Received 10/25/2024 11:14:19 AM Supreme Court Western District

Filed 10/25/2024 11:14:19 AM Supreme Court Western District
26 WAP 2024 and additional consolidated case(s)

IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 26 WAP 2024 & 27 WAP 2024

FAITH GENSER and FRANK MATIS,

Appellees,

v.

BUTLER COUNTY BOARD OF ELECTIONS, REPUBLICAN NATIONAL COMMITTEE, REPUBLICAN PARTY OF PENNSYLVANIA, and the PENNSYLVANIA DEMOCRATIC PARTY

Appellants.

APPELLANTS' APPLICATION FOR STAY OR, IN THE ALTERNATIVE, MODIFICATION OF OCTOBER 23, 2024 JUDGMENT

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Intervenor-Appellants the Republican National Committee and the Republican Party of Pennsylvania (the "Republican Committees") support and seek to uphold free and fair elections on behalf of all Pennsylvanians.

For that reason, the Republican Committees respectfully ask the Court for a stay of its October 23, 2024 judgment, pending disposition of the Republican Committees' 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, individuals who choose to vote by mail ballot are required to comply with the General Assembly's secrecy envelope requirement. *See* Majority Opinion ("Maj. Op.") at 3.[1] The Court's judgment, however, creates a serious likelihood that Pennsylvania's already-commenced 2024 General Election—in which millions of citizens are voting for President, Congress, and scores of state and local offices—will be tainted by the unlawful counting of provisional ballots cast by individuals whose mail ballots were timely received and invalid.

In particular, the Court's judgment mandates that "the county board of elections . . . shall count [a] provisional ballot" cast by an individual whose mail ballot was timely received but lacks a secrecy envelope. *Id.* at 44-45. The judgment thus directly contravenes the General Assembly's express directive that "[a]

[1] This Application uses the term "mail ballot" to refer to both absentee ballots and mail-in ballots. *See* 25 P.S. §§ 3146.6, 3150.16.

provisional ballot shall *not* be counted if . . . the elector's absentee ballot or mail-in ballot is timely received by a county board of elections." 25 P.S. § 3050(a.4)(5)(ii)(F) (emphasis added).

The Court should stay its judgment. To begin, this Court has made clear that it "will neither impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election." *New Pa. Project Education Fund v. Schmidt*, No. 112 MM 2024, 2024 WL 4410884, at *1 (Pa. Oct. 5, 2024) (per curiam). The Election Code's strictures regarding provisional ballots have been in place and applied by county boards of elections for years. This Court should heed its statement from earlier this month and refrain from "substantial[ly] alter[ing]" the rules and procedures governing county boards' counting of ballots in the current election. *Id.*

Furthermore, the Republican Committees have a "substantial case on the merits" that the Court's judgment disregards the General Assembly's duly enacted Election Code. *Commonwealth v. Melvin*, 79 A.3d 1195, 1200 (Pa. Super. Ct. 2013) (quoting *Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz*, 573 A.2d 1001, 1003 (Pa. 1990)). In fact, by "impermissibly distort[ing]" state law, the Court's judgment violates the Elections and Electors Clauses of the U.S. Constitution. *Moore v. Harper*, 600 U.S. 1, 38 (2023) (Kavanaugh, J., concurring) (quoting *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring)); *see id.* at 34-36 (majority

opinion) (holding that federal courts must review state-court interpretations of election laws passed by state legislatures); *see also* Mundy Diss. Op. at 4-5.

Moreover, absent a stay, the Republican Committees will suffer "irreparable injury" because they will lose the right to seek review in the U.S. Supreme Court and, once the 2024 General Election has come and gone, cannot receive a remedy for election results tainted by ballots illegally counted in violation of the General Assembly's plain directives and the Elections and Electors Clauses. *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 ongoing general election. *Id.*

In the alternative, and at a minimum, the Court should safeguard the Republican Committees' right to appellate review by modifying its order. In particular, the Court should modify its order to require that any provisional ballot cast by an individual whose mail ballot was timely received but defective (i) be segregated and kept separate from all other ballots; and (ii) if counted, be counted separately from all other ballots and not be included in the official vote tally. *See Republican Party of Pa. v. Boockvar*, No. 20A84, 2020 WL 6536912, at *1 (U.S. Nov. 6, 2020) (Alito, J.) (ordering similar relief).

Because time is of the essence, the Republican Committees respectfully request that the Court expedite its decision on this Application and enter an administrative stay to preserve the status quo pending such a decision. In all events,

the Republican Committees respectfully request that the Court issue a decision on the Application no later than Sunday, October 27.

BACKGROUND

In practical effect, the Court's judgment requires all county boards of elections to count provisional ballots cast by individuals whose mail ballots were timely received but lack secrecy envelopes. As the majority acknowledged, this case and its judgment implicate Section 3050(a.4) of the Election Code. Maj. Op. at 30 ("We begin and end our analysis with the identified provisional voting provisions set forth in Section 3050(a.4)."). That provision commands that "[a] provisional ballot shall not be counted if . . . the elector's absentee ballot or mail-in ballot is timely received by a county board of elections." 25 P.S. § 3050(a.4)(5)(ii)(F). Nonetheless, the majority held that the provisional ballots cast by the plaintiffs in this case—whose "naked" and invalid mail ballots were timely received—must be counted. *See* Maj. Op. at 44-45; 25 P.S. § 3150.16(a) (establishing secrecy envelope rule).

The Republican Committees now seek a stay or, in the alternative, modification of that judgment pending disposition of their request for further review in the U.S. Supreme Court.

ARGUMENT

The Court's judgment requiring county boards to count provisional ballots cast by individuals whose naked mail ballots were timely received "fundamentally

alters the nature of the election" by giving individuals who have failed to comply with the General Assembly's secrecy envelope requirement an unauthorized do-over. *RNC v. DNC*, 589 U.S. 423, 426 (2020) (per curiam). The Court should stay, or at a minimum modify, its judgment for at least four reasons.

First, regardless of the Court's view of the merits, the judgment improperly changes election rules and procedures in the middle of an ongoing election. *See New Pa. Proj.*, 2024 WL 4410884, at *1.

Second, the Republican Committees have a "substantial case on the merits" that the Court's judgment violates the U.S. Constitution. *Melvin*, 79 A.3d at 1200; Mundy Diss. Op. at 4-5.

Third, the equities also warrant a stay. The Republican Committees 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 ongoing election. *Id.*; *see also Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

Finally, even if the Court denies a stay, it should modify the judgment to preserve the Republican Committees' right to seek review in the U.S. Supreme Court. *See Republican Party of Pa.*, 2020 WL 6536912, at *1.

I. THIS COURT SHOULD STAY ITS JUDGMENT UNDER ITS RECENT DECISIONS ADOPTING THE *PURCELL* DOCTRINE

Regardless of its view of the merits, this Court should stay its judgment and avoid altering election rules and procedures in the midst of the ongoing 2024 General Election. Earlier this month, the Court declared that it "will neither impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election." *New Pa. Proj.*, 2024 WL 4410884, at *1. The Election Code's rules regarding provisional ballots have long specified that such a ballot "shall not be counted" when the individual's mail ballot has been timely received. 25 P.S. § 3050(a.4)(5)(ii)(F). That is the rule that should apply to this election.

This Court's refusal to "substantial[ly] alter[]" voting rules "during the pendency of an ongoing election" makes sense. *New Pa. Project*, 2024 WL 4410884, at *1 ("Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so." (alteration omitted) (quoting *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016))). The U.S. Supreme Court has repeatedly warned that courts should not make last-minute changes to election-administration rules. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). Such last-minute changes by court order can engender widespread "voter confusion," erode public "[c]onfidence in the integrity of our electoral processes," and create an "incentive to

remain away from the polls." *Id.* These risks of "voter confusion" and an erosion of public confidence, *id.*, are only increased if the Court declines to stay its judgment but the U.S. Supreme Court later grants a stay, *see RNC*, 589 U.S. at 425; *Merrill v. People First of Ala.*, 141 S. Ct. 90 (2020) (staying, nine days before the election, a preliminary injunction entered 29 days before the election).

Here, by requiring county boards across the Commonwealth to count provisional ballots cast by individuals whose naked mail ballots were timely received, this Court's judgment effected a "substantial alteration[] to existing laws and procedures during the pendency of an ongoing election." *New Pa. Proj.*, 2024 WL 4410884, at *1. Indeed, many county boards do not even permit individuals who submit a defective and timely mail ballot to cast a provisional ballot, or count such a provisional ballot. The Court's judgment thus requires county boards to "alter[]" these "procedures"—and to do so in the midst of the ongoing election. *Id.* The Court should not "countenance" this outcome in this case, just as it has declined to countenance it in other cases. *Id.* For this reason alone, it should stay the judgment.

II. THE REPUBLICAN COMMITTEES HAVE A SUBSTANTIAL CASE ON THE MERITS THAT THE COURT'S JUDGMENT VIOLATES THE U.S. CONSTITUTION

The Court should grant a stay because the Republican Committees have a "substantial case on the merits" that the Court's judgment violates the U.S.

Constitution. *Melvin*, 79 A.3d at 1200; *Hollingsworth*, 558 U.S. at 190; *see also* Mundy Diss. Op. at 4-5.

A. The Elections And Electors Clauses Require Adherence To The Election Code's Prohibition On Counting A Provisional Ballot Whenever The Individual's Mail Ballot Was Timely Received.

The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. The Electors Clause vests "the Legislature" of "[e]ach State" with the authority to determine the "Manner" in which the State's presidential electors are appointed. *Id.* art. II, § 1, cl. 2. These Clauses "expressly vest[] power to carry out [their] provisions in 'the Legislature' of each State." *Moore*, 600 U.S. at 34.

In other words, "state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules." *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring). Accordingly, "state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." *Moore*, 600 U.S. at 36. And when a "state court impermissibly distort[s] state law beyond . . . a fair reading," the Constitution requires the U.S. Supreme Court to step in and correct that error. *Id.* at 38-39 (Kavanaugh, J., concurring) (internal quotation marks omitted).

The Republican Committees have a substantial case on the merits that the majority's interpretation "impermissibly distort[s]" the General Assembly's duly enacted Election Code. *Id.* at 38 (quoting *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring)); *see also* Mundy Diss. Op. at 4-5. *First*, as three Justices of this Court agree, *see* Brobson Diss. Op. at 24, the General Assembly's mandate here could not have been clearer: "A provisional ballot *shall not be counted* . . . if the elector's absentee ballot or mail-in ballot is *timely received* by a county board of elections." 25 P.S. § 3050(a.4)(5)(ii)(F) (emphases added). Thus, a county board may not count any provisional ballot cast by an individual whose mail ballot the county board "timely received" before the deadline of 8 p.m. on Election Day. *Id.*

Nothing in this plain text uses the terms, much less turns on whether, the individual's mail ballot is "valid," "void," or will be "counted"; instead, the prohibition on counting a provisional ballot arises whenever the individual's mail ballot has been "timely received." *Id.* "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S. § 1921(b). There is no ambiguity here. So long as the individual's mail ballot—even a naked mail ballot—is "timely received," any provisional ballot they cast "shall not be counted." 25 P.S. § 3050(a.4)(5)(ii)(F).

Second, this plain meaning is confirmed by another portion of Section 3050.

In particular, every individual who casts a provisional ballot must first sign an affidavit that states:

> I do solemnly swear or affirm that my name is _____, that my date of birth is _____, and at the time that I registered I resided at _____ in the municipality of _____ in _____ County of the Commonwealth of Pennsylvania and that **this is the only ballot that I cast in this election**.

25 P.S. § 3050(a.4)(2) (emphasis added). Therefore, every individual who seeks to cast a provisional ballot in order to cure a deficient mail ballot and signs this affidavit makes a false statement: Any such individual is attempting to vote provisionally *because they cast another ballot* in the election that is defective, not because they *did not* cast another ballot.

And *third*, this Court had already held that there is no "constitutional or statutory basis" to require county boards to permit curing of mail-ballot defects. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 373-74 (Pa. 2020). It is far too late for this Court to reverse course now, *see infra* Part I, but that is what its latest judgment does. When a county board allows an individual who has submitted a timely naked mail ballot to submit a provisional ballot that will be counted, it has decided to give that individual an "opportunity to cure" their noncompliance with the Election Code. *Pa. Democratic Party*, 238 A.3d at 374. But the decision to provide that opportunity is "best left to the legislative branch of Pennsylvania's government"—not county boards or this Court. *Id.* And although the majority says

that this unambiguous holding "did [not] consider provisional voting," Maj Op. at 26, *Pennsylvania Democratic Party* would be a very strange decision indeed if, in fact, the Election Code *already* allowed individuals to cast corrective ballots to remedy their naked mail ballots.

B. The Majority Misinterpreted The Election Code.

The majority's decision to the contrary—that county boards must count provisional ballots cast by individuals whose mail ballots were timely received—is incorrect.

First, the majority wrongly asserts that a naked mail ballot is *nonexistent* such that a county board cannot "receive[]" one. 25 P.S. § 3050(a.4)(5)(ii)(F). The majority reaches that conclusion by relying on dictionary definitions of the word "void." Maj. Op. at 35. And because "void," in the majority's view, means having "no legal effect," *id.*, a naked mail ballot must be invisible to the Election Code, such that it can never be "timely received," 25 P.S. § 3050(a.4)(5)(ii)(F).

The problem for the majority's interpretation is that the word "void" does not appear in any relevant part of the Election Code. The only provision using "void" the majority identifies is Section 3146.8(g)(4)(ii), which declares a mail ballot "void" if the secrecy envelope "contain[s] any text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference." *Id.* § 3146.8(g)(4)(ii); *see also* Maj. Op. at 31. But, as the principal

dissent points out, *see* Brobson Diss. Op. at 18, that provision has nothing to do with this case. The mail ballots submitted by plaintiffs did not have any "text, mark or symbol" on their secrecy envelopes, because they had *no* secrecy envelope. The Election Code does *not* describe their naked mail ballots as "void."

Instead of relying on the Election Code, the majority references past decisions in which this Court described the consequence of disobeying a mandatory requirement as rendering the proceeding or ballot "void." *See In re Nomination Papers of Am. Lab. Party*, 44 A.2d 48, 49 (Pa. 1945); *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1234 (Pa. 2004). But those opinions were merely making the point that failure to comply with a mandatory requirement renders the proceeding or ballot invalid—not that they should be considered entirely nonexistent for all purposes. *See CBS v. FCC*, 453 U.S. 367, 385 (1981) ("[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute." (citation omitted)). In any event, the Elections and Electors Clauses vest the authority to make the rules for federal elections in *the General Assembly*, not in this Court.

And regardless, even if the definition of "void" were relevant, the principal dissent correctly points out that there is "no practical difference between the word 'void' . . . and 'disqualified.'" Brobson Diss. Op. at 18. The plaintiffs' naked mail ballots failed to comply with the mandatory secrecy envelope requirement, and thus

cannot be counted. That does not make them any less "timely received." 25 P.S. § 3050(a.4)(5)(ii)(F).

Second, the majority attempts to bolster its conclusion by suggesting that it is required by the Pennsylvania Constitution. According to the majority, the Republican Committees' interpretation of the Election Code "is not reconcilable with the right of franchise." Maj. Op. at 44 (citing Pa. Const. art. I, § 5).

That too is wrong. "Even the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right." *Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Opinion of Alito, J.). An individual is not disenfranchised when he is not permitted to vote because he failed to register or showed up at the polls on the Wednesday after Election Day. Neither is he disenfranchised when, because he failed to comply with Pennsylvania's commonsense secrecy envelope rule, his mail ballot is not counted. The "right of franchise," Maj. Op. at 44, does not require that such individuals receive a second chance, *see Pa. Democratic Party*, 238 A.3d at 373-74 (holding that there is "no constitutional or statutory basis" to require curing).

In sum, the General Assembly was clear when it commanded that, when a naked mail ballot is "timely received" by the county board of elections, any provisional ballot cast by that individual "shall not be counted." 25 P.S. § 3050(a.4)(5)(ii)(F). By interpreting that provision to mean the opposite, the

majority's judgment "impermissibly distort[s]" the Election Code "beyond . . . a fair reading" in violation of the Elections and Electors Clauses of the U.S. Constitution. *Moore*, 600 U.S. at 38-39 (Kavanaugh, J., concurring) (quoting *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring)); Mundy Diss. Op. at 4-5. The Republican Committees' substantial case on the merits warrants a stay.

III. THE EQUITIES WEIGH STRONGLY IN FAVOR OF A STAY

The equities also weigh strongly in favor of granting a stay. *First*, the Republican Committees would suffer "irreparable injury," *Melvin*, 79 A.3d at 1200, because without a stay, their request for review in the U.S. Supreme Court will become moot and they will forever lose their ability to obtain such review. Absentee and mail-in voting have already commenced in Pennsylvania, and Election Day is only 11 days away. The U.S. Supreme Court likely will not resolve the Republican Committees' request for review, much less decide the merits, even by Election Day. And once the current election has come and gone, it will be impossible to repair election results that have been tainted by illegally counted 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 judgment are "legally cast vote[s]" under the U.S. Constitution. *Bush v. Gore*, 531 U.S. 1046, 1046 (2000) (Scalia, J., concurring). "The counting of votes that are of questionable legality . . . threaten[s] irreparable harm" not only to the Republican Committees, their voters, and their supported candidates, but also to all Pennsylvanians and even "the country, by casting a cloud upon . . . the legitimacy of the [nationwide Presidential] election" in which Pennsylvania's electoral votes may prove dispositive. *Id.* A stay should be "granted" for this reason alone. *Id.* (per curiam op.).

Third, a judgment barring county boards "from conducting this year's elections pursuant to a statute enacted by the Legislature" would "seriously and irreparably harm the State," the General Assembly, and the Commonwealth's voters. *Abbott v. Perez*, 585 U.S. 579, 602-03 (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 (6th Cir. 2020).

Fourth, no party would be "substantially harm[ed]" by the grant of a stay. *Melvin*, 79 A.3d at 1200. No one disputes that the secrecy envelope requirement is mandatory and that a failure to comply precludes counting of the mail ballot. *See Pa. Democratic Party*, 238 A.3d at 372-80. Nor can anyone seriously claim that

complying with the secrecy envelope requirement is difficult. "[E]very voting rule imposes a burden of *some* sort," *Brnovich v. DNC,* 594 U.S. 647, 669 (2021) (emphasis added), and here, the burden is not even significant, let alone "substantially harm[ful]" to anyone, *Melvin*, 79 A.3d at 1200.

For all of these reasons, the equities also warrant a stay.

IV. IN THE ALTERNATIVE, THE COURT SHOULD MODIFY ITS JUDGMENT.

Finally, in the alternative, and at a minimum, the Court should modify its judgment to preserve the Republican Committees' right to seek review in the U.S. Supreme Court. *See, e.g.*, *John Doe Agency*, 488 U.S. at 1309 (Marshall, J., in chambers); *accord Chafin*, 568 U.S. at 178. In particular, the Court should modify its judgment to require that any provisional ballot cast by an individual whose mail ballot was timely received but defective (i) be segregated and kept separate from all other ballots by the county board; and (ii) if counted by the county board, be counted separately from all other ballots and not be included in the official vote tally.

Indeed, Justice Alito granted this very relief in 2020, when the Republican Party of Pennsylvania sought review of this Court's extension of the mail ballot receipt deadline on the basis that the extension violated the Elections and Electors Clauses. *See Republican Party of Pa.*, 2020 WL 6536912, at *1 (Alito, J.). Here as well, such a modification would preserve the Republican Committees' right to seek further review: It would permit county boards to compute the final vote tally

lawfully and accurately if the U.S. Supreme Court confirms that the Court's judgment violates the U.S. Constitution and, thus, that provisional ballots cast by individuals whose defective mail ballot was timely received may not be included in the official vote tally. *See id.*; *compare supra* at 14-15.

CONCLUSION

The Court should grant a stay or, at a minimum, modify the judgment.

Dated: October 25, 2024

Respectfully submitted,

/s/ Kathleen A. Gallagher

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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-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2024, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

/s/ Kathleen A. Gallagher
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IN THE SUPREME COURT OF PENNSYLVANIA

FAITH GENSER and FRANK MATIS, Appellees, v. BUTLER COUNTY BOARD OF ELECTIONS, *et al.*, Appellants.	Case Nos. 26 WAP 2024 & 27 WAP 2024

PROPOSED ORDER

AND NOW, this ___ day of _____, 2024, upon consideration of the Republican Party of Pennsylvania's Application for Stay of October 23, 2024 Judgment, it is hereby ORDERED, ADJUDGED, AND DECREED that the Application is GRANTED.

BY THE COURT:

_____