

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 602 MD 2020

DONALD J. TRUMP FOR PRESIDENT, INC., et al.,

Petitioners,

v.

**KATHY BOOCKVAR, in her capacity as Secretary of the Commonwealth of
Pennsylvania, et al.,**

Respondents.

**RESPONDENT KATHY BOOCKVAR'S BRIEF
SUBMITTED PURSUANT TO NOVEMBER 6, 2020 ORDER**

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. FACTUAL BACKGROUND..... 2

 A. Mail-In Voting and Proof of Identification..... 2

 B. Letter from the United States Postal Service Warning of Delays..... 4

 C. *Pa. Democratic Party v. Kathy Boockvar*, 133 MM 2020 (Pa.)..... 5

 D. Requests for Stay and Petition for Writ of *Certiorari* 6

 E. The October 28, 2020 and November 1, 2020 Guidance..... 7

 F. Petition for Review in This Action..... 9

III. STATEMENT OF JURISDICTION..... 9

IV. QUESTION PRESENTED 10

V. ARGUMENT..... 10

VI. CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Grey v. Ohio & P.R. Co., 1 Grant 412 (1856) 15

Lancaster Cnty. v. Pa. Labor Relations Bd., 94 A.3d 979 (Pa. 2014) 12

League of Women Voters v. Commonwealth, 178 A.3d 737 (Pa. 2018) 5, 6

In re Luzerne Cnty. Return Bd., 290 A.2d 108 (Pa. 1972) 14

Markham v. Wolf, 136 A.3d 288 (Pa. 2016) 15

Pa. Democratic Party v. Boockvar, No. 133 MM 2020, 2020 WL 5554644
(Pa. Sept. 17, 2020) 1, 2, 4, 5, 10, 11, 12, 14

Petition of Cioppa, 626 A.2d 146 (1993) 13

Rendell v. Pa. State Ethics Comm’n, 938 A.2d 554 (Pa. Cmwlth. 2007) 14

Shambach. v. Bickhart, 845 A.2d 793 (Pa. 2003) 13

Schuylkill Twp. v. Pa. Builders Ass’n, 7 A.3d 249 (Pa. 2010) 12

In re: Weiskerger Appeal, 290 A.2d 108 (Pa. 1972) 13

Winslow-Quattlebaum v. Maryland Ins. Grp., 752 A.2d 878 (Pa. 2000) 13

Winston v. Moore, 91 A. 520 (Pa. 1914)..... 13

STATUTES

Pa. Const., art. I, § 5 1, 5, 13

25 P.S. § 2602(z.5)(3) 3

25 P.S. § 3050(a.4)(5)(E) 3, 12

25 P.S. § 3146.2b(d) 4

25 P.S. § 3146.2c.....	3
25 P.S. § 3146.8(g)(2)	10
25 P.S. § 3146.8(g)(3)	3
25 P.S. § 3146.8(g)(4)	3
25 P.S. § 3146.8(h)(2)	4, 10, 12
25 P.S. § 3146.8(h)(3)	4, 10
25 P.S. § 3150.11	3
25 P.S. § 3150.12a(a)	3
25 P.S. § 3150.12b(a)(2)	3
25 P.S. § 3150.12b(c)	4
25 P.S. § 3150.16.....	3
42 Pa. C.S. § 726	5
42 Pa. C.S. § 761(a)(1)	9
52 U.S.C. § 21082	11
52 U.S.C. § 21083(b)	11
52 U.S.C. § 21084	11
52 U.S.C. § 21085	11

I. INTRODUCTION

Nearly seven million Pennsylvanians voted in the 2020 general election—more than in any other election. More than 2.6 million absentee and mail-in ballots were returned. The election occurred in the midst of a global pandemic and mail delays caused by operational changes in the U.S. Postal Service.

The Pennsylvania Supreme Court balanced the fundamental rights of voters against the challenges posed by the pandemic and postal delays and decided as a matter of equity, for purposes of this election only and to fulfill the Pennsylvania Constitution’s guarantee of a free and equal election, the deadline to receive mail-in and absentee ballots delivered by U.S. mail should be extended by three days from 8:00 pm on Tuesday, November 3, 2020 to 5:00 pm on Friday, November 6, 2020. *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *18 (Pa. Sept. 17, 2020).

In a last gasp attempt to prevent legitimate votes from being counted, however, Petitioners Donald J. Trump For President, Inc. and the Republican National Committee (referred to collectively herein as “Trump Campaign”) commenced the instant action challenging guidance issued by Respondent Secretary of the Commonwealth Kathy Boockvar that advised county boards that voters whose ballots were received after Election Day should have three additional days to provide proof of identification consistent with the three-day extension in

Pa. Democratic Party v. Boockvar. At issue are only a smaller subset of the already small subset of ballots received by U.S. mail between 8:00 pm on Election Day and 5:00 pm on Friday, November 6, 2020—specifically, only those mail-in and absentee ballots for which proof of identification was not previously provided or could not previously be verified. Consistent with the Election Code requirement that identification for such electors must be received and verified within six days, Secretary Boockvar advised county election boards that electors whose ballots were received by mail during the three-day extension should be allowed six days—until Thursday, November 12—to provide the required proof of identification.

The Secretary’s guidance was necessitated by the Supreme Court’s ruling in *Pa. Democratic Party v. Boockvar* and comports with the election deadlines as modified by that ruling as well as federal law governing provisional balloting and proof of identification. The Trump Campaign’s request for a judicial declaration to the contrary is without merit and should be denied.

II. FACTUAL BACKGROUND

A. Mail-In Voting and Proof of Identification

On October 31, 2019, Governor Wolf signed Act 77 of 2019 (“Act 77”) into law, amending the Election Code to permit, for the first time, no-excuse mail-in voting for all qualified electors. 25 P.S. § 3150.11. Act 77 allowed voters until October 27, 2020, to request a ballot for the November 3, 2020 general election, 25

P.S. § 3150.12a(a), and established a deadline of 8:00 p.m. on Election Day to return voted ballots to county boards of elections, 25 P.S. § 3150.16.

When county boards of elections met to pre-canvass or canvass mail-in and absentee ballots, the boards examined the declarations on the exterior envelopes and compared the information on the ballots—the voter’s name and address—to the lists of voters approved to vote by mail. 25 P.S. § 3146.8(g)(3); 25 P.S. § 3146.2c. If an elector provided proof of identification required to be approved to vote by mail (defined in 25 P.S. § 2602 (z.5)(3) as driver’s license number, last four digits of social security number or other specified identification) and the proof of identification was verified by the county board and the elector’s voter declaration was found to be sufficient, his or her ballot was counted unless previously challenged on the grounds permitted by statute. 25 P.S. § 3146.8(g)(4); 25 P.S. § 3150.12b(a)(2).

The Election Code provides that, when proof of identification was not provided with the application for an absentee or mail-in ballot or could not be verified by the county board, the elector is required to provide proof of identification with the absentee or mail-in ballot, or the ballot will not be counted. 25 P.S. § 3146.2b(d); 25 P.S. § 3150.12b(c). Consistent with the provision on provisional ballots which allows voters to submit proof of identification “within six calendar days following the election,” *see* 25 P.S. § 3050(a.4)(5)(E), the Election

Code affords mail-in and absentee voters six “calendar days following the election” to provide proof of identification, 25 P.S. § 3146.8(h)(2), (3). If proof of identification is received and verified prior to the sixth calendar day following the election, then the ballots may properly be counted. 25 P.S. § 3146.8(h)(2).

B. Letter from the United States Postal Service Warning of Delays

On July 29, 2020, Thomas J. Marshall, General Counsel for the United States Postal Service (“USPS”), mailed a letter to Secretary Boockvar warning that, based on the USPS’s expected delivery times for mail service at the time of the general election, there is a “‘significant risk’ that Pennsylvania voters who submit timely ballot requests will not have sufficient time to complete and return their ballots to meet the Election Code’s received-by deadline.” *Pa. Democratic Party*, 2020 WL 5554644, at *12 (quoting July 29, 2020 letter from USPS General Counsel and Executive Vice President Thomas Marshall). Critically, the letter explained that Pennsylvania’s election law “deadlines for requesting and casting mail-in ballots are incongruous with the USPS’s delivery standards.” *Id.* at *13. “This mismatch [between the USPS’s delivery standards and the Election Code deadlines] creates a risk that ballots requested near the deadline under state law will not be returned by mail in time to be counted under [Pennsylvania’s Election Code].” *Id.*

C. *Pa. Democratic Party v. Kathy Boockvar*, 133 MM 2020 (Pa.)

The Pennsylvania Democratic Party and several Democratic candidates (collectively the “Democratic Party”) initiated an action in this Court on July 10, 2020, against Secretary Boockvar and the 67 county boards of elections raising challenges to the mail-in ballot process. Relevant to this matter, the Democratic Party claimed that, in light of the current COVID-19 pandemic and professed delays in mail delivery, the November 3, 2020 deadline violated the Pennsylvania Constitution’s Free and Equal Elections Clause. Pa. Const., art. I, § 5.¹

Recognizing the exigent need to resolve this issue quickly given the impending election date, on August 16, 2020, Secretary Boockvar asked the Pennsylvania Supreme Court to exercise extraordinary jurisdiction over the matter pursuant to 42 Pa. C.S. § 726. The Pennsylvania Supreme Court, after expedited briefing, extended the ballot receipt deadline by three days pursuant to its extraordinary jurisdiction. *Pa. Democratic Party*, 2020 WL 5554644, at *18. The Supreme Court emphasized the unexpected number of requests for mail-in ballots during the June 2, 2020 primary election—1.5 million rather than the expected

¹ The Free and Equal Elections Clause provides that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right to suffrage.” Pa. Const., art. I, § 5. The Pennsylvania Supreme Court has held that this provision “guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process for the selection of his or her representatives in government.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018).

100,000—and the difficulties the COVID-19 pandemic caused for some election boards. *Id.* at **12, 17. “In light of these unprecedented numbers and the near-certain delays that will occur in Boards processing the mail-in applications,” the Supreme Court determined that the timeline built into the Election Code could not be met under the USPS’s delivery standards. *Id.* at *18. Accordingly, pursuant to its “broad authority to craft meaningful remedies when required” in enforcing the Free and Equal Elections Clause, *id.* at *18 (quoting *League of Women Voters*, 178 A.3d at 822), the Supreme Court extended the ballot receipt deadline by three days, until November 6, 2020 at 5:00 pm for this election only. *Id.* at *18 & n.26. “[T]his proposal * * * requires that all votes be cast by Election Day but does not disenfranchise a voter based upon the absence or illegibility of a USPS postmark that is beyond the control of the voter once she places her ballot in the USPS delivery system.” *Id.* at *13 n.20.

D. Requests for Stay and Petition for Writ of *Certiorari*

The Republican Party of Pennsylvania and State Senators Joseph B. Scarnati and Jake Corman applied to the Pennsylvania Supreme Court to stay its decision pending appeal to the U.S. Supreme Court. The Pennsylvania Supreme Court denied those requests by Order dated September 24, 2020. The Republican Party of Pennsylvania and State Senators Scarnati and Corman then sought a stay from

the U.S. Supreme Court. That application was similarly denied on October 19, 2020.

On October 23, 2020, the Republican Party of Pennsylvania filed a petition for a writ of *certiorari* in the U.S. Supreme Court challenging the three-day extension and a motion for expedited consideration. The motion was denied on October 28, 2020. The Republican Party of Pennsylvania filed an emergency application for an injunction in the U.S. Supreme Court seeking segregation of ballots received by mail between 8:00 pm on Election Day and 5:00 pm on November 6, 2020. On November 6, 2020, Justice Samuel A. Alito, Jr. entered an Order directing county election boards to comply with the guidance that had already issued by the Secretary Boockvar on October 28, 2020 and November 1, 2020 (discussed below), “namely, (1) that all ballots received by mail after 8:00 p.m. on November 3 be segregated . . . and (2) that all such ballots, if counted, be counted separately.”

E. The October 28, 2020 and November 1, 2020 Guidance

In recognition of the litigation pending in the U.S. Supreme Court, the Secretary issued guidance to the county boards of elections on October 28, 2020 advising that ballots received by mail after 8:00 pm on Election Day and before 5:00 pm on Friday, November 6, 2020 should be kept separate and segregated from

all other voted ballots.² County boards were directed to maintain a detailed log of ballots received during this window and not to count the ballots pending further direction. *See* October 28, 2020 Guidance at p. 2. The October 28, 2020 guidance advised that additional guidance would be forthcoming. *Id.* at p. 3.

The Secretary issued additional guidance on November 1, 2020 (“the November 1, 2020 Guidance”) in response to questions concerning canvassing of the segregated ballots.³ The November 1, 2020 Guidance included detailed instruction to county boards with respect to canvassing. Among other things, county boards were advised that it was critically important to maintain accurate records of the disposition of ballots received during this period. R-4. County boards were further advised to count, compute and separately tally the segregated ballots. R-6. And, corresponding with the provision in the Election Code

² *See* “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,” available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Documents/2020-10-28-Segregation-Guidance.pdf> (last visited November 10, 2020).

³ *See* “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,” available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Canvassing-Segregated-Ballot-Guidance.pdf> (last visited November 10, 2020). The November 1, 2020 Guidance is published in the Stipulated Appendix at R-3 to R-6.

affording voters six days after the election to provide proof of identification, the November 1, 2020 guidance advised that, “[i]f proof of identification for an absentee or mail-in voter was not received or could not be verified, the ballot should not be counted unless the elector provides proof of identification that can be verified by the county board by the sixth calendar day following the canvassing, or on or before Thursday, November 12.” R-5.

F. Petition for Review in This Action

The Trump Campaign commenced this action on November 4, 2020, seeking a declaratory judgment prohibiting county boards from counting votes cast by absentee and mail-in voters whose proof of identification is not received and verified by November 9, 2020.

III. STATEMENT OF JURISDICTION

This Court has original jurisdiction over the request for declaratory relief in this action under 42 Pa. C.S. § 761(a)(1).

IV. QUESTION PRESENTED

Whether the Supreme Court decision extending the ballot return deadline by three days requires a corresponding three-day extension of the period for electors whose ballots are delivered by U.S. mail and are received between 8:00 pm on November 3, 2020 and 5:00 pm on November 6, 2020 to provide proof of identification?

Suggested Answer: Yes.

V. ARGUMENT

The threshold question posed in this action is whether electors whose ballots are timely cast but received after 8:00 pm on Election Day and before 5:00 pm on November 6, 2020 due to delay in mail delivery are entitled to the same statutory six-day opportunity to provide proof of identification confirming their right to vote. The answer can only be yes.

At issue is 25 P.S. § 3146.8(h)(2) which provides in pertinent part:

For those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified[,] [i]f the proof of identification is received and verified ***prior to the sixth calendar day following the election***, then the county board of election shall canvass the absentee ballots and mail-in ballots under this subsection in accordance with [25 P.S. § 3146.8](g)(2).

25 P.S. 3146.8(h)(2) (emphasis added). But for the Supreme Court's decision in *Pa. Democratic Party v. Boockvar*, the deadline for electors to provide proof of

identification would be Monday, November 9, 2020. The Supreme Court decision in *Pa. Democratic Party v. Boockvar*, however, altered “the timeline for the 2020 General Election mail-in ballot process” and extended the received-by deadline by three days to “protect[] voters’ rights” and enforce the Free and Equal Elections Clause. *Pa. Democratic Party v. Boockvar*, 2020 WL 5554644 at *18.

Straightforward application of the Supreme Court’s decision requires a corresponding extension of the proof of identification deadline in 25 P.S. § 3146.8(h)(2). Anything less would deny voters the protection and benefit of the three-day extension ordered by the Supreme Court.

Denying voters the corresponding three days to provide proof of identification would also undermine protections guaranteed by the Help America Vote Act (“HAVA”). HAVA requires county boards to afford voters who are identified as ineligible to vote, but believe themselves to be eligible, to cast a provisional ballot, subject to a proceeding before the county boards to determine whether or not the ballot should be counted. 52 U.S.C. § 21082. In addition, HAVA imposes certain requirements with respect to voter registration and proof of identification requirements for voters who register to vote by mail. 52 U.S.C. § 21083(b). HAVA sets minimum requirements, 52 U.S.C. § 21084, and leaves it to the states to decide specific methods of compliance with HAVA obligations, 52 U.S.C. § 21085.

Pennsylvania implemented HAVA's requirements by, *inter alia*, creating a statutory process whereby voters who vote by provisional ballot or by absentee and later mail-in ballot are allowed an additional six days after an election to provide proof of identification. *See* 25 P.S. § 3050(a.4)(5)(E) (allowing electors who vote by provisional ballot to present proof of identification to county board of elections within six calendar days following the election); 25 P.S. § 3146.8(h)(2) (allowing electors who vote by mail-in or absentee ballot to present proof of identification to county board of elections within six calendar days following the election). To reduce the six-day period for voters whose mail-in or absentee ballots were delivered late through no fault of their own would significantly undermine protections guaranteed by HAVA.

Secretary Boockvar's guidance appropriately harmonizes and gives effect to the ruling in *Pa. Democratic Party v. Boockvar*, the HAVA protections and the corresponding provisions in the Election Code. The Secretary's interpretation of the statutory deadline in light of the three-day extension ordered by the Supreme Court is certainly not clearly erroneous and, as a result, is entitled to "substantial deference" and is to be given "controlling weight." *See Lancaster Cty. v. Pa. Labor Relations Bd.*, 94 A.3d 979, 986 (Pa. 2014) ("[W]ith respect to issues involving the interpretation of a statute, an administrative agency's interpretation is to be given controlling weight unless clearly erroneous."); *Schuylkill Twp. v. Pa.*

Builders Ass'n, 7 A.3d 249, 253 (Pa. 2010) (“This Court gives substantial deference to an agency’s interpretation of a statute the agency is charged with implementing and enforcing.”) (citation and internal quotation marks omitted); *Winslow-Quattlebaum v. Maryland Ins. Grp.*, 752 A.2d 878, 881 (Pa. 2000) (“It is well settled that when the courts of this Commonwealth are faced with interpreting statutory language, they afford great deference to the interpretation rendered by the administrative agency overseeing the implementation of such legislation.”).

The Secretary’s guidance also comports with the “longstanding and overriding policy in this Commonwealth to protect the elective franchise.” *Petition of Cioppa*, 626 A.2d 146, 148 (Pa. 1993); *see also In re: Weiskerger Appeal*, 290 A.2d 108, 109 (Pa. 1972) (“Our goal must be to enfranchise and not to disenfranchise.”). The Pennsylvania Constitution guarantees that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5. Elections are free and equal within the meaning of the Constitution when the regulation of the right to exercise the franchise does not deny the franchise itself or make it so difficult as to amount to a denial. *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). Therefore, election laws are to be “construed liberally in favor of the right to vote.” *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2003); *Petition of Cioppa*, 626

A.2d at 148 (“[O]ur Election Code should be liberally construed so as not to deprive . . . the voters of their right to elect a candidate of their choice.”). The “goal must be to enfranchise and not to disenfranchise.” *In re Luzerne County Return Bd.*, 290 A.2d 108, 109 (Pa. 1972). The Secretary’s guidance is faithful to and gives full effect to this policy.

For all these reasons, the Secretary correctly interpreted the decision in *Pa. Democratic Party v. Boockvar* as requiring a three-day extension of the proof of identification deadline. Accordingly, the Trump Campaign fails to establish a right to the declaratory relief sought in the Petition for Review and judgment on the merits should be entered in favor of the Secretary.

Beyond failing on the merits, the Petition for Review is marked by other fatal defects. For one thing, the Petition alleges, at best, a hypothetical situation where proof of identification for late-delivered ballots might be received between November 9 and November 12 and, as a result, there is no concrete case or controversy as required under the Declaratory Judgments Act. *See Rendell v. Pa. State Ethics Comm’n*, 938 A.2d 554, 560-61 (Pa. Cmwlth. 2007) (“issues [that] depend upon the unfolding of hypothetical facts that may never occur . . . do not present this Court with a concrete case or controversy” under the Declaratory Judgments Act). In addition, the Trump Campaign does not allege that allowing voters to provide proof of identification between November 9 and November 12

will result in concrete harm to a political prospect or any other interest. The Petition for Review is merely a generalized complaint about the correctness of the Secretary's guidance and, as a result, fails to satisfy the requirements of standing. *Markham v. Wolf*, 136 A.3d 134, 145 (Pa. 2016) ("generalized grievance about the correctness of governmental conduct" is insufficient to confer standing). Further, the Trump Campaign unreasonably delayed until after the close of business on November 4 before seeking relief from this Court. To grant the injunctive relief sought by the Trump Campaign now would disadvantage voters who relied on the guidance. *See generally Grey v. Ohio & P.R. Co.*, 1 Grant 412, 413 (1856) ("To entitle the plaintiff to an injunction, he . . . must not be guilty of any improper delay in applying for relief.").

IV. CONCLUSION

For the reasons above, the Petition for Review fails to allege a basis for declaratory relief and should be dismissed with prejudice.

Dated: November 10, 2020

Respectfully submitted,

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

/s/ Daniel T. Brier
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Date: November 10, 2020

PROOF OF SERVICE

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

Date: November 10, 2020

/s/ Daniel T. Brier