

Nos. 20-542, 20-574

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IN THE  
**Supreme Court of the United States**

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REPUBLICAN PARTY OF PENNSYLVANIA,  
*Petitioner,*

v.

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

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JOSEPH B. SCARNATI III, ET AL.,  
*Petitioners,*

v.

PENNSYLVANIA DEMOCRATIC PARTY, ET AL.,  
*Respondents.*

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**On Petition for Writ of Certiorari to the  
Supreme Court of Pennsylvania**

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**BRIEF OF LUZERNE COUNTY BOARD  
OF ELECTIONS IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

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November 30, 2020

## **COUNTERSTATEMENT OF THE QUESTIONS PRESENTED**

Whether the General Assembly of Pennsylvania, in exercising its authority under U.S. Const. art. II, § 1, adopted a “[m]anner” for appointment of presidential electors which included recognition that the Pennsylvania Supreme Court was empowered to grant equitable relief in the face of an unprecedented emergency so as to protect the franchise by allowing valid and timely cast mail-in ballots to be counted if received up to three days after Election Day.

Whether the Pennsylvania Supreme Court’s order allowing the counting of valid and timely cast mail-in ballots received during a limited time after Election Day (not unlike valid ballots received from overseas voters) was consistent with federal law establishing a uniform Election Day.

**PARTIES TO THE PROCEEDINGS**

In *Republican Party of Pennsylvania v. Kathy Boockvar, Secretary of Pennsylvania, et al.*, No. 20-542, Petitioner is the Republican Party of Pennsylvania.

Respondents are Pennsylvania Democratic Party; Secretary of State Kathy Boockvar; State Senator Joseph Scarnati; State Senator Jake Corman; Adams County Board of Elections; Allegheny County Board of Elections; Armstrong County Board of Elections; Bedford County Board of Elections; Berks County Board of Elections; Blair County Board of Elections; Bucks County Board of Elections; Butler County Board of Elections; Cambria County Board of Elections; Carbon County Board of Elections; Centre County Board of Elections; Chester County Board of Elections; Clarion County Board of Elections; Clinton County Board of Elections; Columbia County Board of Elections; Delaware County Board of Elections; Dauphin County Board of Elections; Elk County Board of Elections; Erie County Board of Elections; Fayette County Board of Elections; Franklin County Board of Elections; Greene County Board of Elections; Huntingdon County Board of Elections; Indiana County Board of Elections; Jefferson County Board of Elections; Lackawanna County Board of Elections; Lancaster County Board of Elections; Lawrence County Board of Elections; Lebanon County Board of Elections; Lehigh County Board of Elections; Luzerne County Board of Elections; Mercer County Board of Elections; Monroe County Board of Elections; Montgomery County Board of Elections; Montour County Board of Elections; Northampton County Board of Elections; Northumberland County Board of Elections; Perry County Board of Elections; Philadelphia County Board of Elections; Pike County

Board of Elections; Potter County Board of Elections; Snyder County Board of Elections; Susquehanna County Board of Elections; Tioga County Board of Elections; Union County Board of Elections; Venango County Board of Elections; Washington County Board of Elections; Wayne County Board of Elections; Westmoreland County Board of Elections; and York County Board of Elections.

In *Scarnati, et al. v. Pennsylvania Democratic Party, et al.*, No. 20-574, Petitioners are Joseph B. Scarnati III, Pennsylvania Senate President Pro Tempore; Jake Corman, Senate Majority Leader (collectively “Senate Leaders”); Bryan Cutler, Speaker of the Pennsylvania House of Representatives; and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives (collectively “House Leaders”).

Respondents are the same as in 20-542, with the exclusion of Joseph Scarnati and Jake Corman.

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## COUNTERSTATEMENT OF THE CASE

Petitioners in each of the above captioned matters<sup>1</sup> take issue with the decision of the Pennsylvania Supreme Court which extended the deadline for receipt by boards of election (such as the present Respondent) of validly cast mail-in ballots from 8:00 P.M. on Election Day to 5:00 P.M. three days later, November 6, 2020. As this decision is consistent with the Pennsylvania General Assembly’s “manner” for selection of presidential electors, certiorari should be denied.

In October of 2019, the General Assembly passed legislation which amended the Election Code of Pennsylvania. Penn. Act of Oct. 31, 2019, P.L. 552, No. 77 – Pennsylvania Election Code-Omnibus Amendments, <https://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2019&sessInd=0&act=77> (last visited Nov. 24, 2020). This legislation, commonly referred to as Act 77, was, as with any bill passed by the General Assembly, submitted to the Governor who signed it into law on October 31, 2019.<sup>2</sup> *Id.*; *see also* Pa. Const. art. IV, § 15. Among other things, Act 77 changed Pennsylvania’s long-standing process regarding absentee voting and allowed, for the first time, “excuse-free” casting of ballots by mail. *See* 25 P.S. §§ 3150.11-3150.17. The Act also established timelines regarding mail-in and traditional absentee ballots, relative to this matter, i.e., applications for mail-in ballots had to be submitted to the county election board one week before the

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<sup>1</sup> As the questions presented in the two petitions for writs of certiorari are identical, the present brief in opposition is submitted for both.

<sup>2</sup> There is nothing in the legislation to suggest that the General Assembly did not intend to include the full machinery of Pennsylvania’s governmental structure in implementing Act 77.

November 3, 2020 Election Day, and completed mail-in ballots had to be received by the boards no later than 8:00 P.M. on Election Day. *Id.* Notably, Act 77 did not change the deadline for receipt of ballots sent from overseas pursuant to the Penn. Uniform Military and Overseas Voters Act (UMOVA), 25 Pa.C.S. § 3501, *et seq.*, which allows for ballots cast prior to the Election Day deadline to be counted if received by the county boards up to one week later. 25 Pa.C.S. § 3511.<sup>3</sup>

This was all prior to the world being consumed and inexorably altered by the COVID-19 pandemic.

Given the potential impact of the pandemic on the electoral process, the General Assembly passed Act 12 which was of limited duration, mainly addressed delay of the primary election later in Spring and consolidated polling places, but did not change the mail-in application and received-by deadlines. Penn. Act of Mar. 27, 2020, P.L. 41, No. 12 - Pennsylvania Election Code-Omnibus Amendments, <https://www.legis.state.pa.us/cfdocs/Legis/LI/uconsCheck.cfm?txtType=HTM&yr=2020&sessInd=0&smthLwInd=0&act=12> (last visited Nov. 24, 2020). No additional bills were passed relating to the conduct of elections in the face of the pandemic.

The present matter was initiated on July 10, 2020 by the Democratic Party of Pennsylvania filing a petition for review in Commonwealth Court seeking declaratory and injunctive relief against the Secretary of the Commonwealth, Kathy Boockvar (Secretary). Relative to the issues at hand, the petition addressed concerns over the timelines imposed by Act 77 given the likelihood that a significant number of citizens

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<sup>3</sup> This provision fulfills Pennsylvania's duty under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. §§ 20301-20311.

would vote by mail due to the pandemic. Coupled with concerns about the U.S. Postal Service's (USPS) ability to deliver those ballots prior to the Election Day deadline, the petitioners sought an extension of seven days for receipt of mail-in and absentee ballots, consistent with the UOCAVA/UMOVA deadline, *supra*.

Before Commonwealth Court issued a decision, the Democratic Party petitioners sought invocation of the Pennsylvania Supreme Court's statutory authority to exercise extraordinary jurisdiction over "any matter pending before any court . . . of th[e] Commonwealth involving an issue of immediate public importance . . .". 42 Pa.C.S. § 726. The Supreme Court granted that request, and after briefing, issued its decision on September 17, 2020. In that decision, the Court rejected the requested seven day extension, but accepted the Secretary's suggestion that a three day extension was appropriate. As a result, and at issue here, the Supreme Court directed that "ballots mailed by voters via the United States Postal Service and postmarked by 8:00 p.m. on Election Day, November 3, 2020, shall be counted if they are otherwise valid and received by the county boards of election on or before 5:00 p.m. on November 6, 2020." *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 386 (Pa. 2020). The Court further directed that "ballots received within this period that lack a postmark or other proof of mailing, or for which the postmark or other proof of mailing is illegible, will be presumed to have been mailed by Election Day unless a preponderance of the evidence demonstrates that it was mailed after Election Day." *Id.*

The present Petitioners, critical of both the extended received-by deadline and the "postmark presumption," each sought relief from this Court through emergency

applications for stay of the Pennsylvania Supreme Court's directive. *See* Emergency Application Nos. 20A53; 20A54. On October 18, 2020, the Court denied these applications. On October 23, 2020, Petitioner Republican Party of Pennsylvania (RPP) filed its petition for a writ of certiorari, as well as a motion to expedite consideration, which the Court denied on October 28. Petitioners Scarnati, *et al.*, filed their petition for a writ of certiorari on October 27, 2020. The present brief is in opposition to both.

### **REASONS FOR DENYING THE WRIT**

#### **I. The method of selecting presidential electors chosen by the General Assembly allows for the type of emergency relief which the Pennsylvania Supreme Court granted here.**

At the heart of the two petitions at issue herein is the argument that since the Constitution “leaves it to the [state] legislature *exclusively* to define the method of appointment” of presidential electors, a state judiciary’s interpretation of that “method” is afforded no particular deference and is subject to review by this Court. *See Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring)(emphasis added; internal citation omitted). While the *Bush v. Gore* per curiam opinion recognized the “plenary” authority of state legislatures “to select the manner for appointing electors,” 531 U.S. at 104, the broad power to second guess a state judicial interpretation of its own state’s electoral scheme suggested by Chief Justice Rehnquist’s concurring opinion has never been adopted by the Court. Even if it were, nothing in the Pennsylvania Supreme Court decision, nor in the authority of that court to issue its decision, is inconsistent with the “manner” chosen by the General Assembly for selection

of electors. On the contrary, since this “manner” embraces all aspects of the state’s electoral process, including judicial oversight and provision for emergency judicial action in order to protect the franchise, there is nothing constitutionally questionable about it.

Petitioners seem to suggest that regardless of what legislation the General Assembly adopts to effectuate the “manner” of elector selection, the Pennsylvania Supreme Court is somehow not permitted to definitively interpret that legislation even if assigned that role by the legislature itself. It is respectfully submitted that, in this regard, Petitioners are misguided.

For example, in the present case, the issues before the Court arise solely from Act 77 and the deadlines it imposed on mail-in ballots.<sup>4</sup> These deadlines were universal and applied to all ballots, not merely those aimed at selecting presidential electors. There is nothing in Act 77 which differentiates one contest from another, but instead merely establishes rules for mail-in ballot application and receipt across the electoral landscape. Regarding the November 3, 2020 election, voters faced not only the presidential contest, but also races for U.S. House of Representatives, state House and Senate, and the state “row” offices of attorney general, auditor general and treasurer, with some local municipalities also including various initiative and like issues on the ballot. *See, e.g.*, Penn Lake Borough,

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<sup>4</sup> Prior to Act 77, the only “mail-in” ballots Pennsylvania allowed were absentee ballots which required declaration of expected absence from the voter’s home jurisdiction. While Act 77 provides for no-excuse mail-in voting, it also retains the concept of absentee balloting. Since the latter is more relic than relevant, reference in this brief to “mail-in” ballots refers to both species.

PA, sample ballot, <https://www.luzernecounty.org/DocumentCenter/View/22725/Penn-Lake-Park-Boro-187-Bi-Lingual-All> (last visited Nov. 23, 2020). The provisions of Act 77 at issue here applied to each of these and made no distinction between one race or another.

What is most telling, then, is that the “manner” chosen by the General Assembly for selection of presidential electors was not a “stand-alone” provision but instead was fully incorporated into existing state law and procedure for conduct of elections of all nature, from presidential to the smallest municipal entity. By its own definition, Act 77 was “An Act, [a]mending the act of June 3, 1937 (P.L.1333, No.320) [the Pennsylvania Election Code],” and was fully integrated into that statute. Even assuming Petitioners are correct that a state legislature is constitutionally empowered to choose a “manner” of elector selection which may diminish (or even eliminate) any interpretive role for the judiciary, that is *not* what Act 77 does. Instead, by incorporating the provisions of Act 77 into the Election Code and further, by *not* amending other legislative provisions which have implications for the electoral process (such as the Judicial Code), the General Assembly has chosen a “manner” for selection of presidential electors which indeed *does* include a decisive role for the Pennsylvania judiciary. That was the choice the General Assembly made and a choice which Petitioners’ efforts now seek to negate.<sup>5</sup>

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<sup>5</sup> It would be unduly burdensome if boards of election, such as the present Respondent, were required to discern which portions of the Election Code are inapplicable to the presidential elector process and which remain enforceable in all other respects. The General Assembly, exercising its constitutional prerogative under Article II, made the economical decision to weld all electoral matters to an integrated scheme upon which election

For example, among the intersections between the judiciary and the electoral process, the Election Code grants broad powers to the courts of common pleas regarding such things as voter registration controversies, 25 P.S. § 3073, and Election Day duties where the courts “shall be in continuous session” to, among other things, “settle summarily controversies that may arise with respect to the conduct of the election; [and] shall issue process, if necessary, to enforce and secure compliance with the election laws . . .”. 25 P.S. § 3046.

Further, and of particular note regarding the present issues, the Election Code intertwines directly with Pennsylvania’s Judicial Code in matters related to selection of presidential electors by providing that:

[t]he Commonwealth Court shall have exclusive original jurisdiction of . . . [c]ontested nominations and elections of the second class<sup>6</sup> under the act of June 3, 1937 (P.L. 1333, No. 320), known as the “Pennsylvania Election Code.”

42 Pa.C.S. § 764.

These provisions are certainly not unusual, and indeed, one would expect that a state’s legislature would operate most comfortably “[t]hrough the structure of its [own] government [by which it] defines itself as a sovereign,” *Arizona State Legislature v. Arizona Indep.*

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officials as well as citizens can rely in all instances, including obtaining guidance, directive and remedy from a fully incorporated judiciary. For these reasons, the present Respondent, and the other boards of election, would experience significant impact if this electoral structure were disjoined.

<sup>6</sup> The Election Code defines “elections of the second class” to include, among others, “[n]ominations and elections of electors of President and Vice-President of the United States . . .”. 25 P.S. § 3291.



*Redistricting Comm'n*, 576 U.S. 787, 817 (2015)(citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), and include provisions for judicial involvement in overseeing elections. Indeed, in his concurring opinion in *Bush v. Gore*, Chief Justice Rehnquist recognized that “various bodies” within Florida’s governmental structure, including the courts, were “statutorily [charged with various] responsibilit[ies]” regarding presidential elector selection. But what neither the Chief Justice nor the per curiam opinion addressed was any sense that in exercising its authority to choose the elector selection mechanism, a state legislature may likewise choose to defer interpretation and implementation of its choice to its own judiciary. That is precisely what the General Assembly has done here and precisely why this case is unworthy of certiorari review.

In the face of an unprecedented pandemic, coupled with implementation of a vastly expanded mail-in voting option (with tight timelines regarding application for and receipt of these ballots) and concerns about the USPS’s ability to adequately process the ballots, the Pennsylvania Supreme Court “exercised Extraordinary Jurisdiction to address these issues and to clarify the law of this Commonwealth in time for the 2020 General Election.” *Boockvar*, 238 A.3d at 352 (Pa. 2020). Invoking its statutory authority to “cause right and justice to be done,” 42 Pa.C.S. § 726, the Court fashioned an equitable solution to the problems it faced and provided the three day extension for receipt of timely mailed-in ballots.

As the Court noted, judicial relief in the face of emergency (which the pandemic caused) is not new. When flooding interfered with an election several decades ago, Commonwealth Court addressed the authority of the judiciary to suspend voting and

reschedule an election for a later time. Recognizing that “[t]he purpose of the election laws is to ensure fair elections,” the Court concluded that the Election Code:

implicitly grants the court authority to suspend voting when there is a natural disaster or emergency such as that which confronted voters . . . on the election date here involved. To permit an election be conducted where members of the electorate could be deprived of their opportunity to participate because of circumstances beyond their control, such as a natural disaster, would be inconsistent with the purpose of the election laws.

*In re Gen. Election-1985*, 531 A.2d 836, 839 (Pa. Cmwlth. 1987).<sup>7</sup>

The Supreme Court noted as well several other instances where “other jurisdictions have likewise granted temporary extensions when faced with natural disasters, such as hurricanes. . . . [see, e.g.] *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1259 (N.D. Fla. 2016); *Georgia Coalition for the Peoples’ Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344, 1345 (S.D. Ga. 2016).” *Boockvar*, 238 A.3d at 366. Given the countless circumstances, whether of natural or other origin, which could create an emergent need for judicial intervention in the electoral process, it is

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<sup>7</sup> Also invoking legislative authority provided by 35 Pa.C.S. § 7301, and in the face of an emergency caused not only by COVID-19 but also civil unrest resulting from the death of George Floyd, Governor Tom Wolf extended the time in the Spring 2020 primary election for receipt of mail-in ballots in six counties. See Penn Exec. Order No. 2020-20 (June 1, 2020), available at <https://www.governor.pa.gov/wp-content/uploads/2020/06/20200601-EO-Deadline-Extension.pdf>.

difficult to imagine that the General Assembly's interspersing of judicial provisions in the manner it has chosen for elector selection is somehow subject to this Court's review when Pennsylvania's judiciary acts to mitigate such an emergency. One can hardly think of a greater insult to the unique constitutional role a state legislature plays in the presidential elector process than to diminish its chosen path by unbidden federal review. As respect for choice of that path is essential, the petitions should be denied.<sup>8</sup>

**II. Receipt of mail-in ballots after Election Day is not only not contrary to federal law, it is often a remedy chosen by federal courts to protect at least one species of absentee ballot.**

Petitioners' argument that somehow the extension of the deadline for receipt of valid mail-in ballots runs contrary to federal law establishing "a single nationwide federal Election Day" is unworthy of further review. RPP Pet. at 31. It is not that Petitioners are

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<sup>8</sup> Petitioners pepper their submission with reference to the concurring and dissenting opinions of the Pennsylvania Supreme Court justices who disagreed with the Majority. It is important to note, however, that *all* seven justices proposed a remedial response to the problem of covid/USPS/mail-in ballots. While the Majority adopted the three day extension for receipt of validly cast mail-ins, the concurring/dissenting justices supported reducing the application deadline for mail-in ballots by three days, thereby, presumably, making their receipt by Election Day more likely. *Boockvar*, 238 A.3d at 396 (Donahue, J., concurring and dissenting). In each case, the justices recognized the need for extra-legislative action on the part of the Supreme Court to address an emergency and protect the franchise. There is no indication that these minority justices saw their proposal as running contrary to the General Assembly's Article II power. U.S. Const. art. II, § 1.

incorrect in noting that a troika of federal statutes combine to establish this one, uniform Election Day. *See, e.g.*, 3 U.S.C. § 1; 2 U.S.C. § 1; 2 U.S.C. § 7. Indeed, the “first Tuesday after the first Monday” is universally recognized as the statutorily established day for conduct of federal elections (and with their electoral statutes bootstrapped to this date, state elections as well). Where Petitioners’ argument derails is in its supposed assumption that this well-recognized “Election Day” is somehow subverted by allowance of late receipt of otherwise validly cast mail-in ballots.

To be sure, there is nothing in these federal provisions which prohibits acceptance of ballots received after the mandated Election Day. Pursuant to UOCAVA, states are required to protect the franchise of overseas citizens which, in Pennsylvania under UMOVA, means that “[a] valid military-overseas ballot cast under section 3509 (relating to timely casting of ballot) shall be counted if it is delivered by 5 p.m. on the seventh day following the election to the address that the appropriate county election board has specified.” 25 Pa.C.S. § 3511(a).<sup>9</sup> In fact, the Department of Justice has frequently litigated a state’s failure to comply with the UOCAVA mandate, and has often successfully sought court orders which

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<sup>9</sup> As noted *supra*, one of the objections Petitioners raise regarding the Pennsylvania Supreme Court decision is its rebuttable presumption of validity of late non-postmarked or illegibly postmarked mail-in ballots. *Boockvar*, 238 A.3d at 386. Again, there is nothing extraordinary about this presumption, given that a somewhat similar benefit is provided to the UMOVA voter: “If, at the time of completing a military-overseas ballot and balloting materials, the voter has declared under penalty of perjury that the ballot was timely submitted, the ballot may not be rejected on the basis that it has a late postmark, an unreadable postmark or no postmark.” 25 Pa.C.S. § 3511(b).

require states to accept overseas mail-in ballots long after Election Day. See U.S. Dept. of Justice, Cases Raising Claims Under the Uniformed and Overseas Citizen Absentee Voting Act, <https://www.justice.gov/crt/cases-raising-claims-under-uniformed-and-overseas-citizen-absentee-voting-act> (last visited Nov. 24, 2020). In one case, *United States v. Arizona*, No. 18-CV-00505 PHX-DLR (D. Ariz. Feb. 15, 2018), the state did not forward ballots to UOCAVA voters in time for them to be returned by election day as was required by state law.<sup>10</sup> In order to prevent their disenfranchisement, the Court required ballots to be counted which were received up to ten days *after* election day if they were executed and sent on or before that day. In another case, *United States v. Pennsylvania*, No. 04-CV-830 (M.D. Pa. 2004), an even lengthier acceptance window was imposed, with the Court ordering “[c]ounty boards of elections to accept absentee ballots cast for federal office” in the primary election of 2004 *twenty days after* election day.<sup>11</sup>

These statutes and cases, enforcing protection of the franchise for overseas voters, represent the understanding that, despite Petitioners’ ardent pleas, there is nothing *per se* polluted about a late-arriving ballot. Just as a score of federal courts have extended deadlines in the UOCAVA context for receipt of ballots, the Pennsylvania Supreme Court’s exercise of a like remedy in this case is equally as constitutionally sound. In each instance, the remedy was designed to protect the sacred right to vote. Disrupting that judgment now can only create a mischief much more

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<sup>10</sup> As noted, Pennsylvania provides a week-long “window” for receipt of ballots mailed pursuant to UMOVA.

<sup>11</sup> At the time of this decision, the statutory deadline for receipt of absentee ballots was the Friday *before* Election Day.

constitutionally unsound than anything the Supreme Court below may have done.<sup>12</sup>

### CONCLUSION

For these reasons, the petitions for writ of certiorari should be denied.

Respectfully submitted,

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November 30, 2020

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<sup>12</sup> Aside from these arguments on the merits, the Court must also address the jurisdictional question posed by the electoral circumstances unfolding rapidly. Pursuant to the Election Code, 25 P.S. § 3154(f), each county board of elections was required to “certify the returns” by November 23, 2020, which the present Respondent did. *See* Appendix (memorandum of Romilda P. Crocamo, Luzerne County Chief County Solicitor). In doing so, however, the “255 ballots which arrived after 8:00 PM on election day and before 5:00 PM on November 6, 2020, were not included in the certified results.” *Id.* Further, on November 24, 2020, the Secretary certified, statewide, the results of the election, and likewise did not include in this certification any late-arriving ballots at issue here. *See* Department of State press release, *available at* <https://www.media.pa.gov/pages/State-details.aspx?newsid=435> (last visited Nov. 25, 2020); *see also*, Department of State election returns, *available at* <https://www.electionreturns.pa.gov/> (last visited Nov. 25, 2020).

As a result, the issues raised by Petitioners are moot since the ballots in question are completely irrelevant to the election result.

## **APPENDIX**

1a

**APPENDIX**

**MEMORANDUM**

**TO: THE HONORABLE  
JOSEPH M. COSGROVE (ret.)**

**FROM: Romilda P. Crocamo, Esq.,  
Luzerne County Chief County  
Solicitor**

**DATE: November 23, 2020**

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Dear Judge Cosgrove:

Please be advised that the Luzerne County Board of Election has certified the election results from the November 3, 2020, General Election. The 255 ballots which arrived after 8:00 PM on election day and before 5:00 PM on November 6, 2020, were not included in the certified results.

Respectfully,

Romilda P. Crocamo, Esq. /s/