

No. 20A84

In the Supreme Court of the United States

REPUBLICAN PARTY OF PENNSYLVANIA,
Applicant

v.

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

**RESPONSE IN OPPOSITION TO
EMERGENCY APPLICATION FOR INJUNCTION**

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The Pennsylvania Office of Attorney General, on behalf of the Secretary of the Commonwealth Kathy Boockvar, respectfully files this memorandum in opposition to the emergency application for an injunction. Applicant is the Pennsylvania Republican Party (the Republican Party). Respondents are Secretary Boockvar, the Pennsylvania Democratic Party, and all 67 Pennsylvania County Boards of Elections.

INTRODUCTION

Pursuant to unambiguous guidance issued more than a week ago—and reiterated in additional guidance and official correspondence—the Secretary of the Commonwealth has already instructed—and this Court has now ordered—each of Pennsylvania’s 67 county boards of elections to segregate mail-in and absentee ballots that arrived after 8:00 p.m. on November 3 and until 5:00 p.m. last evening, November 6. Having already been denied a stay and then denied expedited consideration of its petition for a writ of certiorari, the Republican Party now returns to ask this Court to issue an injunction ordering Pennsylvania’s counties to do that which the Commonwealth has already directed counties to do and which the counties are already doing.

There is no evidence that any county is disobeying that clear guidance to segregate these votes, and the Republican Party offers only speculation that certain unidentified counties may ignore that repeated guidance or that the Secretary will inconsistently change course. Such conjecture does not justify the extraordinary relief sought here. In fact, as of this filing, 63 counties have already confirmed to the

Secretary their compliance with the prior guidance, including the Commonwealth's two largest counties (Allegheny and Philadelphia). And no county has expressed an intention to violate the guidance.

As for the rest of the requested relief, which relates to the counting of the segregated ballots, the Republican Party's request is without basis in law and is by no means "necessary to preserve this Court's jurisdiction," as the Republican Party extrapolates. Appl. at 5. To the contrary, the Secretary clearly instructed the counties on this point: after segregating the ballots at issue, the counties have been instructed to "count, compute, and *separately* tally the ballots approved for canvassing." A.7 (Nov. 1 Guidance) (emphasis added). And the Department of State has offered further instruction to counties confirming how to do just that in accordance with the counties' voting machines and technology. Respondent's A.9 (Nov. 3 email from V. Degraffenreid). The Republican Party offers no basis for this Court to conclude that counties are not following the Secretary's instructions and separately tallying these votes.

Furthermore, the Republican Party's requested injunction would unnecessarily halt the counting of votes for Pennsylvania state races, impacting the Commonwealth's ability to seat its General Assembly by December 1, 2020, as required by the Pennsylvania Constitution. PA. CONST. Art. II, § II. How Pennsylvania conducts elections for state offices does not implicate the Electors and Elections Clauses of the United States Constitution. Therefore, in addition to being

unnecessary, the Republican Party’s request for relief is overbroad and should be denied.

Finally, the Republican Party cannot meet the standard for extraordinary relief. An injunction is a rarely granted form of relief which demands a “significantly higher justification” than does a stay, which this Court already denied. *Ohio Citizens for Responsible Energy, Inc., v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia J., in chambers). Far from the Republican Party’s right to relief being “indisputably clear,” as this Court’s precedents require, *ibid.*, the Republican Party advances a novel and expansive interpretation of the Elections and Electors Clauses that has never been endorsed by this Court and is in fact contrary to controlling precedent. *See Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 817-818 (2015) (*AIRC*).

The injunction should be denied.

PROCEDURAL HISTORY AND BACKGROUND

To protect the Pennsylvania Constitution’s Free and Equal Elections Clause’s guarantee of free exercise of the right to suffrage, on September 17, 2020, the Pennsylvania Supreme Court held that absentee and mail-in ballots mailed by voters via the USPS and postmarked by 8:00 p.m. on Tuesday, 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 Friday, November 6, 2020.

On September 28, the Republican Party moved to stay that decision, which this Court denied on October 19. Then, on October 23, the Republican Party

petitioned for a writ of certiorari and moved to expedite consideration of that petition, which this Court denied on October 28. Thus, Pennsylvania voters, who were permitted to request mail-in or absentee ballots until October 27, and pursuant to the Pennsylvania Supreme Court's order, were required to mail them by November 3 and ensure their delivery by 5:00 p.m. on November 6.

While the Republican Party's motion to expedite was pending, and given the proximity of the election, the Department of State issued guidance to county boards of elections officials directing them 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." A.2 (Oct. 28 Guidance). The Department further instructed counties 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, and instructed the boards to "not pre-canvass or canvass any mail-in or civilian absentee ballots received" in this timeframe "until further direction is received." A.2.

Following the Department's issuance of its October 28 guidance, this Court denied the motion for expedited consideration of the Republican Party's certiorari petition, confirming that the Court would not resolve the petition prior to Election Day. As a result, on November 1, the Department issued additional guidance—the "further direction" promised in the October 28 guidance—regarding the canvassing of ballots segregated in accordance with the October 28 guidance. The opening paragraph of the November 1 guidance confirms as much:

On October 28, 2020, the Department of State issued guidance related to the segregation of 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. In doing so, the Department of State indicated it would update the county boards of elections on how to canvass those segregated ballots. That guidance follows[.]

A.6 (Nov. 1 Guidance). The November 1 guidance unambiguously confirmed 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,” and then provided detailed directions for canvassing and counting these ballots. *Ibid.* In particular, the November 1 guidance instructs that county boards of elections must “count, compute, and separately tally the ballots approved for canvassing.” *Ibid.* The Department specifically instructed the counties to “maintain separate counts” for ballots received after 8:00 p.m. on November 3. Both the October 28 and November 1 guidance was promptly shared with counsel of record for the Republican Party and published on the Department of State’s website for the benefit of all Pennsylvania voters. Applicant’s A.113-116.

Subsequently, on November 3, in response to inquiries from counties regarding the technological logistics of separately counting the ballots in question, the Department issued further instructions to counties on how to separately tally those votes. Those instructions reiterated: “The county boards of elections shall count, compute, and separately tally the ballots approved for canvassing and received by Mail after 8:00 P.M. on Tuesday, November 3, 2020 and Before 5:00 P.M. on Friday, November 6, 2020.” A.9 (Nov. 3 instructions).

Finally, following entry of Justice Alito's administrative order yesterday evening ordering the county boards of elections to comply with the Secretary's October 28 and November 1 guidance, the Department promptly distributed the Order to the county boards of elections and requested that they promptly confirm their understanding and intention to follow that guidance. A.10 (Nov. 6 Instructions). As of this filing, 63 county boards, many of which remain engaged in the counting of ballots received prior to 8:00 p.m. on November 3, have so confirmed, including the Pennsylvania's two most populous counties (Allegheny and Philadelphia). No county has expressed any intention not to comply with the administrative order or the prior guidance regarding ballot segregation.

ARGUMENT

A. The Republican Party's Requested Injunction is Unnecessary.

The Court should deny the Republican Party's requested relief because it is unnecessary: the Secretary of the Commonwealth has repeatedly directed the ballot segregation requested in the motion and there is no evidence that any county board is not following that direction. Accordingly, the Republican Party cannot meet its burden to show that it is necessary in aid of this Court's jurisdiction. *See All Writs Act*, 28 U.S.C. § 1651; *Wisconsin Right to Life, Inc. v. Federal Election Com'n*, 542 U.S. 1305, 1306 (2004); *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers).

The Department issued clear guidance on October 28 instructing the counties to segregate ballots, and has reiterated that guidance three times since: November

1, November 3, and again yesterday, November 6. There is no evidence and no reason to suppose that county boards are not following it. *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926) (courts “presume that [public officers] have properly discharged their official duties” “in the absence of clear evidence to the contrary”).

Similarly, the Republican Party’s suggestion that an injunction is necessary because the Secretary might change her guidance has no factual foundation. Application at 5. But again, the Secretary will not change that position, and in fact, her position has remained clear and consistent: the ballots in question should be separately segregated and separately counted and tallied.

To be clear, proceeding in the manner instructed by the Secretary (and reiterated in Justice Alito’s administrative order) will not interfere with the future consideration of the Republican Party’s pending petition for certiorari. To the contrary, the Secretary has instructed that ballots be segregated and then separately counted, which will ensure this Court’s further review, if necessary.

B. The Requested Relief Is Overbroad.

The requested relief would also unnecessarily interfere with the Commonwealth’s elections. Halting the counting of these ballots would also significantly impact numerous state races and inhibit the Commonwealth from timely sitting its General Assembly. Though dominating the news cycle, federal elections were not the only elections conducted on November 3. On the same ballot, Pennsylvanians also voted for numerous state offices, including 25 state senators

and all 203 members of the state House of Representatives. These races are not part of this action. And the Electors and Elections Clauses of the United States Constitution do not control how Pennsylvania elects its own state officials. Yet, halting the counting of the ballots received between November 3 and November 6 will likewise halt the election of federal and state officers alike, who all appeared on the same ballots. A member of our General Assembly begins his or her term “on the first day of December next after their election.” PA. CONST. Art. II, § II. The deadline for the Secretary to order a recount of state races is November 12, 25 P.S. § 3154(g)(2), and the deadline for the county boards of election to certify the votes is November 23, 25 P.S. § 2642(k).¹ Any halt to the counting of ballots will significantly impact the Commonwealth’s ability to timely seat its legislature.

The Republican Party of Pennsylvania is obviously well aware of this, and yet did not address it in its application. Indeed, it makes no distinction between state and local versus federal races. And it is no answer to suggest that ballots be half-counted. Ballots are scanned into computers as a single document. Halting the counting of some races necessitates the halting of counting for all. For this reason, the Secretary directed the county boards of elections to count the ballots, but separately track the tallies so that votes for federal offices could be discerned based on any potential future action by this Court. This Court should not enjoin the

¹ A copy of the 2020 Election Calendar for the Commonwealth of Pennsylvania can be found at https://www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice/Documents/58680_2020%20Election%20Calendar_for%20web_FINAL.pdf. Pages 26-29 explain the statutory deadlines post-election.

counting of any ballots, and certainly should not enjoin the counting of votes for state offices, which are not part of this action.

C. The Republican Party Failed to Establish That its Legal Rights are “Indisputably Clear.”

The Republican Party places heavy reliance on the fact that four justices of this Court dissented from their unsuccessful request for a stay as though this necessarily entitles it to an injunction. It does not.

Unlike a stay, an injunction “does not simply suspend judicial alteration of the status quo.” Rather, an injunction grants “judicial intervention that was previously withheld.” *Lux*, 561 U.S. 1307. As such, an injunction “demands a significantly higher justification” than that required for a stay. *Ibid.* (quoting *Ohio Citizens for Responsible Energy, Inc., supra*). Thus, this power is to be used “sparingly and only in the most critical and exigent circumstances.” *Ohio Citizens for Responsible Energy*, 479 U.S. at 1313; *see also* Sup. Ct. R. 20.1 (issuance of an extraordinary writ under the All Writs Act “is not a matter of right, but of discretion sparingly exercised”).

The Republican Party does not cite this Court’s well-established injunction standard anywhere in its filing. The Republican Party’s failure in this regard is, by itself, a sufficient basis for denying the requested relief. *See e.g., Ohio Citizens*, 479 U.S. at 1312 (Scalia, J., in chambers) (summarily dismissing injunction request where applicant failed to address “the particular requirements for its issuance”). Moreover, even if the Republican Party had referenced the correct requirements for

issuance of an injunction, it cannot satisfy the demanding standard for that extraordinary and rarely granted form of relief.

Contrary to the Republican Party’s contention, *AIRC*, not Chief Justice Rehnquist’s concurrence in *Bush v. Gore*, 531 U.S. 98, 111 (2000), controls here. *See Democratic Nat’l Comm. v. Wisc. State Legislature*, No. 20A66, __ U.S. __, 2020 WL 6275871, *1 (2020) (C.J., Roberts, concurring in denial of stay) (allowing the modification of election rules in Pennsylvania because it “implicated the authority of state courts to apply their own constitutions to election regulations”).² In *AIRC*, this Court held that a state legislature must enact regulations governing federal elections in accord with its state constitution. *AIRC*, 576 U.S. at 817-18; *see also League of Women Voters v. Commonwealth*, 178 A.3d 737, 811 (Pa. 2018) (rejecting as “radical” state legislators’ argument that Elections Clause “nullifie[s]” the Pennsylvania Constitution with respect to congressional reapportionment), *stay denied Turzai v. League of Women Voters*, 17A909 (U.S. 2018), *certiorari denied Turzai v. Brandt*, 17-1700 (U.S. 2018). When the state legislature “contravenes the state constitution, it is not acting as the legitimate legislative body * * * and thus [it is] not entitled to Article II protection.” Vikram Amar & Alan Brownstein, *Bush v. Gore and Article II: Pressured Judgment Makes Dubious Law*, *The Federal Lawyer*, Mar./Apr. 2001, Vol. 48, No. 3 at 31. Otherwise, state legislatures could enact laws without regard to their state constitutional restraints—for example, the

² *Bush v. Gore* did not involve the authority of state courts to apply their own constitutions to election regulations.

Pennsylvania Constitution’s prohibition against logrolling. PA. CONST. Art. III, § 3 (“No bill shall be passed containing more than one subject[.]”).

Recognizing that *AIRC* precludes the doctrine they seek to create, the Republican Party asks this Court to overturn that prior precedent. The very fact the Republican Party asks this Court to take these extraordinary steps establishes that their right to relief is certainly not indisputably clear.

CONCLUSION

The Court should deny the application to enjoin the counting of lawfully cast votes.

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