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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 133 MM 2020

PENNSYLVANIA DEMOCRATIC PARTY, et al.,
Petitioners,

v.

KATHY BOOCKVAR, et al.,
Respondents.

APPLICATION FOR STAY OF COURT'S OPINION AND ORDER OF SEPTEMBER 17, 2020 BY INTERVENOR RESPONDENTS JOSEPH B. SCARNATI III, PRESIDENT PRO TEMPORE, JAKE CORMAN, MAJORITY LEADER OF THE PENNSYLVANIA SENATE, BRYAN CUTLER, SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, AND KERRY BENNINGHOFF, MAJORITY LEADER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES

Intervenor Respondents, Joseph B. Scarnati III, Pennsylvania Senate President Pro Tempore, and Jake Corman, Senate Majority Leader, and Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives,[1]

[1] One of the issues that Speaker Cutler and Majority Leader Benninghoff ("the House Leaders") will appeal to the Supreme Court of the United States is this Court's inexplicable denial of their intervention application in a footnote of the Opinion. The House Leaders' intervention application was timely filed, and was unopposed, with even the Petitioners agreeing that the House Leaders' intervention was appropriate. *See Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020, Response to Motions to Intervene of Senator Costa and Representatives Dermody, Cutler, and Benninghoff (filed Sept. 9, 2020) ("Petitioners believe the motions to intervene filed by Proposed

(together "Intervenor Respondents") by and through the undersigned counsel, jointly submit this Application for Stay of this Court's Opinion and Order of September 17, 2020 on two grounds.

First, the decision violates federal law, which establishes "the Tuesday next after the 1st Monday in November" as a single Federal Election Day, which falls on November 3rd this year. 2 U.S.C. § 7; *see also* 2 U.S.C. § 1; 3 U.S.C. § 1. These provisions mandate holding all elections for Congress and the Presidency on a single day throughout the Union. However, Footnote 26 and page 63 of this Court's Slip Opinion extend Election Day past November 3, 2020. It does this by forcing election officials to accept ballots received after election day even if these ballots lack a legible postmark. This permits ballots to be both voted and counted after election day, extending the General Election past November 3, 2020. This clearly violates 2 U.S.C. § 7.

Intervenors offer the same issues as the motions decided by the Court in its September 3 Order and have no objection to the intervention of the Proposed Intervenors either as individuals or as leaders of their respective caucuses, consistent with this Court's order of September 3."). The House Leaders were also permitted to intervene by this Court in another case concerning the received-by deadline. *See Crossey, et al. v. Boockvar, et al.*, No. 108 MM 2020. Despite there having been no reasonable basis for the petition's denial, the petition to intervene was denied by this Court. As United States Supreme Court precedent supports a writ of certiorari being sought by anyone with an interest in the outcome of a matter, including wrongly denied intervenors, the House Leaders join in this Petition to both demonstrate the unanimity of the General Assembly in this matter, and because they plan to seek a writ of certiorari from the United States Supreme Court. *See United States v. Int'l Bhd. of Teamsters*, 931 F.2d 177, 183–84 (2d Cir.1991) (quoting *Hispanic Soc'y v. N.Y. City Police Dep't*, 806 F.2d 1147, 1152 (2d Cir.1986), *aff'd*, *Marino v. Ortiz*, 484 U.S. 301, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988)); *Kaplan v. Rand*, 192 F.3d 60, 67 (2d Cir.1999) ((("The question therefore is whether the putative appellant can identify an 'affected interest.'").

Second, the decision violates the Elections Clause, Article I, § 4 cl. 1 of the United States Constitution, by seizing control of setting the times, places, and manner of federal elections from the state legislature. Although this Court has the final say on the substantive law of Pennsylvania, the Elections Clause of the United States Constitution vests the authority to regulate the times, places, and manner, of federal elections to Pennsylvania's General Assembly, subject only to alteration by Congress, not this Court. U.S. Const. Art. I, § 4. The General Assembly has not delegated authority to alter these regulations to the Pennsylvania Judiciary, yet this Court's decision fundamentally changes the policy decisions inherent in the General Assembly's duly enacted election laws. This Court has substituted its will for the will of the General Assembly and this substitution usurps the authority vested in the General Assembly by the Elections Clause. U.S. Const. Art. I, § 4.

For these reasons, Intervenor Respondents request that this Court stay the portions of its decision: (1) forcing election officials to accept ballots received after election day to be counted even if they lack a legible postmark; and, (2) extending the absentee and mail-in ballot deadline past Election Day, pending the disposition of Intervenor Respondents' forthcoming petition for writ of certiorari to the United States Supreme Court.

ARGUMENT

I. THE COURT SHOULD STAY ITS DECISION PENDING APPEAL.

On an application for stay pending appeal, the movant must (1) "make a substantial case on the merits," (2) "show that without the stay, irreparable injury will be suffered," and (3) that "the issuance of the stay will not substantially harm other interested parties in the proceedings and will not adversely affect the public interest." *Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz*, 573 A.2d 1001, 1003 (1990); *see also Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (enunciating similar considerations for stay applications to the United States Supreme Court). All of these elements are met here.

A. Intervenor Respondents Are Likely To Succeed On Appeal.

There is, at minimum, a "reasonable probability" that the United States Supreme Court will take the Intervenor Respondents' forthcoming appeal and a "fair prospect" that it will reverse this Court's decision. *See Hollingsworth*, 558 U.S. at 190 (enunciating stay standards). The Court's decision violates federal law because its mandate to accept late ballots lacking a legible postmark permits individuals to cast votes after Election Day, creating multiple election days in contravention of 2 U.S.C. § 7, 2 U.S.C. § 1, and 3 U.S.C. § 1. The Court's decision also intrudes on power delegated expressly to Pennsylvania's legislative processes under the

Elections Clause of the federal Constitution, presenting an issue of federal law long overdue for definitive resolution by the United States Supreme Court.

1. The Decision Violates Federal Law By Permitting Votes After Election Day.

The Elections Clause also provides Congress with the authority to make laws prescribing "[t]he times, places and manner of holding elections for senators and representatives . . . ." U.S. Const. art. I, § 4, cl. 1. Consistent with the Elections Clause, in 1872 Congress established a national uniform election day for choosing members of the House of Representatives by enacting, which provides: "[t]he Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter." 2 U.S.C. § 7.

Likewise, Congress has set the same date for the selection of presidential electors: "[t]he electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President." 3 U.S.C. § 1; *see also* U.S. Const. art. II, § 1, cl. 4 ("The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States."). Upon ratification of the Seventeenth Amendment, Congress adopted a similar provision respecting the election of

Senators. *See* 2 U.S.C. § 1; *see also Foster v. Love*, 522 U.S. 67, 69-70 (1997). In combination these provisions "mandate[] holding all elections for Congress and the Presidency on a single day throughout the Union." *Foster*, 522 U.S. at 69-70.

Although these statutes clearly establish one uniform "Federal Election Day" throughout the nation, the omission of a definition of the term "election" has led the United States Supreme Court to comment on the opacity of the statutory language at issue in this case, particularly regarding the precise acts that the statutes require a State to perform on that day. *Foster*, 522 U.S. at 72. Accordingly, courts have turned to the statutes' legislative history for guidance. *See Blum v. Stenson*, 465 U.S. 886, 896 (1984)).

By establishing a uniform date for holding federal elections, Congress sought "to remedy more than one evil arising from the election of members of congress occurring at different times in the different states." *Ex Parte Yarbrough*, 110 U.S. 651, 661 (1884). Specifically, a review of the legislative history of these provisions demonstrates that Congress wanted to, *inter alia*, prevent States that voted early from unduly influencing those voting later and to combat fraud by minimizing the opportunity for voters to cast ballots in more than one election. *Love*, 90 F.3d at 1029; *Busbee v. Smith*, 549 F. Supp. 494, 524 (D.D.C. 1982) (three-judge court), *aff'd*, 459 U.S. 1166 (1983). These objectives reflect the importance voting played in the political debates of the Reconstruction era. *Voting Integrity Project, Inc. v.*

Keisling, 259 F.3d 1169, 1172 (9th Cir. 2001) (placing congressional debates over enactment of 2 U.S.C. § 7 and allowing voting over multiple days in their historical context).

In advancing these rationales, proponents expressed their understanding of what establishing a national, uniform federal election day meant. Representative Butler of Massachusetts, who authored the 1872 law, articulated his aim in sponsoring the legislation:

> The object of this amendment is to provide a uniform time of electing Representatives in Congress . . . . But on account of the facility for colonization and repeating among the large central States, New York holding its election in November, and Ohio, Pennsylvania, and Indiana holding their elections in October, the privilege is allowed the border States, if any man is so disposed, of throwing voters across from one into the other. *I think it will be fair for everybody that on the day when one votes all should vote, and that the whole question should be decided then.*

Cong. Globe, 42d Cong., 2d Sess. 112 (1871) (emphasis added). Representative Butler further elaborated:

> Unless we do fix some time at which, as a rule, Representatives shall be elected, it will be in the power of each State to fix upon a different day, and we may have a canvass going on all over the Union at different times. It gives some states undue advantage. It gives some parties undue advantage.

Cong. Globe, 42d Cong., 2d Sess. 141 (1871).

In congressional debate over establishing a single national election day, the Senate even defeated an amendment that would have permitted voting for

Representatives over multiple days in states that conducted elections for their own officers on more than one day. Cong. Globe, 42d Cong., 2d Sess. 676-77 (1871).

In *Foster v. Love*, the United States Supreme Court considered whether Louisiana's "open primary" statute conflicted with federal election statutes. 522 U.S. 67, 68 (1997). Under Louisiana law, an open primary was held for congressional offices in October. *Id*. All candidates, regardless of party, appeared on the same ballot. *Id*. If any candidate received a majority of votes in the primary, he or she was considered "elected" without any further action on federal election day. *Id*. The Court held that Louisiana's open primary system conflicted with federal election statutes because the "final selection" of candidates could be "concluded as a matter of law before the federal election day, with no act in law or in fact to take place on the date chosen by Congress . . ." *Id*. at 72. *Foster* is instructive on the meaning of "election" under 2 U.S.C. § 7. 522 U.S. at 68. The Court observed that:

> When the federal statutes speak of "the election" of a Senator or Representative, they plainly refer to *the combined actions of voters and officials meant to make a final selection of an officeholder* . . . . See N. Webster, An American Dictionary of the English Language 433 (C. Goodrich & N. Porter eds. 1869) (defining "election" as 'the act of choosing a person to fill an office'). By establishing a particular day as 'the day' on which these actions must take place, the statutes simply regulate the time of the election, a matter on which the Constitution explicitly gives Congress the final say.

Id. at 71-72 (emphasis added). This Court declined to identify these combined acts of voters and officials. *Id*. at 72. *But see Lamone v. Capozzi*, 396 Md. 53, 83-84 (Md.

2006) ("The Constitution contemplates an election in terms of the voter, not in terms of the election process. Moreover . . . there is no dispute that the 'combined actions' must occur, *that voting must end*, on federal election day." (emphasis added)) (interpreting 2 U.S.C. § 7, *Foster*, 522 U.S. 67, and Maryland Law). *See also Fladell v. Elections Canvassing Comm'n of Fla*., CL 00-10965 AB, CL 00-10970 AB, CL 00-10988 AB, CL 00-10992 AB, CL 00-11000 AB, 2000 Fla. Cir. LEXIS 768, *6-*17 (Fla. 15th Jud. Cir. 2000) ("[T]he Constitution of the United States . . . require[s] that Presidential 'electors' be elected on the *same day* throughout the United States. (emphasis added)).

a. Requiring Counties To Count Ballots That Are Received By Friday, November 6, 2020, Even Absent A Postmark Establishing The Ballot Was Mailed on Election Day, Violates Federal Law.

This Court's decision provides for a three-day extension of the federal election in contravention of federal law. Specifically, the decision forces election officials to accept ballots received by them after election day even if the ballots "lack a postmark or other proof of mailing, or for which the postmark or other proof of mailing is illegible." Slip Op. at 37, n. 26. *See also id*. at 63. This functionally enables votes that are cast *after* election day to be counted if no legible postmark is placed on the envelope. This creates a scenario where votes will be cast *and* counted on days *after* election day, and is especially troubling given this Court's sanctioning of unmanned, unsecured dropboxes in contravention of the statutorily-defined procedures for mail-

in voting. *Id*. at 20. The casting *and* counting of ballots unquestionably constitutes an "election" under federal law. *See Foster*. 522 U.S. 67. Accordingly, this Court's decision creates multiple federal election days, including after Election Day, and raises the same concerns of fraud, undue advantage, and non-uniformity which led to the creation of a Federal Election Day. *See* Cong. Globe, 42d Cong., 2d Sess. 112 (1871); Cong. Globe, 42d Cong., 2d Sess. 141 (1871); *see also Ex Parte Yarbrough*, 110 U.S. at 661; *Love*, 90 F.3d at 1029; *Busbee*, 549 F. Supp. at 524.

Moreover, the fact that courts have determined that early voting procedures are consistent with federal law does not save this Court's decision from illegality. In those cases, early voting conducted prior to election day was legal because "the final selection [of candidates] is not made before the federal election day." *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 776 (5th Cir. 2000). *See also Millsaps v. Thompson*, 259 F.3d 535, 545-46 (5th Cir. 2001); *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d at 1175-76. This is because the word "election" in 2 U.S.C. § 7, as interpreted by the United States Supreme Court, means "the combined actions of voters and officials meant to make a final selection of an office holder." *Foster*, 522 U.S. at 71. This Court's decision, which permits voting *after* Election Day, is clearly distinguishable from *early* voting cases because voting after election day is a combined action of voters and officials that makes a final selection of an office holder. *See Foster*, 522 U.S. at 71. In early voting, voters cast votes *prior to* election

day, but, in contrast to the *post-election* voting in this case, those votes are not counted immediately. Rather, election officials hold the ballots of early voters until the close of all polling places on election day, then record the early votes along with absentee votes. *See, e.g.*, *Millsaps v. Thompson*, 259 F.3d at 537. Here, under this Court's decision, individuals are able to vote and have those votes counted by election officials *after election day*. *See Foster*, 522 U.S. at 71. Because a final selection of an office holder cannot be made until all votes are counted, post-election voting necessarily requires a final selection on a day other than election day. This creates multiple election days in violation of 2 U.S.C. § 7, 2 U.S.C. § 1, and 3 U.S.C. § 1.

Accordingly, there is more than a "reasonable probability" that the United States Supreme Court will hear Intervenor Respondents' forthcoming appeal and at least a "fair prospect" that it will reverse this Court's decision. *See Hollingsworth*, 558 U.S. at 190.

2. <u>Intervenor Respondents are Likely to Succeed on its Appeal Because This Court's Decision Violates The Elections Clause.</u>

This Court's decision also violates the Elections Clause of the United States Constitution. *See* Const. art. I, § 4, cl. 1. 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*; but the Congress may at any time by law make or alter such regulations, except as to the places of chusing

Senators." U.S. Const. art. I, § 4, cl. 1 (emphasis added). The Elections Clause commits power to regulate congressional elections to "the legislature" of each state and to "Congress." *Id*.

a. *The Plain Text and Historical Context of the Elections Clause Subverts this Court's Assumption of Legislative Power.*

The Constitution does not delegate any authority regarding the time, place and manner of elections to state courts. In fact, the Clause specifically excludes them. The principle that state courts are not delegated any Elections Clause authority is plain from the provision's text. The word "legislature" was "not one 'of uncertain meaning when incorporated into the Constitution.'" *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)). The term "legislature" necessarily differentiates between that body and the "State" of which it is only a subpart. By empowering one body of the state to prescribe election rules, the Constitution impliedly denies it to others.

Aside from its plain language, the Elections Clause denies authority to state judiciaries through several contextual reference points. For example, the power to regulate federal elections is incidental to the Constitution's establishment of a federal government; it is not an inherent state power. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 806 (1995); *Cook v. Gralike*, 531 U.S. 510, 522 (2001). Thus, it "had to be delegated to, rather than reserved by, the states." *Cook*, 531 U.S.

at 522 (quotations omitted). Because the delegation necessarily confines the scope of power, the term "legislature" is "a limitation upon the state in respect of any attempt to circumscribe the legislative power" over federal elections. *McPherson v. Blacker*, 146 U.S. 1, 25 (1892).

Further, in referencing the "Times, Places and Manner" of elections, the Elections Clause plainly references what English Parliamentary law called "methods of proceeding" as to the "time and place of election" to the House of Commons. *See* William Blackstone, 1 Blackstone Commentaries *158-59, *170-174. Those "time and place" "methods" were in turn completely within parliamentary control, beyond the reach of "the Common Law" and "the Judges." George Petyt, Lex Parliamentaria, 9, 36-37, 70, 74-75, 80 (1690); William Blackstone, 1 Blackstone Commentaries, *146-47. By delegating the procedures of congressional elections to legislative bodies, the Elections Clause carried forward that English law tradition of maintaining legislative control, and excluding judicial control, over such matters.

Another contextual reference point for the Elections Clause comes from the framing debates and early commentaries. Though all concerned parties appreciated that state legislatures might abuse their authority over election rules, none of them even proposed that other branches of state government may exercise a check on such abuse. Instead, they viewed Congress as the *exclusive* check. *See* The Federalist No. 59 (Alexander Hamilton). That check, expressed directly in the Constitution's text,

parallels the judicial-type functions Congress performs in other quintessentially legislative affairs, as described in adjacent constitutional provisions. *See, e.g.*, U.S. Const. art. I, §§ 2-5. It was furthermore assumed that even Congress would exercise its prerogative to override state legislatures' regulations only "from an extreme necessity, or a very urgent exigency." 1 J. Story, Commentaries on the Constitution of the United States § 820 (3d ed. 1858). This was because the power "will be so desirable a boon" in the "possession" of "the state legislatures" that "the exercise of power" in Congress would (it was thought) be highly unpopular. *Id*. That state courts might deprive state legislatures of this "desirable . . . boon" in their "possession" was beyond belief. *Id.*

While the authority to regulate congressional elections is conferred by the federal Constitution on the state legislatures via the Elections Clause, the states also retain their own plenary power to regulate state elections. *See Tex. Democratic Party v. Abbott*, 961 F.3d 389 at 29 (5th Cir. 2020); *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986). In either event, the power to regulate and administer elections is committed to "Congress and state legislatures—not courts." *Coalition v. Raffensperger*, No. 1:20-cv-1677-TCB, 2020 U.S. Dist. LEXIS 86996 at *8-9 (N.D. Ga. May 14, 2020); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves

to prevent the judicial process from being used to usurp the powers of the political branches.").

A final point of reference for the Elections Clause comes from its sister provision found in U.S. Const. art. I, § 1, cl. 2 (the "Electors Clause"). The Electors Clause particularly "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment of electors. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). "Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance." *Bush v. Gore*, 531 U.S. 98, 112–13 (2000) (Rehnquist, J., concurring). "A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question," including when such departure is carried out by the state judiciary. *Id.* at 113. "[W]ith respect to a Presidential election," state courts must be "mindful of the legislature's role under Article II in choosing the manner of appointing electors." *Id.* at 114.

Therefore, the plain language, context, and history of the Elections Clause clearly demonstrate that the Legislature has the primary authority to regulate elections checked only by the United States Congress.

b. *This Court Does Not Possess Legislative Power Pursuant To The Elections Clause.*

"[T]he duty of courts is to interpret laws, not to make them." *Watson v. Witkin*, 22 A.2d 17, 23 (Pa. 1941). As such, this Court does not exercise a legislative function

when it decides cases. And, contrary to what this Court implied in its Opinion, the General Assembly has never delegated its authority to regulate elections in a blanket manner to the judiciary. *Cf.* Slip Op. at 35 (citing 25 P.S. § 3046; In re General Election-1985, 531 A.2d at 839). Accordingly, this Court has no authority to alter the General Assembly's duly enacted prescriptions for federal elections in Pennsylvania, and doing so violated Article I, Section 4 of the United States Constitution.

Moreover, the fact that the Court ruled solely on Pennsylvania substantive law does not save it from violating the Elections Clause. This frustrates the Elections Clause's express delegation of authority to "the legislature" because an alleged conflict between the state constitution's policy and the state legislature's policy requires the state courts to pick one policy over another. This would instigate a battle between the state's courts and its legislature, and the Elections Clause plainly sides with "the legislature" in that dispute.

A state court's enforcement of constitutional policy prescriptions results in court-made policy superseding legislative policy. Inferences courts draw from constitutional rules may be remote and tenuous, whereas an actual enacted policy undoubtedly reflects the choices of "the legislature." Accordingly, the United States Supreme Court has never held that state constitutional provisions purporting to set time, place, or manner rules or policy limitations on those rules can nullify contrary

acts of a legislature pursuant to their authority under the Elections Clause. Indeed, many other state courts, including this one, have concluded that a state constitution may not "impose a restraint upon the power of prescribing the manner of holding [federal] elections." *Chase v. Miller*, 41 Pa. 403, 409 (1862); *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887). *See also In re Op. of Justices*, 45 N.H. 595, 601-07 (N.H. 1864); *Wood v. State*, 142 So. 747, 755 (Miss. 1932) (concurring opinion); *Thomas Cooley et al.*, TREATISE ON THE CONSTITUTIONAL LIMITATION WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION 903 & n.1 (1903).

c. This Court's Extension Of the Ballot Receipt Deadline Violates The Elections Clause.

Pennsylvania's period for absentee and mail-in ballot submission is unquestionably a regulation of the times, places, or manner of elections, U.S. Const. Art. I, § 4, because it regulates the time during which absentee and mail-in ballots may be submitted to elections officials. *See* 25 P.S. § 3150.16(c).[2] This deadline is a quintessential example of the General Assembly exercising its authority under the Elections Clause. *See In re Nomination of Driscoll*, 847 A.2d 44, 45 n.1 (Pa. 2004) (stating that a candidate for federal office must "abide by the election procedures in

[2] Pennsylvania used to require that absentee ballots be received by the Friday before the election. The General Assembly changed that in the fall of 2019. *See* Act 77. The legislature also made changes again to Pennsylvania's election code in March of 2020 as the legislature considered the impact of COVID on the primary. ACT 12. No further change in the receipt deadline was included in that legislation.

the Pennsylvania Election Code" because, unless altered by Congress, Pennsylvania's General Assembly prescribes the Times, Places and Manner of holding Elections for Senators and Representatives); *In re Guzzardi*, 99 A.3d 381, 385-86 (Pa. 2014) (stating that the legislature enacts election related deadlines for the orderly, efficient, and fair proceedings of elections as well as creating much needed stability). This federal constitutional grant of authority provides state legislatures with "a wide discretion in the formulation of a system for the choice by the people of representatives in Congress." *In re Nomination of Driscoll*, 847 A.2d at 45 n.1.

This Court was "not asked to interpret the statutory language establishing the received-by deadline for mail-in ballots" because "*there is no ambiguity regarding the deadline set by the General Assembly* . . . ." Slip Op. at 32 (emphasis added). Moreover, this Court was "not asked to declare the language facially unconstitutional as *there is nothing constitutionally infirm* about a deadline of 8:00 p.m. on Election Day for the receipt of ballots." *Id*. (emphasis added). Instead, this Court was asked to replace the General Assembly's policy judgments with its own.[3] This Court obliged. This Court's ruling ignores this Court's own precedent establishing that when reviewing challenges to election related statutes,

[3] This Court said as much in its opinion. *See id*. at 32-33. *See also id*. ("The parties, instead, question whether the application of the statutory language to the facts of the current unprecedented situation results in an as-applied infringement of electors' right to vote.").

"Pennsylvania courts may not mitigate the legislatively prescribed outcome through recourse to equity." *See In re Guzzardi*, 99 A.3d at 386. This Court's view of equity's role when interpreting unambiguous statutes is longstanding:

> When the rights of a party are clearly established by defined principles of law, equity should not change or unsettle those rights. Equity follows the law." *Piper v. Tax Claim Bureau of Westmoreland County*, 910 A.2d 162, 165 (Pa. Cmwlth. 2006) (quoting *First Federal Savings and Loan Association v. Swift*, 321 A.2d 895, 897 (Pa. 1974)).

See Crossey, et al. v. Boockvar, et al., No. 266 M.D. 2020, slip op. at 32 (Pa. Comm. Ct. Sept. 7, 2020) (Leavitt, P.J., amended report and recommendation) (attached as Ex. A). Voters can vote in person on Election Day. Voters can request and cast their mail-in ballot beginning 50 days before an election. 25 P.S. §3150.12a. Voters can choose to wait a week before Election Day to request their ballot. *Crossey*, slip op. at 35. Voters can send their ballot via overnight mail or deliver their ballot to the county election office. *See id*. at 35-36. This is not a case where the right to vote is illusory. In fact, in the parallel case where this Court's designated master held a hearing, developed a record on the ballot received-by deadline, and subjected witnesses to cross-examination, the Court found that the United States Postal Service's on-time delivery rate in Pennsylvania is higher than the national average, with 99% of presort First Class mail being received within 3 days of mailing. *See id*.

at 21, 36. Pennsylvania's General Assembly has done everything it can to establish a voting regime that is easy and accessible, even in the midst of a pandemic.[4]

This Court's decision makes precisely the kind of policy choices the Elections Clause assigned to the various state legislatures. In doing so, this Court has unconstitutionally usurped the General Assembly's authority under the Elections Clause. It is, in fact, the General Assembly's constitutionally vested duty to regulate the time, manner and place of federal elections, not the judicial branch's duty. *Crossey*, slip op. at 36. Accordingly, there is at least a "reasonable probability" that the United States Supreme Court will hear Intervenor Respondents' forthcoming appeal and at least a "fair prospect" that it will reverse this Court's decision. *See Hollingsworth*, 558 U.S. at 190; *see also Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 77 (2000) ("There are expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2 circumscribe the legislative power") (internal quotations omitted).

[4] This Court heavily relies on the USPS's Marshall Letter. *See* slip op. at 24-27. But in *Crossey*, where witnesses testified concerning the Postal Service's abilities and were subject to cross-examination, both the *Crossey* Petitioners' Postal Service expert and the Senate Intervenors' expert agreed that the Postal Service was capable of delivering ballots within Pennsylvania's statutory timeline for requesting and receiving ballots. *See Crossey*, slip op. at 10-11, 30-31, 35. In fact, the Secretary is spending taxpayer dollars to inform voters to request and mail in their ballot as early as possible. *See id*. at 28. There is no evidence establishing that Pennsylvania's ballot receipt-by deadline is plainly and palpably unconstitutional. *See id*. at 35.

This Court's decision to extend the received-by deadline and accept untimely voted ballots constitutes a "significant departure" from the election laws duly enacted by the General Assembly, "rais[ing] a federal constitutional question" and a substantial issue on the merits. *Bush*, 531 U.S. at 112–13 (Rehnquist, J., concurring).

B. The Equitable Factors Support A Stay.

First, Intervenor Respondents, Respondents, and the Commonwealth will suffer irreparable harm if the case is not stayed. The mere enjoining of validly enacted legislation amounts to irreparable injury because "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012).

A stay would prevent harm to the public and to the Commonwealth that otherwise would result from this Court's Decision. *Melvin*, 79 A.3d at 1200. The United States Supreme Court has repeatedly warned that courts should not make or alter election laws on the eve of elections. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006); *Husted v. Ohio State Conference of N.A.A.C.P.*, 573 U.S. 988 (2014). Such late changes by judicial fiat can cause widespread "voter confusion," erode public "[c]onfidence in the integrity of our electoral process," and create an "incentive to remain away from the polls." *Purcell*, 549 U.S. at 4–5.

The Court's Order will engender confusion and uncertainty about the rules governing the fast-approaching 2020 General Election. The Commonwealth's interest in election integrity and the general public's interest in predictable procedures outweighs the private interests advanced by Petitioners here. The citizens and election administrators of the Commonwealth are familiar with those procedures. Those citizens and officials have a right to *an Election Day* at a predictable time according to predictable procedures that do not overly confuse the average person or change at a moment's notice. The public interest weighs overwhelmingly in favor of the status quo.

The risks to the public and Commonwealth are further exacerbated here because the United States Supreme Court has made clear that stays are appropriate to restore postmark deadlines and to prevent a "fundamental[] alter[ation] [of] the nature of the election" through judicial "[e]xten[sion] [of] the date by which ballots may be cast by voters [until] after the scheduled election day." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). Therefore, a stay should be granted here.

CONCLUSION

For the forgoing reasons, this Court should stay the portions of its decision: (1) forcing election officials to accept ballots received after election day to be counted even if they lack a legible postmark; and, (2) extending the absentee and

mail-in ballot deadline past Election Day, pending the disposition of Intervenor Respondents' forthcoming stay application and petition for writ of certiorari to the United States Supreme Court.

Dated: September 22, 2020	Respectfully submitted, **Obermayer Rebmann Maxwell & Hippel LLP** By: */s/ Richard Limburg* Lawrence J. Tabas (ID No. 27815) Mathieu J. Shapiro (ID No. 76266) Richard Limburg (ID No. 39598) Centre Square West 1515 Market St., Suite 3400 Philadelphia, PA 19102 *Attorneys for Joseph B. Scarnati III and Jake Corman* **Holtzman Vogel Josefiak Torchinsky PLLC** By: */s/ Jason B. Torchinsky* Jason B. Torchinsky (Va. ID No. 47481) Jonathan P. Lienhard (Va. ID No. 41648) Shawn T. Sheehy (Va. ID No. 82630) Gineen Bresso (Md. ID No. 9912140076) Phillip M. Gordon (DC. ID No. 1531277) 45 North Hill Drive, Suite. 100 Warrenton, VA 20186 (540) 341-8808 (P) (540) 341-8809 (F) *Attorneys for Joseph B. Scarnati III, and Jake Corman pending approval of application for admission pro hac vice* **HOLLAND & KNIGHT LLP**

	By: */s/ Jake Evans* Jake Evans (Admitted *Pro Hac Vice*) Georgia Bar No. 797018 James E. DelBello Pa. ID No. 78638 Hyun Yoon Pa. ID No. 323706 2929 Arch Street, Suite 800 Philadelphia, PA 19104 **CHALMERS & ADAMS LLC** By: */s/ Zachary M. Wallen* Zachary M. Wallen Pa. ID No. 309176 301 South Hills Village Drive, No. LL200-420 Pittsburgh, PA 15241 *Attorneys for Proposed-Intervenors Speaker of the Pennsylvania House of Representatives Bryan Cutler and Majority Leader of the House of the Pennsylvania House of Representatives Kerry Benninghoff*

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 requires filing confidential information and documents differently than non -confidential information and documents.

By: */s/ Richard Limburg*

Date: September 22, 2020

PROOF OF SERVICE

I, Richard Limburg, hereby certify that I am this day serving the foregoing Supplemental Brief upon all counsel of record via PACFi1e eService, which service satisfies the requirements of Pa.R.A.P. 12.

By: */s/ Richard Limburg*

Date: September 22, 2020

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 133 MM 2020

PENNSYLVANIA DEMOCRATIC PARTY, et al.,
Petitioners,

v.

KATHY BOOCKVAR, et al.,
Respondents.

[PROPOSED] ORDER GRANTING APPLICATION FOR STAY OF THIS COURT'S OPINION AND ORDER OF SEPTEMBER 17, 2020

AND NOW, this _____ day of September, 2020, upon consideration of Intervenor Respondents' Application for Stay of Court's Order of September 17, 2020, it is hereby ORDERED, ADJUDGED, and DECREED that the Application is GRANTED.

This Court's Order of September 17, 2020 as it pertains to the required extension of the statutory received-by deadline is stayed pending the Intervenor Respondents' appeal to the Supreme Court of the United States.

BY THE COURT:

_____
J.