 77 was “An Act, [a]mending the act of June 3, 1937 (P.L.1333, No.320)[the Pennsylvania Election Code],” and was fully integrated into that statute. Even assuming Petitioners are correct that a state legislature is constitutionally empowered to choose a

⁶ Notably, within the present Respondent’s jurisdiction was a ballot question initiated in Penn Lake Borough, a municipality which has “approximately 280 registered voters” out of a population of 308 people. *See* <http://pennlakeborough.com/about-plpb/> (last visited March 15, 2021). The Penn Lake voters had to decide whether the Borough should assume a \$3,000,000 public debt for certain municipal projects. *See, e.g.,* Penn Lake Borough, PA, sample ballot, <https://www.luzernecounty.org/DocumentCenter/View/22725/Penn-Lake-Park-Boro-187-Bi-Lingual-All> (last visited March 15, 2021). While perhaps not as vital to the Republic as the question of who would next serve as Commander in Chief, assumption of debt that large by such a small number of citizens was important to the Penn Lake residents. But since the General Assembly made no distinction between the “manner” in which presidential electors are chosen or how Penn Lake’s public debt is to be agreed upon, the provisions of Act 77 at issue here applied equally to each, as well as to the races for the other state and federal offices.

“manner” of elector selection which may diminish (or even eliminate) any interpretive role for the judiciary, that is *not* what Act 77 does. Instead, by incorporating the provisions of Act 77 into the Election Code and further, by *not* amending other legislative provisions which have implications for the electoral process (such as the Judicial Code), the General Assembly has chosen a “manner” for selection of presidential electors which indeed *does* include a decisive role for the Pennsylvania judiciary. That was the choice the General Assembly made and a choice which Petitioners’ efforts now seek to negate.⁷

For instance, among the intersections between the judicial and electoral processes, the Election Code grants broad powers to the courts of common pleas regarding such things as voter registration controversies, 25 P.S. § 3073, and Election Day duties where the courts “shall be in continuous session” to, among other things, summarily

⁷ It would be uniquely burdensome if boards of election, such as the present Respondent, were required to discern which portions of the Election Code are inapplicable to the presidential elector process and which remain enforceable in all other respects. The General Assembly, exercising its constitutional prerogative under Article II, made the economical decision to weld all electoral matters to an integrated scheme upon which election officials as well as citizens can rely in all instances, including obtaining guidance, directive and remedy from a fully incorporated judiciary. For these reasons, the present Respondent, and the other boards of election, would be unduly hampered if this electoral structure were disjoined.

settle “controversies that may arise with respect to the conduct of the election; [and] shall issue process, if necessary, to enforce and secure compliance with the election laws ...”. 25 P.S. § 3046.

Further, and of particular note regarding the present issues, the Election Code links directly to the Pennsylvania’s Judicial Code in matters related to selection of presidential electors by providing that:

[t]he Commonwealth Court shall have exclusive original jurisdiction of ... [c]ontested nominations and elections of the second class⁸ under the act of June 3, 1937 (P.L. 1333, No. 320), known as the “Pennsylvania Election Code.”

42 Pa.C.S. § 764.

These provisions are certainly not unusual, and indeed, one would expect that a state’s legislature would operate most comfortably “[t]hrough the structure of its [own] government [by which it] defines itself as a sovereign,” *Arizona State Legislature*, 576 U.S. at 817 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), and include provisions for judicial involvement in overseeing elections. Indeed, in his concurring opinion in *Bush*, 531 U.S. at 114, Chief Justice Rehnquist

⁸ The Election Code defines “elections of the second class” to include, among others, “[n]ominations and elections of electors of President and Vice-President of the United States ...”. 25 P.S. § 3291.

recognized that “various bodies” within Florida’s governmental structure, including the courts, were “statutorily [charged with various] responsibility[ies]” regarding presidential elector selection. But what neither the Chief Justice nor the *per curiam* opinion addressed was any sense that in exercising its authority to choose the elector selection mechanism, a state legislature may likewise decide to defer interpretation and implementation of its choice to its own judiciary. That is precisely what the General Assembly has done here and precisely why this case is unworthy of certiorari review.

In the face of an unprecedented pandemic, coupled with implementation of a vastly expanded mail-in voting option (with tight timelines regarding application for and receipt of these ballots) and concerns about the USPS’s ability to adequately process the ballots, the Pennsylvania Supreme Court “exercised Extraordinary Jurisdiction to address these issues and to clarify the law of this Commonwealth in time for the 2020 General Election.” *Boockvar*, 238 A.3d at 352 (Pa. 2020). Invoking its statutory authority to “cause right and justice to be done,” 42 Pa.C.S. § 726, the Court fashioned an equitable solution to the

problems it faced and provided the three day extension for receipt of timely mailed-in ballots.

As the Court noted, judicial relief in the face of emergency (which the pandemic caused) is not new. When flooding interfered with an election several decades ago, Commonwealth Court addressed the authority of the judiciary to suspend voting and reschedule an election for a later time. Recognizing that “[t]he purpose of the election laws is to ensure fair elections,” the Court concluded that the Election Code:

implicitly grants the court authority to suspend voting when there is a natural disaster or emergency such as that which confronted voters in Washington County on the election date here involved. To permit an election be conducted where members of the electorate could be deprived of their opportunity to participate because of circumstances beyond their control, such as a natural disaster, would be inconsistent with the purpose of the election laws.

In re Gen. Election-1985, 531 A.2d 836, 839 (Pa. Cmwlth. 1987).⁹

The Supreme Court noted as well several other instances where “other jurisdictions have likewise granted temporary extensions when

⁹ Also invoking legislative authority provided by 35 Pa.C.S. § 7301, and in the face of an emergency caused not only by COVID-19 but also civil unrest resulting from the death of George Floyd, Governor Tom Wolf extended the time in the Spring 2020 primary election for receipt of mail-in ballots in six counties. *See* <https://www.governor.pa.gov/wp-content/uploads/2020/06/20200601-EO-Deadline-Extention.pdf> (last visited March 15, 2021).

faced with natural disasters, such as hurricanes. ... [see, e.g.] *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1259 (N.D. Fla. 2016); *Georgia Coalition for the Peoples' Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344, 1345 (S.D. Ga. 2016)).” *Boockvar*, 238 A.3d at 366. Given the countless circumstances, whether of natural or other origin, which could create an emergent need for judicial intervention in the electoral process, it is difficult to imagine that the General Assembly’s interspersing of judicial provisions in the manner it has chosen for elector selection is somehow subject to this Court’s review when Pennsylvania’s judiciary acts to mitigate such an emergency. One can hardly think of a greater insult to the unique constitutional role a state legislature plays in the presidential elector process than to diminish its chosen path by unbidden federal review. As respect for choice of that path is essential, the petitions should be denied.

CONCLUSION

For these reasons, the petitions for writ of certiorari should be denied.

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