

IN THE SUPREME COURT OF THE UNITED STATES

REPUBLICAN PARTY OF PENNSYLVANIA,

Petitioner,

v.

KATHY BOOCKVAR, SECRETARY OF THE COMMONWEALTH OF
PENNSYLVANIA, ET AL.,

Respondents.

**Application from the Supreme Court of Pennsylvania
(No. 133 MM 2020)**

**OPPOSITION OF THE PENNSYLVANIA DEMOCRATIC PARTY
RESPONDENTS TO EMERGENCY APPLICATION FOR INJUNCTION
PENDING CERTIORARI REVIEW**

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent Pennsylvania Democratic Party states that it has no parent corporation and that there is no publicly held company that owns 10% or more of its stock.

INTRODUCTION

The Republican Party of Pennsylvania’s (“RPP”) emergency application requests that this Court issue an injunction pending certiorari review that would direct county board of elections officials “to log, to segregate, and otherwise not to take any action related to mail-in or civilian absentee ballots” received between 8 p.m. on Election Day and 5 p.m. on November 6. Application 11. The Pennsylvania Democratic Party Respondents agree that such ballots should be logged and segregated. But the Pennsylvania Department of State has already issued guidance directing county boards to do just that. There is no reason to believe that guidance is not being or will not be followed—and RPP offers none. As for RPP’s request that no other “action” be taken with respect to these ballots—*i.e.*, that county boards not canvass and maintain separate counts of these ballots—granting this relief is in no way “necessary to preserve this Court’s jurisdiction,” *id.* at 5, and indeed could both prevent this Court from being able to determine whether its resolution of this case would have any bearing on any election and cause substantial disruptions to the Commonwealth’s elections.

BACKGROUND

On October 28, the Pennsylvania Department of State issued guidance to county board of elections officials. See Attachment to Letter of Secretary of the Commonwealth (Oct. 28, 2020), *Republican Party of Pa. v. Boockvar*, No. 20-542 (Oct. 28, 2020) (“October 28 Guidance”). The October 28 Guidance directed county boards to “ke[ep] separate and segregated” mail-in and civilian absentee ballots received

between 8:00 p.m. on Tuesday, November 3, 2020 and 5:00 p.m. on Friday, November 6, 2020 “from all other voted ballots.” October 28 Guidance at 2; see also *ibid.* (requiring county boards to “maintain an accurate log of the date upon which” ballots received in the challenged window “w[ere] delivered by the USPS” to the county board of elections). It also instructed that “county boards of elections shall not pre-canvass or canvass any mail-in or civilian absentee ballots received” in the challenged window “until further direction is received.” *Ibid.*

That same day, counsel for RPP emailed county boards of elections acknowledging that it “expect[ed] that each county board of elections will follow this guidance.” A.117. It nonetheless requested that each board of elections confirm by email that it intended to follow the guidance. Counsel for RPP requested a response the next day—by 2 p.m. on Thursday, October 29. See A.117. Forty-two boards responded, and all of them confirmed that they were following the guidance. Application 4.

On November 1, the Pennsylvania Department of State issued further guidance, as the October 28 Guidance had contemplated. See A.113-116 (“November 1 Guidance”). The November 1 Guidance stated that “[a]ll directions in [the October 28 Guidance] concerning the segregation and logging of ballots received during this defined post-election period continue to apply.” A.114. The November 1 Guidance gave detailed directions for canvassing those ballots. See A.114-116. The document requires county boards of elections to “count, compute, and *separately tally* the ballots approved for canvassing.” A.116 (emphasis added).

On November 6—over a week after counsel for RPP requested that county boards confirm their compliance with the guidance and five days after the November 1 Guidance issued—RPP filed the present application for an emergency injunction. The application contends that the guidance is insufficient for two reasons: First, it argues that the guidance is not binding on county boards of elections and they “may choose not to follow” it. Application 4. Second, RPP notes that “the Secretary has reserved the right to change her guidance,” such that there is a risk that the Secretary “may issue new directions in the absence of an order from this Court.” *Id.* at 5.

Also on November 6, Justice Alito entered an administrative order stating that “[a]ll county boards of election are hereby ordered, pending further order of the Court, to comply with the following guidance provided by the Secretary of the Commonwealth on October 28 and November 1, namely, (1) that all ballots received by mail after 8:00 p.m. on November 3 be segregated and kept ‘in a secure, safe and sealed container separate from other voted ballots,’ and (2) that all such ballots, if counted, be counted separately.” 20A84 Administrative Order at 1.

ARGUMENT

1. As the Pennsylvania Democratic Party Respondents informed this Court in their opposition to RPP’s motion to expedite, segregation of ballots received between November 3 at 8 p.m. and November 6 at 5 p.m. is appropriate. But the Secretary has already directed county boards to do just that, and to “separately tally” the segregated ballots “approved for canvassing.” A.116.

RPP asserts that this Court must intervene because there is no guarantee that the guidance has been followed or will continue in force. That argument is meritless. Even assuming, as RPP asserts, that the guidance is not binding, there is no reason to think that county election boards have not complied with it. The Secretary issued the guidance for an unquestionably legitimate purpose: to preserve this Court’s jurisdiction to adjudicate the validity of the Pennsylvania Supreme Court’s decision extending the mail-in ballot received-by deadline. No evident reason exists for a county board to refuse to follow explicit guidance issued for such a clearly legitimate purpose, nor does any evidence exist that county boards failed to follow it—and RPP suggests none. Given that courts “presume that [public officers] have properly discharged their official duties” “in the absence of clear evidence to the contrary,” RPP must offer concrete evidence that county boards would arbitrarily decline to follow the Secretary’s guidance. See *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926); see also *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001). Instead, RPP offers only baseless speculation.

The sole purported evidence on which RPP relies is that some county boards of elections allegedly did not respond to its email requesting confirmation that they would follow the guidance. But RPP may not manufacture evidence that county boards are not complying by sending them an email on a one-day turnaround in the week before Election Day and then crying “gotcha” when some fail to respond. Indeed, the fact that each of the forty-two boards that *did* respond confirmed that it was following the guidance rebuts RPP’s unfounded allegations. And to the extent RPP

was legitimately concerned that some boards' failure to respond suggested that they planned to disregard the guidance, one would expect RPP to have filed an immediate (and certainly, pre-Election Day) application for emergency relief in this Court. Its failure to do so—and its inability to muster a single shred of evidence that any board has not complied with the guidance—demonstrates that this Court's intervention is unjustified.

RPP's arguments that the Secretary might alter the guidance are similarly unfounded. RPP complains that the Secretary's November 1 guidance directed counties to begin canvassing the segregated ballots, while the October 28 guidance directed counties not to begin canvassing "until further direction is received." As the quoted language indicates, the November 1 guidance simply provided the further direction contemplated by the October 28 guidance. RPP suggests no reason to think that the Secretary would direct county boards to reverse the *segregation*.

2. The Pennsylvania Democratic Party Respondents respectfully submit that should the Court order any relief, that relief should be consistent with the November 1 Guidance. The November 1 Guidance provides detailed instructions for how county boards of elections should treat ballots arriving during the challenged period. In order to avoid confusion and permit the Commonwealth appropriate leeway over its conduct of the canvassing process, any order of the Court should be consistent with the existing guidance.

In particular, any order should permit county boards to continue counting the segregated ballots, as the administrative order entered by Justice Alito does.

Administrative Order at 1 (ordering “that all such ballots, if counted, be counted separately”). RPP, however, asks that this Court order county boards “not to take any action related to” these ballots, barring them from counting the ballots. Application 11. Stopping counting ballots is in no way necessary to “preserve[] the ability of this Court to render a meaningful judgment” on the validity of the Pennsylvania Supreme Court’s extension of the mail-in ballot received-by deadline. Application 11. The November 1 Guidance, like the Administrative Order, ensures that the challenged ballots will remain segregated and that their counts will not be added to the counts of ballots arriving before November 3 at 8 p.m.¹ See A.114, 116. Counting these ballots separately thus does not threaten the ability of this Court to adjudicate this case and grant effective relief, should it become necessary to do so.

On the other hand, ordering the county boards to stop counting the segregated ballots would have significant adverse consequences. First, without counting the ballots, it may be impossible to determine whether this Court’s resolution of this case would have any effect on any race. To the extent those ballots would not change the outcome of a race, this case may be moot and, at the very least, the need for the Court’s review would be substantially lessened. RPP’s insistence that county boards

¹ For that reason, RPP’s assertion that counting the challenged ballots could “cast[] a cloud upon * * * the legitimacy of [the] election” is baseless. Application 11 (quoting *Bush v. Gore*, 531 U.S. 1046, 1046–47 (2000) (Scalia, J., concurring)) (alteration in RPP Application). Because the challenged ballots are segregated from ballots received by November 3 at 8 p.m., and will be separately counted, it is difficult to see how the mere act of counting the challenged ballots could cast any cloud over the election.

not count these ballots would threaten this Court's ability to determine whether it has jurisdiction and whether it should review the case.

Second, the ballots contain votes for state races that are not implicated in this case, as RPP's challenge extends only to votes cast in federal races. State law requires county boards to provide unofficial returns to the Secretary by 5 p.m. on November 10 and, in certain circumstances, requires the Secretary to order a recount based on those returns by November 12. See *Statewide Return and Recount Directive Procedures* (Nov. 1, 2020).² It is thus critical to the operation of Pennsylvania's recount procedures with respect to state races that the Secretary have as accurate as possible a count of the ballots by next week. RPP's requested relief would upend that statutory scheme.

² Available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Documents/2020-11-01-StatewideReturnRecountDirective.pdf>.

CONCLUSION

For the foregoing reasons, the Court should deny the injunction as unnecessary. To the extent the Court orders relief, it should issue an order that is consistent with the November 1 Guidance and that allows ballots to continue to be counted in a segregated fashion.

Dated: November 6, 2020

Respectfully submitted,

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