

No. 20O155

In the
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE OF GEORGIA, STATE
OF MICHIGAN, and STATE OF WISCONSIN,

Defendants.

On Motion for Leave to File Bill of Complaint

**MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE BRIEF
AND BRIEF FOR BRYAN CUTLER, SPEAKER OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES, AND KERRY
BENNINGHOFF, MAJORITY LEADER OF THE PENNSYLVANIA
HOUSE OF REPRESENTATIVES AS AMICI CURIAE IN SUPPORT
OF PLAINTIFF**

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Pursuant to Supreme Court Rule 37.2(b), Speaker of the Pennsylvania House of Representatives Bryan Cutler and Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff respectfully move for leave to file the accompanying brief as amici curiae.

As a key element of this case concerns election administration issues in the Commonwealth of Pennsylvania, amici, as leaders of the legislative branch constitutionally charged with governing Pennsylvania's elections who have litigated a number of cases concerning these election administration issues, are well positioned to offer context to this Court concerning the events giving rise to this lawsuit.

Amici believe this concise brief would be helpful to this Court in analyzing the Pennsylvania-specific issues raised by Plaintiff. Amici offer no opinion or arguments with respect to the application of laws in any other state.

Given the expedited circumstances concerning this matter, amici respectfully request leave to file the enclosed brief supporting Plaintiff without 10 days' advance notice to the parties of intent to file. See Sup. Ct R. 37.2(a). Plaintiff filed the motions on December 8, 2020. The Court ordered responses by 3 p.m. on December 10, 2020. On December 9, 2020,¹ counsel for amici gave notice to Plaintiff² and Defendants of the intent of amici to file an amici brief in support of Plaintiff. On December 9, 2020, Proposed Intervenor, Donald J.

¹ Notice to the State of Michigan was provided in the early hours of December 10, 2020.

² As Amici were preparing to file this Petition, Missouri, Arkansas, Louisiana, Mississippi, South Carolina, and Utah moved to intervene in this matter. Based on the timing, Amici did not have time to provide notice to these proposed intervenors.

Trump for President, Inc. consented. On December 10, 2020, Plaintiff consented and Georgia and Wisconsin stated that they did not oppose the filing of the amicus brief. As of the filing of this motion, counsel for amici had not yet heard from counsel for Michigan or Pennsylvania.

The above circumstances justifies the request to file the enclosed amicus brief supporting Plaintiff without ten days' advance notice to the parties of intent to file. In addition, amici respectfully request leave to file the enclosed brief on 8½-by-11-inch paper. Because of the timing of the motion and the logistics required to print this amicus brief, amici respectfully request leave to file their brief on 8½-x-11-inch paper.

Amici therefore respectfully move this Court for leave to file an amicus curiae brief in this matter.

Respectfully submitted on this 10th day of December, 2020.

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INTERESTS OF AMICI CURIAE³

Amici curiae, Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives (the “House Leaders”), have a strong interest in the outcome of this case, and in the underlying issues raised being carefully considered by this Court.

The House Leaders, as leaders of the Pennsylvania House of Representatives, one of the two coequal houses of the Pennsylvania legislative branch, have been heavily involved in the implementation of election policy and procedures in the Commonwealth, pursuant to the powers granted to the General Assembly under the federal and state Constitutions.

The House Leaders have personal and direct insight into both the goals of the General Assembly in its recent amendments to the Pennsylvania Election Code, and also in how state courts and outside actors have subverted those intentions via spurious lawsuits, extrajudicial Executive Branch guidance, and manipulation of election procedures at the county level. This wholesale evisceration of the Pennsylvania Election Code had a deleterious effect on the procedural safeguards put in place by the General Assembly

SUMMARY OF ARGUMENT

No doubt, the 2020 General Election campaign was a vigorous exchange of ideas between contrasting candidates and their supporters. While such a campaign

³ No party’s counsel authored any part of this brief. No person other than *amici* and their counsel contributed any money intended to fund the preparation or submission of this brief.

can be a healthy democratic institution, it was the underlying election procedures that frequently found themselves under attack this year.

No place was this more apparent than Pennsylvania, where despite the bipartisan efforts of the General Assembly to strike a careful balance between access and security in the Commonwealth's election process, those legislative efforts were subverted by outside actors who greatly damaged the Commonwealth's election integrity procedures.

In October 2019, the Pennsylvania General Assembly (the "General Assembly") took the laudable step of enacting bipartisan legislation, Act 77, which allowed, for the first time, all qualified electors to vote by mail without requiring them to show their absence from the voting district. *See* 2019 (P.L. 552, No. 77) 2019 Pa. Legis Serv. Act 2019-77 (S.B. 421) (West); 25 P.S. § 3150.11(b). This expansion of voting options was balanced with preexisting safeguards to protect the integrity of the voting process.

Unfortunately, since that legislative enactment, other actors have used COVID-19 as a pretext to eviscerate the election integrity provisions of the Commonwealth's Election Code, such that the administration of the 2020 General Election bore no resemblance to the carefully considered procedures enacted by the General Assembly.

While amici curiae take no position with regard to the remedies requested by Plaintiff as that is entirely the province of the Court's discretion, amici respectfully submit this Brief to provide this Court with greater background concerning events

and circumstances that have occurred in the Commonwealth of Pennsylvania, which require this Court's guidance and consideration.

ARGUMENT

Plaintiff's Bill of Complaint highlights a number of the ways the procedure of Pennsylvania's General Election differed markedly from the carefully considered statutory requirements of the Commonwealth's Election Code.

This extrajudicial assault on the mechanism of the Commonwealth's elections came from all sides: well-funded national groups who, using COVID-19 as a pretext, brought a litany of lawsuits challenging seemingly every facet of Pennsylvania's elections; then the executive branch shrank from its obligations to defend the Commonwealth's laws, and then took to offering extrajudicial guidance to the Commonwealth's county boards of elections. Finally, these efforts were condoned and furthered by the overreaching of Pennsylvania's Supreme Court, in clear violation of the requirements of the U.S. Constitution.

In late 2019, the Pennsylvania General Assembly passed a bipartisan election reform bill, Act 77, which in addition to allocating \$90 million to ensuring that Pennsylvanians could vote safely and securely on modern voting machines, created a new category of "no excuse" mail-in voting. 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West). These no excuse mail-in voters can also request those ballots later in the process than was previously possible, and are able to return their ballots several days later than had been traditionally been allowed—8:00 p.m. on Election Day. *Id.* The traditional voting options remained available—voters may still choose to request an

absentee ballot if they have a statutorily permitted reason for doing so, or vote in-person on Election Day. *See* 25 P.S. § 3146.1; 25 P.S. § 3031.12.

While these reforms proved prescient when our society and its elections were greatly impacted by the COVID-19 pandemic, the mail-in voting component proved to be an easy target for those seeking to manipulate election procedures.

In the spring, under the pretextual guise of COVID-19, special interests began attempting to use Pennsylvania Courts to impose election procedures of their own choosing, *See, e.g. Disability Rights PA v. Boockvar*, 234 A.3d 390 (Pa. 2020) (May 2020 case seeking to extend the received-by deadline for mail-in ballots); *DeLisle v. Boockvar*, 234 A.3d 410 (Pa. 2020) (same); *Crossey v. Boockvar*, 239 A.3d 14 (Pa. 2020) (same).

This spurious litigation only worsened over the summer as these interest groups brought countless more suits challenging both in-person and mail-in election procedures for their own perceived benefit. *See, e.g. Crossey v. Boockvar*, 239 A.3d 14 (Pa. 2020) (amended after the Primary Election); *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020).

Even factfinders determining that the relevant circumstances did not merit the relief sought was not enough to protect the textual requirements of the Pennsylvania Election Code. *See, e.g. Crossey v. Boockvar*, 239 A.3d 14 (Pa. 2020) (where special master determined that extension to received-by deadline was not necessitated by evidentiary record raised by petitioners and Secretary of the Commonwealth).

As the pressures of the upcoming election grew nearer and more intense, in response to yet another challenge to the Election Code, the Pennsylvania Supreme Court, while recognizing that the statutory deadlines concerning absentee and mail-in ballots are “fully enshrined within the authority granted to the Legislature under the United States and Pennsylvania Constitutions”, used cases involving sudden natural disasters and its “extraordinary jurisdiction” to impose a three-day extension of the received-by deadline for absentee and mail-in ballots, regardless of date of postmark. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 370-72 (Pa. 2020).⁴ In that same case, the Pennsylvania Supreme Court sanctioned the use of unmanned, unsecured dropboxes in contravention of the statutorily-defined procedures for mail-in voting. *See id.* at 356-61 (*cf.* “Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person *to said county board of election.*” 25 P.S. Sec. 3150.16(a) (emphasis added)).

This assault on the textual requirements of the Election Code did not stop with the *Pennsylvania Democratic Party* decision. Emboldened by the Court’s decision and the intense partisan pressures of the upcoming election, Secretary of the Commonwealth Kathy Boockvar⁵ sought King’s Bench jurisdiction seeking a judicial declaration from the Pennsylvania Supreme Court that county election officials may

⁴ The House Leaders have sought a Writ of Certiorari in this matter, with said Writ presently pending before this Court. *See Scarnati et al. v. Pennsylvania Democratic Party*, No. 20-574.

⁵ Secretary Boockvar had earlier stopped defending the statutory received-by deadline. *See Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). Secretary Boockvar has also offered extra-textual “guidance” concerning the exercise of the election process and the “curing” of defective ballots. *See Bill of Complaint*.

not reject absentee or mail-in applications or refuse to count voted absentee or mail-in ballots on signature verification grounds; and that absentee and mail-in ballots and the applications for those ballots may not be challenged by third-parties at any time based on signatures. *In re November 3, 2020 General Election*, 240 A.3d 591 (Pa. 2020).

The Pennsylvania Election Code provides detailed procedures for the casting of absentee and mail-in ballots, in that “the elector shall, in secret, proceed to mark the ballot” 25 P.S. § 3146.6(a).

The absentee or mail-in voter shall:

then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed ‘Official Election Ballot.’ This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector’s county board of election and the local election district of the elector. **The elector shall then fill out, date and sign the declaration printed on such envelope.** Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

Id. (emphasis added); *see also* 25 P.S. § 3150.16(a) (providing for the identical procedure for mail-in voters).

When the ballots are returned, the county board of elections must “**examine the declaration on the envelope of each ballot . . . and shall compare the information thereon with that contained in the ‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File.’**” 25 P.S. § 3146.8(g)(3)

(emphasis added). The declaration includes a signature as provided by 1306 and 1306-D of the Election Code.

Notwithstanding these clear textual requirements, the Pennsylvania Supreme Court eviscerated the signature matching safeguard and held “that county boards of elections are prohibited from rejecting absentee or mail-in ballots based on signature comparison conducted by county election officials or employees, or as the result of third-party challenges based on signature analysis and comparisons.” *In re November 3, 2020 General Election*, 240 A.3d 591, 611 (Pa. 2020).

Having dispensed with the signature verification requirement, in a later case the Pennsylvania Supreme Court deemed the term “fill out” ambiguous, and held that an absentee or mail-in voter’s failure to handwrite the voter’s name and/or address on the security envelope was not a material violation of statutory directive to “fill out” the declaration, thereby removing the last of the procedural safeguards for absentee and mail-in ballots. *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, __ A.3d __, 2020 WL 6866415 (Pa. Nov. 23, 2020).

Pennsylvania Courts and the County Boards of Elections also dispensed with the statutory requirements of allowing candidate and party representatives to meaningfully observe the counting of ballots. As an example, the Pennsylvania Supreme Court upheld the procedures of the Philadelphia County Board of Elections, where properly credentialed representatives of the candidates were made to stand

thirty-five (35) yards away from many of the ballots being counted. *In re Canvassing Observation*, __ A.3d __, 2020 WL 6737895 (Pa. Nov. 17, 2020).⁶

CONCLUSION

The unimpeachability of our elections requires clear procedures of administration so that everyone gets a fair shake. Unfortunately, outside actors have so markedly twisted and gerrymandered the Commonwealth's Election Code to the point that amici find it unrecognizable from the laws that they enacted. The Plaintiff and others have raised important questions about how this procedural malfeasance affected the 2020 General Election. Amici hope that this additional background to the events and circumstances that have occurred in the Commonwealth of Pennsylvania which have given rise to this lawsuit will aid the Court in resolving this matter expeditiously.

For the foregoing reasons, amici respectfully request that this Court carefully consider the procedural issues and questions raised by the Plaintiff concerning the administration of the 2020 General Election in Pennsylvania.

⁶ Amici Curiae would also note that as the litigation escalated and in light of the House Leaders' ardent defense of the textual requirements of the Election Code in prior cases (*see, e.g., Crossey v. Boockvar*, 239 A.3d 14 (Pa. 2020)), the Pennsylvania Supreme Court began denying the House Leaders the right to intervene, despite their clear prerogative to do so under the Pennsylvania Rules of Civil and Appellate Procedure. *See, e.g. Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 370-72 (Pa. 2020); *In re November 3, 2020 General Election*, 240 A.3d 591, 611 (Pa. 2020); *In re Canvassing Observation*, __ A.3d __, 2020 WL 6737895 (Pa. Nov. 17, 2020). This procedural gerrymandering of the House Leaders' ability to participate in the judicial review of the Election Code serves to highlight the unfairness of the process.

Respectfully submitted,

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