

No. A-_____

IN THE SUPREME COURT OF THE UNITED STATES

PENNSYLVANIA DEMOCRATIC PARTY, ET AL,

Plaintiffs-Respondents,

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS PENNSYLVANIA SECRETARY OF STATE,
ET AL.,

Defendants-Respondents,

and

REPUBLICAN PARTY OF PENNSYLVANIA,

Intervenor-Applicant.

Application from the Supreme Court of Pennsylvania

(No. 133 MM 2020)

**EMERGENCY APPLICATION FOR INJUNCTION PENDING CERTIORARI
REVIEW**

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RULE 29.6 STATEMENT

As required by Supreme Court Rule 29.6, Applicant hereby submits the following corporate-disclosure statement.

1. Applicant has no parent corporation.
2. No publicly held corporation owns any portion of Applicant, and Applicant is not a subsidiary or an affiliate of any publicly owned corporation.

Date: November 6, 2020

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TABLE OF CONTENTS

	Page
RULE 29.6 STATEMENT	i
INDEX OF APPENDICES	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	6
STATEMENT OF THE CASE.....	6
JURISDICTIONAL STATEMENT	8
REASONS FOR GRANTING THE APPLICATION	8
CONCLUSION.....	11

INDEX OF APPENDICES

	Page
APPENDIX A: Majority Opinion by Justice Baer, Supreme Court of Pennsylvania, Middle District (Sept. 17, 2020).....	A.01
APPENDIX B: Concurring Opinion by Justice Wecht, Supreme Court of Pennsylvania, Middle District (Sept. 17, 2020).....	A.64
APPENDIX C: Concurring and Dissenting Opinion by Justice Donohue, Supreme Court of Pennsylvania, Middle District (Sept. 17, 2020)	A.76
APPENDIX D: Concurring and Dissenting Opinion by Chief Justice Saylor, Supreme Court of Pennsylvania, Middle District (Sept. 17, 2020)	A.88
APPENDIX E: Per Curiam Order Denying the Applications for Stay, Supreme Court of Pennsylvania, Middle District (Sept. 24, 2020)	A.92
APPENDIX F: Dissenting Statement of the Order Denying the Applications for Stay by Justice Mundy, Supreme Court of Pennsylvania, Middle District (Sept. 24, 2020).....	A.95
APPENDIX G: Letter from the Supreme Court of Pennsylvania Refusing to Consider Request to Segregate Ballots Received After the General Assembly’s Deadline (Oct. 26, 2020)	A.99
APPENDIX H: Canvassing Segregated Mail-In And Civilian Absentee Ballots Received After 8:00 P.M. On Tuesday, November 3, 2020 And Before 5:00 P.M. On Friday, November 6, 2020 (Nov. 1, 2020)	A.113
APPENDIX I: Correspondence.....	A.117

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Bush v. Gore</i> , 531 U.S. 98 (2000)	10
<i>Bush v. Gore</i> , 531 U.S. 1046 (2000)	11
<i>Bush v. Palm Beach Cnty. Canvassing Bd.</i> , 531 U.S. 70 (2000) (per curiam)	10
<i>Chafin v. Chafin</i> , 568 U.S. 165 (2013)	10
<i>Democratic Nat’l Comm. v. Wis. State Legislature</i> , No. 20A66, slip op. (U.S. Oct. 26, 2020).....	10
<i>Hamilton v. Johnson</i> , 141 A. 846 (Pa. 1928).....	4
<i>John Doe Agency v. John Doe Corp.</i> , 488 U.S. 1306 (1989)	10
<i>Lucas v. Townsend</i> , 486 U.S. 1301 (1988)	9
<i>Maryland v. King</i> , 133 S. Ct. 1 (2012)	1
<i>Perzel v. Cortes</i> , 870 A.2d 759 (Pa. 2005).....	4
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006)	10
<i>Republican Party of Pa. v. Boockvar</i> , No. 20A54 (U.S. Oct. 19, 2020)	1, 7, 9
<i>Republican Party of Pa. v. Boockvar</i> , No. 20-542, slip op. (U.S. Oct. 28, 2020)	<i>passim</i>
<i>Scarnati v. Boockvar</i> , No. 20A53 (U.S. Oct. 19, 2020)	1
CONSTITUTIONAL AND STATUTORY AUTHORITIES	
U.S. Const. art. I.....	10
U.S. Const. art. II.....	10

TABLE OF AUTHORITIES
(continued)

	Page(s)
2 U.S.C. § 1.....	10
2 U.S.C. § 7.....	10
3 U.S.C. § 1.....	10
28 U.S.C. § 1257.....	8
28 U.S.C. § 1651.....	5, 9
28 U.S.C. § 2101.....	5, 9
Pa. Stat. § 2621.....	4
Pa. Stat. § 2642.....	4
Pa. Stat. § 3146.6.....	3
Pa. Stat. § 3150.16.....	3, 7

OTHER AUTHORITIES

Pennsylvania Department of State, Pennsylvania Guidance for Mail-in and Absentee Ballots Received From the United States Postal Service after 8:00 p.m. on Tuesday, November 3, 2020 (October 28, 2020).....	2, 3, 5, 9
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TO THE HONORABLE SAMUEL A. ALITO, ASSOCIATE JUSTICE OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT:

Republican Party of Pennsylvania (RPP) has filed a petition for a writ of certiorari asking this Court to resolve the important questions of federal law implicated by the Pennsylvania Supreme Court’s 4–3 decision extending the General Assembly’s Election Day received-by deadline and mandating a presumption of timeliness for non-postmarked ballots. *See* Pet. i, *Republican Party of Pa. v. Boockvar*, No. 20-542 (U.S. Oct. 23, 2020). Four Justices of this Court already have agreed that there is “a reasonable probability’ that this Court will grant certiorari” to review those questions and “a fair prospect’ that the Court will then reverse the decision below.” *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers) (citations omitted); *see Republican Party of Pa.*, No. 20A54 (U.S. Oct. 19, 2020); *Scarnati v. Boockvar*, No. 20A53 (U.S. Oct. 19, 2020). Three Justices have also stated that “there is a strong likelihood that the [Pennsylvania] Supreme Court decision violates the Federal Constitution” and that “the question presented . . . calls out for review by this Court.” *Republican Party of Pa.*, No. 20-542, slip op. at 3 (U.S. Oct. 28, 2020) (statement of Alito, J.). Those Justices further recognized that, in light of the Court’s denial of RPP’s motion to decide this case before Election Day, RPP may “apply to this Court to obtain th[e] modest relief” of an “order that ballots received after election day be segregated.” *Id.* at 3–4.

RPP now files an application for such an order. In particular, RPP asks the Court to order Respondents Secretary of State Boockvar and the county boards of elections to log, to segregate, and otherwise not to take any action related to any

ballots that arrive after the General Assembly’s Election Day received-by deadline but before the Pennsylvania Supreme Court’s judicially extended deadline. Given the results of the November 3, 2020 general election, the vote in Pennsylvania may well determine the next President of the United States—and it is currently unclear whether all 67 county boards of elections are segregating late-arriving ballots. Thus, without an immediate order from this Court, RPP could lose its right to “a targeted remedy” “if the State Supreme Court’s decision is ultimately overturned.” *Id.*

In recent days, Respondent Secretary of State Boockvar has issued two guidance documents—one on October 28 and the other on November 1—related to absentee and mail-in ballots received after the General Assembly’s Election Day received-by deadline of 8:00 p.m. on Election Day and before the Pennsylvania Supreme Court’s extended deadline of 5:00 p.m. on Friday, November 6, 2020. Both guidance documents recognize that the Pennsylvania Supreme Court’s extended deadline is applicable, if at all, only to ballots returned via the U.S. Postal Service. *See* Pennsylvania Department of State, Pennsylvania Guidance for Mail-in and Absentee Ballots Received From the United States Postal Service after 8:00 p.m. on Tuesday, November 3, 2020 (October 28, 2020), https://www.supremecourt.gov/DocketPDF/20/20-542/158993/20201028140128485_Attachment%20-%20Segregation%20Guidance%2010-28-2020.pdf (“October 28 Guidance”); Pennsylvania Department of State, Canvassing Segregated Mail-In And Civilian Absentee Ballots Received By Mail After 8:00 P.M. On Tuesday, November

3, 2020 And Before 5:00 P.M. On Friday, November 6, 2020 (Nov. 1, 2020) (“Nov. 1 Guidance”), A.113–14.

The Secretary’s October 28 Guidance purported to direct county boards of elections to segregate all such late-arriving ballots “from all other voted ballots,” to maintain those ballots “in a secure, safe and sealed container separate from other voted ballots,” to keep an accurate log of each such ballot, and “not [to] pre-canvass or canvass any” of those ballots “until further direction is received.” October 28 Guidance at 2; *see also Republican Party of Pa.*, slip op. at 3–4 (statement of Alito, J.). The Secretary submitted a copy of the October 28 Guidance to the Court, *see Oct. 28, 2020 Letter, Republican Party of Pa.*, No. 20-542 (U.S. Oct. 28, 2020), and three Justices made explicit reference to it, *Republican Party of Pa.*, slip op. at 4 (statement of Alito, J.).

The Secretary’s November 1 Guidance reiterates that “[a]ll directions in the guidance issued on October 28, 2020 concerning the segregation and logging of ballots received during this defined post-election period continue to apply.” A.114. The November 1 Guidance, however, took a different approach with respect to *counting* the late-arriving ballots. It purported to direct county boards to canvass the late-arriving ballots “as soon as possible upon receipt of the ballots and within the period specified by law for the canvass.” *Id.* Thus, the Secretary has purported to direct county boards to count ballots that the General Assembly has directed are invalid and should not be counted. *See id.*; *see also* 25 Pa. Stat. § 3146.6(c); 3150.16(c). The Secretary further indicated that “[t]he county boards shall count, compute, and

separately tally the ballots” received after the Election Day received-by deadline, A.116.

For at least two “reason[s],” the Secretary’s guidances are not “satisf[actory]” or sufficient to preserve RPP’s rights to “a targeted remedy” “if the State Supreme Court’s decision is ultimately overturned.” *Republican Party of Pa.*, slip op. at 3–4 (statement of Alito, J.). First, the Secretary’s guidances are not binding on Pennsylvania’s 67 county boards of elections. That is because the Secretary acts primarily in a ministerial capacity under Pennsylvania law, which grants the county boards jurisdiction and authority to conduct the Commonwealth’s elections. *See* 25 Pa. Stat. §§ 2621, 2642; *Perzel v. Cortes*, 870 A.2d 759, 764 (Pa. 2005); *Hamilton v. Johnson*, 141 A. 846, 847 (Pa. 1928). Thus, county boards of elections may choose not to follow the Secretary’s guidances—and in the fast-paced and chaotic pace of post-election events in Pennsylvania, it is unclear whether all 67 county boards of elections are currently segregating late-arriving ballots.

In an effort to obviate the need for further proceedings before this Court, counsel for RPP contacted counsel for county boards of elections to request confirmation that the boards would segregate any late-arriving ballots. A.117. Forty-two counties affirmatively responded that they would do so, and no county indicated that it would not. The Secretary similarly requested such confirmation and received it from 33 of those counties. A.122. Thus, to date, a total of 25 Pennsylvania county boards of elections have not indicated whether they are segregating the late-arriving ballots.

Second, the Secretary has reserved the right to change her guidances or to provide “further direction regarding the ballot’s subject to the Supreme Court’s decision.” October 28 Guidance at 3. The Secretary, therefore, may issue new directions to county boards of elections in the absence of an order from this Court, just as she did in her November 1 Guidance when she purported to direct county boards to count the late-arriving ballots. A.114.

In short, an order from the Court is badly needed. But given some county boards’ refusal to confirm that they are segregating ballots and the Secretary’s changing guidance, an order requiring segregation of ballots may not suffice to preserve RPP’s appellate rights. RPP therefore now asks the Court for an order directing Respondents Secretary of State Boockvar and the county boards of elections, pending certiorari review or further order of the Court, to log, to segregate, and otherwise to take no further action related to any mail-in or civilian absentee ballots received after the General Assembly’s received-by deadline.

An order at this juncture is necessary to preserve this Court’s jurisdiction to resolve this matter on the merits, as well as its ability to enter an appropriate remedy for this general election. *See* 28 U.S.C. §§ 1651(a), 2101(f). Respondent Pennsylvania Democratic Party (PDP), *see* Pa. Dem. Party Opp’n to Mot. to Expedite at 7, *Republican Party of Pa.*, No. 20-542 (U.S. Oct. 25, 2020), the Secretary, *see* October 28 Guidance at 2, and 42 county boards of elections, *see* A.117, agree that segregation of ballots at a minimum is appropriate.

Given the imminence of post-election deadlines, RPP further requests that the Court enter an administrative order granting the requested relief immediately and set 5:00 p.m. on Friday, November 6, 2020, as the deadline for parties to file any oppositions to this Application. In all events, RPP asks the Court for a ruling on this Application as soon as possible.

OPINIONS BELOW

The Pennsylvania Supreme Court majority's merits opinion is attached as Appendix A. Justice Wecht's concurring opinion is attached as Appendix B. Justice Donohue's concurring and dissenting opinion is attached as Appendix C. Chief Justice Saylor's concurring and dissenting opinion is attached as Appendix D.

The Pennsylvania Supreme Court's denial of Applicant's motion for a stay pending certiorari is attached as Appendix E. Justice Mundy's Dissenting Statement is attached as Appendix F. That same court's refusal to consider Applicant's request to segregate ballots received after the General Assembly's deadline is attached as Appendix G. Appendix H contains the Secretary's November 1 Guidance. Appendix I includes correspondence between counsel and county boards of elections attempting to confirm that county boards are segregating late-arriving ballots.

STATEMENT OF THE CASE

This Court is familiar with the background of this proceeding, which is detailed in RPP's petition for certiorari. *See* Pet. 4–16 (No. 20-542). As relevant here, the Pennsylvania General Assembly has decreed that all absentee and mail-in 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 Pa. Stat. § 3150.16(c). Nonetheless, on a 4–3 vote, the Pennsylvania Supreme Court ordered “a three-day extension” of that deadline for the imminent general election—and even imposed a remedy that creates a serious likelihood that election officials will count ballots cast or mailed after Election Day. A.62. Specifically, the majority required election officials to presume that any ballot received by its extended deadline that lacks an intelligible postmark was “mailed by Election Day unless a preponderance of the evidence demonstrates that it was mailed after Election Day.” A.63. Thus, under the majority’s presumption, ballots without intelligible postmarks (hereinafter, “non-postmarked ballots”) will be counted even if they are cast or mailed after Election Day, except in the extraordinarily rare case where proof of the untimely casting or mailing can be adduced. *See id.*

RPP asked the Pennsylvania Supreme Court for a stay pending the disposition of a petition for certiorari on September 21, 2020. The Pennsylvania Supreme Court denied that application on September 24, 2020. *See* A.94.

RPP also sought a stay in this Court. The stay was denied on October 19 by an equally divided vote, with four Justices noting they would have granted the stay. *Republican Party of Pa.*, No. 20A54 (U.S. Oct. 19, 2020). In an effort to obtain a decision on the merits prior to Election Day, RPP shortly thereafter filed a petition for certiorari, *see* Pet. (No. 20-542), along with a motion to expedite, *see* Mot. to Expedite 1–5, *Republican Party of Pa.*, No. 20-542 (U.S. Oct. 23, 2020).

To ensure meaningful review in the event this Court were unable to rule before Election Day, RPP also sought an order from the Pennsylvania Supreme Court that would require the Secretary and the county boards of elections to segregate ballots received after the General Assembly's deadline of 8 o'clock P.M. on November 3, 2020 from those received before the deadline. The Pennsylvania Supreme Court refused to consider that request on October 26, 2020. A.99.

This Court denied RPP's motion to expedite on October 28, 2020. *Republican Party of Pa.*, slip op. at 1. However, three Justices noted that RPP could "apply to this Court to obtain th[e] modest relief" needed to preserve this Court's jurisdiction and prevent irreparable harm. *Id.* at 3–4 (Statement of Alito, J.).

Election Day took place on November 3, 2020. As of the time of this filing, no winner of the presidential election has been declared in Pennsylvania or in the country. RPP now applies for an order that would preserve this Court's jurisdiction pending certiorari review.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1257(a).

REASONS FOR GRANTING THE APPLICATION

RPP's petition for a writ of certiorari seeks review of the Pennsylvania Supreme Court's judgment insofar as it extends the General Assembly's received-by deadline and mandates a judicially crafted presumption that non-postmarked ballots were timely cast and mailed. *See* Pet. i (No. 20-542). As the petition lays out, the extension of the received-by deadline and the presumption violate the Electors and

Elections Clauses of the U.S. Constitution and are preempted by federal statutes creating a uniform nationwide federal Election Day. *See id.* at 18–33.

This Court should act to preserve its jurisdiction to resolve the questions presented. *See* 28 U.S.C. §§ 1651(a), 2101(f); *see, e.g., Lucas v. Townsend*, 486 U.S. 1301 (1988) (Kennedy, J., in chambers) (enjoining election pending appeal to Supreme Court of denial of Voting Rights Act challenge). To be sure, Respondent Secretary of State Boockvar has issued guidances that purport to direct “county boards of elections . . . to securely segregate” ballots received between 8:00 p.m. on November 3, 2020, and 5:00 p.m. on November 6, 2020, October 28 Guidance at 2, and to “count, compute, and separately tally” such ballots, A.116. But those guidances are not binding on county boards of elections; it is unclear whether all county boards are following them in the post-election chaos; and the Secretary has reserved the right to change those guidances.

Accordingly, RPP requests that this Court order Respondents Secretary Boockvar and county boards of elections, pending certiorari review or further order of this Court, to log, to segregate, and otherwise not to take any action related to any ballots received after the Election Day received-by deadline. For the reasons laid out in its petition for certiorari, RPP has demonstrated a clear right to relief. *See* Pet. 18–33 (No. 20-542). At least four Justices have already deemed these issues worthy of this Court’s attention. *See Republican Party of Pa.*, No. 20A54 (U.S. Oct. 19, 2020). In short, the Pennsylvania Supreme Court majority gave insufficient regard to—and, in fact, *usurped*—the General Assembly’s plenary authority to “direct” the “Manner”

for appointing electors for President and Vice President, U.S. Const. art. II, § 1, cl. 2, and broad power to prescribe “[t]he Times, Places and Manner” for congressional elections, *id.* art. I, § 4, cl. 1; *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 77 (2000) (per curiam); *Bush v. Gore*, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring); *Democratic Nat’l Comm. v. Wis. State Legislature*, No. 20A66, slip op. at 9 n.1 (U.S. Oct. 26, 2020) (Kavanaugh, J., concurring); *Republican Party of Pa.*, slip op. at 3 (statement of Alito, J.). The majority’s judicial extension and non-postmarked ballots presumption also are preempted by federal statutes that set a uniform nationwide federal Election Day. *See* 3 U.S.C. § 1, 2 U.S.C. §§ 1, 7. That the majority imposed these changes to the Commonwealth’s Election Code by judicial fiat at the last minute only underscores its error. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006).

Unless this Court provides the requested relief, RPP will face irreparable injury—and this Court could lose its ability to adjudicate this matter and issue a meaningful remedy with respect to the 2020 general election. If county election boards count and do not segregate late-arriving ballots, it could become impossible for this Court to repair election results tainted by illegally and untimely cast or mailed ballots. The potential loss of appellate review and remedies for this election is classic irreparable harm and “[p]erhaps the most compelling justification” for the requested relief. *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers); *cf. 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.”).

Moreover, “[t]he 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.” *Bush v. Gore*, 531 U.S. 1046, 1046–47 (2000) (Scalia, J., concurring). And here, the “issue[]” presented is “precisely whether the votes that have been ordered to be counted” under the Pennsylvania Supreme Court’s extension and non-postmarked ballot presumption are “legally cast vote[s]” under federal law and the U.S. Constitution. *Id.* The requested relief should be “granted” for this reason alone. *Id.* at 1047 (per curiam op.).

This is particularly so here, as no party will be harmed if this Court were to grant the requested relief. That relief merely preserves the ability of this Court to render a meaningful judgment on the validity of those ballots and to order the appropriate disposition of such ballots as part of that judgment.

CONCLUSION

The Court should order Respondents county boards of elections, pending certiorari review or further order of this Court, to log, to segregate, and otherwise not to take any action related to mail-in or civilian absentee ballots that arrive after the General Assembly’s Election Day received-by deadline but before the Pennsylvania Supreme Court’s judicially extended deadline.

Respectfully submitted,

Date: November 6, 2020

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