

No. 220155

In The
Supreme Court of the United States

STATE OF TEXAS, *et al.*,
Plaintiffs,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Defendants.

On Motion for Leave to File Bill of Complaint

**MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE
AND BRIEF ON BEHALF OF CERTAIN SELECT
PENNSYLVANIA STATE SENATORS AS AMICI CURIAE
IN SUPPORT OF NO PARTY**

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MOTION FOR LEAVE TO FILE

Certain select Pennsylvania State Senators¹ bring this brief as *Amici Curiae* in support of their authority as a legislative body under the U.S. Constitution, and respectfully move for leave of Court to file the accompanying amicus brief in support of neither plaintiffs nor defendants, and instead asks this Court to affirm the grant of authority to state legislatures, and not courts, under the U.S. Constitution's Elections Clause.

This brief will be helpful as *Amici Curiae* assert that the Pennsylvania Senate, together with the Pennsylvania House of Representatives, comprises the General Assembly of the Commonwealth of Pennsylvania. The General Assembly, as the legislature of Pennsylvania is given authority to prescribe the "Times, Places, and Manner of holding elections" under Article I, § 4, cl 1 of the U.S. Constitution.

Amici further assert that the Pennsylvania Supreme Court, aided by the Pennsylvania Secretary of State, usurped the authority of the Pennsylvania General Assembly when ignoring or rewriting Pennsylvania's duly enacted election regulations. Therefore, this Court should affirm the grant of authority to state legislatures under the U.S. Constitution's Elections Clause and disclaim state supreme courts and executive branch officials, from usurping that authority for themselves. *Amici Curiae* request that their motion to file the attached *amicus* brief be granted.

¹ The following Pennsylvania State Senators, being a majority of all Republican members of the Senate, join this brief in full: ¹ Jake Corman, Kim Ward, Douglas V. Mastriano, Robert Mensch, Wayne Langerholc, Jr., David G. Argall, Scott E. Hutchinson, Scott F. Martin, Kristin Phillips-Hill, Michele Brooks, Camera Bartolotta, Judy Ward, Ryan P. Aument, Pat Stefano, Michael R. Regan, Dave Arnold, Mario Scavello, John DiSanto, Joe Pittman, Daniel Laughlin, Patrick M. Browne, Gene Yaw, John R. Gordner, Devlin Robinson.

Pursuant to this Court's order of April 15, 2020, *Amici Curiae* are hereby filing a single paper copy of this motion on 8 1/2 x 11-inch paper under Rule 33.2.

Respectfully submitted on this 10th day of December, 2020.

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STATEMENT OF INTEREST OF AMICI CURIAE¹

Certain select Pennsylvania State Senators² bring this brief as *Amici Curiae* in support of their authority as a legislative body under the U.S. Constitution. The Pennsylvania Senate, together with the Pennsylvania House of Representatives, comprises the General Assembly of the Commonwealth of Pennsylvania. The General Assembly, as the legislature of Pennsylvania, is given authority to prescribe the “Times, Places, and Manner of holding elections” under Article I, § 4, cl. 1 of the U.S. Constitution.

Amici present the following arguments in support of neither plaintiff nor defendants and respectfully request they be heard in support of the General Assembly’s primary authority to enact election regulations pursuant to the Constitution’s plain text. Because the issues raised in this action directly pertain to the General Assembly’s power under the U.S. Constitution, *Amici* have a significant interest in this case.

SUMMARY OF THE ARGUMENT

The Elections Clause of Article I, § 4 of the U.S. Constitution delegates to state legislatures in the first instance, and Congress in the second, the authority to enact regulations for federal elections. Neither State nor Federal courts have any

¹ No counsel for a party authored this brief in whole or in part. No person or entity other than *Amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

² The following Pennsylvania State Senators, being a majority of all Republican members of the Senate, join this brief in full: ² Jake Corman, Kim Ward, Douglas V. Mastriano, Robert Mensch, Wayne Langerholc, Jr., David G. Argall, Scott E. Hutchinson, Scott F. Martin, Kristin Phillips-Hill, Michele Brooks, Camera Bartolotta, Judy Ward, Ryan P. Aument, Pat Stefano, Michael R. Regan, Dave Arnold, Mario Scavello, John DiSanto, Joe Pittman, Daniel Laughlin, Patrick M. Browne, Gene Yaw, John R. Gordner, Devlin Robinson.

such delegation of power.³ The plain language of the text, the history of the text, and the history of the founders who wrote the text all point to this obvious conclusion. The Supreme Court of Pennsylvania, aided and abetted by Kathy Boockvar—the politically friendly Secretary of State—had a different opinion.

In a majority opinion in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), the Supreme Court of Pennsylvania took for itself the legislative power conferred directly upon the Pennsylvania General Assembly by the U.S. Constitution, and, in so doing, effectively declared itself the *rex imperator* of Pennsylvania elections. Using the pandemic as an excuse, the Pennsylvania Secretary of State and Supreme Court both disregarded and rewrote Pennsylvania law by, in one motion, advocating for and ordering the extension of the statutorily-prescribed time for absentee ballots to be received. In fact, the Supreme Court of Pennsylvania ignored the factual findings of their own assigned special master in *Crossey v. Boockvar*, 2020 Pa. LEXIS 4868 (Sept. 17, 2020). These actions wrested from the Pennsylvania General Assembly its constitutionally designated authority and impermissibly took that power for the Supreme Court.

This Court should disclaim the “authority” of State and Federal courts and Executive officials from enacting their own election regulations in contravention of duly enacted state law and affirm the rights of State legislatures to do the same.

³ Under the Elections Clause there is, at most, a limited role for a state’s governor in signing or vetoing election legislation as part of a state’s “prescriptions for lawmaking.” See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm.*, 576 U.S. 787, 808 (2015) (“In sum, our precedent teaches that redistricting is a legislative function, to be performed in accordance with the State’s prescriptions for lawmaking . . .”).

ARGUMENT

I. ONLY STATE LEGISLATURES AND CONGRESS HAVE THE AUTHORITY TO REGULATE ELECTIONS.

The Constitution delegates the authority to regulate the time, place, and manner of elections to the legislatures of the fifty states in the first instance and to Congress in the second. U.S. Const. art. I, § 4, cl. 1. State courts—as well as their federal counterparts—are wholly excluded. *See id.* The term “legislature” was “not one ‘of uncertain meaning when incorporated into the Constitution’” and is not of uncertain meaning today. *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 itself and the “State” of which it is only a subpart. The plain text of the Elections Clause is clear—neither courts nor executive personnel have authority to usurp legislative decision-making and supplant their own in the area of elections. By empowering the legislature of the state to prescribe election rules, the Constitution denies that power to others.

There are multiple other ways the Constitution denies authority to non-legislative actors to create or modify election regulations. One reference point, for instance, is that the Elections Clause is an adaptation of an English law that existed well before the founding. The Elections Clause is derived from an English Parliamentary law called the “methods of proceeding” which designated authority as to “time and place of election” to the House of Commons. *See* 1 William Blackstone, *Commentaries* *158-59, *170-74. Those “time and place” “methods” were in turn completely within parliamentary control, beyond the reach of “the

Common Law” and “Judges.” George Petyt, *Lex Parliamentaria* 9, 36-37, 70, 74-75, 80 (1690); 1 William Blackstone, *Commentaries* *146-47. By delegating the procedures of congressional elections to legislatures, the Elections Clause carried forward the English law tradition of maintaining legislative control, and specifically 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 ever proposed that other branches of state government may exercise or wrest control from the legislature. Instead, they viewed Congress as the *exclusive* overriding authority. *See* The Federalist No. 59 (Alexander Hamilton). That authority, 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.*

Another reference point that buttresses the plain language of the Elections Clause is that the power to regulate federal elections is not an inherent state power. Therefore, it “had to be delegated to, rather than reserved by, the states.” *Cook v. Gralike*, 531 U.S. 510, 522 (2001) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-06 (1995)). A state’s legislature would, in fact, have no authority to regulate federal elections at all but for the specific grant of authority found in the Elections Clause. *See Cook*, 531 U.S. at 522.

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 plenary power to regulate state elections. *See Tex. Democratic Party v. Abbott*, 961 F.3d 389, 407 (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.” *Coal. For Good Governance 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.”).

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

II. THE PENNSYLVANIA SUPREME COURT AND SECRETARY OF STATE USURPED THE LEGISLATURE'S AUTHORITY.

The Supreme Court of Pennsylvania's three-day extension of the ballot received-by deadline is an archetypal example of when Article One, Section Four of the U.S. Constitution is violated.

A. The Pennsylvania Legislature Enacts No-Excuse Mail-In Voting.

On October 31, 2019, after engaging in bi-partisan negotiations and deliberations, the majority Republican Pennsylvania General Assembly passed, and the Governor (a member of the Democratic Party) signed, a comprehensive reform of the state's election laws. This was accomplished before the impact of COVID-19 was known. *See* 2019 (P.L. 552, No. 77) 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West). Among other reforms, this legislation made available for the first time no-excuse mail-in voting to every registered Pennsylvania voter. *See* 25 P.S. § 3150.11(b). Additionally, the Pennsylvania General Assembly's 2019 bi-partisan deliberations and negotiations produced an extension of the absentee and mail-in ballot received-by deadline from 5 P.M. the Friday before Election Day, to 8 P.M. on Election Day. *See* 25 P.S. § 3146.6(a); § 3150.16(a).⁴

Then, as the COVID-19 virus descended on the United States, Pennsylvania's General Assembly acted and, through bi-partisan deliberation and negotiation,

⁴ *See Crossey, et al. v. Boockvar, et al.*, No. 266 M.D. 2020 at 174a (Pa. Commw. Ct. Sept. 4, 2020) (Leavitt, P.J.) (Report and Recommendation) (the Report and Recommendation can be found at *Republican Party of Pennsylvania, Petitioner v. Kathy Boockvar, Secretary of Pennsylvania, et al.*, No. 20-542 (U.S.) (appendix to petition for writ of certiorari filed October 23, 2020) (All citations to the Report and Recommendation will be to Appendix F of that document and its corresponding page numbers)). Importantly, Pennsylvania has imposed a "received-by" deadline since 1964 and has never imposed a "mailed-by" deadline. *See id.* at 29-30.

modified its election code to address the pandemic. *See* Act of Mar. 27, 2020, (P.L. 41, No. 12), 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422) (West). After all of these changes to state law, Pennsylvania offered its citizens two options for voting in 2020: Voters could either apply for and submit a mail-in ballot⁵ before the 8:00 p.m. Election Day deadline, or they could vote in-person at their designated polling site on Election Day.

Some organizations and individuals disagreed with the General Assembly's perceived omissions. Two different sets of plaintiffs filed lawsuits in Pennsylvania state court, seeking to alter Pennsylvania's election code and enact their own policy preferences.

B. Litigation Challenging the Ballot Received-By Deadline: *Crossey v. Boockvar*.

On April 22, 2020, a group of individual and organizational petitioners filed a Petition for Declaratory and Injunctive Relief in the Commonwealth Court of Pennsylvania against Secretary of the Commonwealth Kathy Boockvar with regard to voting procedures for Pennsylvania's June 2, 2020 primary election. *See Crossey et al. v. Boockvar*, No. 266 MD 2020 at 140a. The Secretary challenged jurisdiction, and on June 17, 2020, the Commonwealth Court transferred jurisdiction to the Supreme Court of Pennsylvania. *Id.* at 141a. The petitioners, and later the Pennsylvania Secretary of State, requested that the Supreme Court of Pennsylvania extend the 8:00 p.m. received-by deadline by seven days (or, per the Secretary, three days), require prepaid postage on mail-in ballots, and allow for the use of third-

⁵ Unless otherwise noted, when this Amici Brief refers to mail-in ballots, it also includes absentee ballots.

party assistance in collecting mail-in ballots. *Id.* at 142a. The Supreme Court of Pennsylvania appointed President Judge Leavitt of the Commonwealth Court as special master over the case, and the special master held an evidentiary hearing in the matter on August 31, 2020. *Id.* at 144a-145a.

Based on the evidence presented at the August 31, 2020 hearing, the special master found that the Petitioners failed to meet their burden of showing that the statutory 8:00 p.m. received-by deadline was unconstitutional. *Id.* at 175a-177a. Importantly, after hearing from experts, Judge Leavitt found that USPS performance in Pennsylvania exceeded the national average, and that issues with mail were unlikely to prevent voters from submitting their ballots on time. *Id.* Ultimately, based on the available evidence, on September 7, 2020, the special master recommended that the Supreme Court of Pennsylvania deny the Petitioners' prayer for relief. *Id.* at 185a.

C. **Pennsylvania Democratic Party v. Boockvar.**

Unlike *Crossey*, in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), no factual record was developed, no witnesses were cross-examined, and no exhibits were even scrutinized before admission into evidence. On July 10, 2020, the Pennsylvania Democratic Party commenced an action in the Commonwealth Court of Pennsylvania seeking a variety of changes to Pennsylvania voting procedures. Pls.' Pet. for Declaratory and Injunctive Relief. Petitioners sought injunctive relief that would, *inter alia*, suspend the statutory 8:00 p.m. received-by deadline on Election Day for ballots that were postmarked before that time, extend

the deadline for receipt of ballots to one week after the elections, and afford numerous forms of relief on various other issues under Pennsylvania’s election laws—many of which were supported by the Secretary. *Id.* at 352-55. The Supreme Court of Pennsylvania expedited consideration of the case under its extraordinary procedure known as “Kings Bench,” 42 Pa. C.S. § 726. The Court allowed one week for parties and intervenors to submit supplemental briefing materials but did not schedule a hearing in the case or take any factual evidence.

On September 17, 2020, the Supreme Court of Pennsylvania, without presentation of any factual evidence, granted partial relief to Petitioners and extended the statutory received-by deadline by three additional days after Election Day, until 5:00 p.m. on Friday, November 6, 2020. *Pennsylvania Democratic Party*, 238 A.3d at 386. The court even went further than Petitioners’ requested relief by establishing a presumption that a mail-in ballot lacking any postmark or other proof of mailing was mailed before Election Day “unless a preponderance of the evidence demonstrate[d]” otherwise. *Id.*

In doing so, the Supreme Court of Pennsylvania, supported by the Secretary, has both overridden the constitutionally delegated authority of the state legislature over election law, and it has also mandated the counting of mail-in ballots which bear no evidence that they were cast on or before Election Day at all.

D. The Supreme Court of Pennsylvania Tasked the Commonwealth Court's President Judge Leavitt With Developing a Factual Record and Then Ignored It.

The Supreme Court of Pennsylvania ignored the factual findings of Judge Leavitt on the crucial point about the ability of the Postal Service to timely deliver ballots. In ignoring Judge Leavitt's findings, the Supreme Court of Pennsylvania altered the 8:00 p.m. on Election Day deadline as the received-by deadline and extended it by three days. In doing so, the Supreme Court of Pennsylvania usurped the legislature's deliberate and considered decision to establish and maintain that deadline.

The Supreme Court of Pennsylvania ignored Judge Leavitt's finding that the average postal delivery times in Pennsylvania were above the national average. *Crossey, et al. v. Boockvar, et al.*, No. 266 M.D. 2020 at 164a-165a (Pa. Commw. Ct. Sept. 4, 2020); *see also id.* at 183a ("Whatever delays may be occasioned in the November 2020 general election with respect to the receipt of mail-in ballots by county boards of elections, they are not likely to be caused by the USPS. The evidence demonstrated that USPS performance in Pennsylvania exceeds the national average."). In fact, for first class presort mail, the Postal Service was delivering 98% of that mail in Pennsylvania in one day, with most intra-Pennsylvania mail being delivered in 2 days. *Id.* at 164a-165a. Based upon this finding, Judge Leavitt declined to recommend any extension to the ballot received-by deadline. *See id.* at 184a-185a.

Even though the Supreme Court of Pennsylvania found that the Election Day deadline did not violate the Pennsylvania Constitution, and without addressing the factual findings before it that led the special master to conclude that the Postal Service was capable of timely delivering ballots, the Supreme Court of Pennsylvania ruled that an extension of the received-by deadline was warranted. *Pennsylvania Democratic Party*, 238 A.3d at 386. The Supreme Court of Pennsylvania based this alleged “necessity” on the U.S.P.S. General Counsel’s letter that advised Pennsylvania’s Secretary of State that Pennsylvania’s ballot *request* deadline and ballot *receipt* deadline might be incongruous. *See id.* at 365-66. The incongruity arose from the General Counsel’s use of generic nationwide delivery times of 2-5 days for First Class Mail, and 3-10 days for Marketing Mail. *See id.* In fact, the Supreme Court of Pennsylvania credited the General Counsel’s letter without hearing any testimony and contrary to Judge Leavitt’s findings of fact. *See id.* at 371 (“[W]e place stock in the USPS’s General Counsel’s expression that his client could be unable to meet Pennsylvania’s statutory election calendar.”).

However, this letter was before Judge Leavitt as well. *Crossey, et al. v. Boockvar, et al.*, No. 266 M.D. 2020 at 145a-152a (Pa. Commw. Ct. Sept. 4, 2020). She neither credited nor discredited the letter, but she did place it in the context of the live testimony that established Pennsylvania’s First-Class mail delivery standard as 2 days. *Id.* at 164a-165a. Judge Leavitt also credited as fact that the Postal Service prioritizes election-related mail over other First-Class mail. *Id.* at 164a. In fact, even the *Crossey* Petitioners’ expert testified that it was possible to

meet Pennsylvania’s ballot request and ballot receipt deadlines. *Id.* at 167a. Judge Leavitt also recognized that the U.S.P.S. General Counsel’s letter was also sent to 46 States. *Id.* at 159a. After an evidentiary hearing, the General Counsel’s concerns were placed in their proper context.

Pennsylvania’s General Assembly, through bi-partisan deliberation and negotiation, concluded that seven days between its ballot request deadline, October 27, and the ballot receipt deadline, November 3, was sufficient time. The Pennsylvania General Assembly did not adjust that deadline in March of 2020 when it chose to adjust other deadlines. That was the decision of the legislature.

The Supreme Court of Pennsylvania, however, usurped the General Assembly’s authority, and it did so brazenly. Although the Supreme Court of Pennsylvania may have the final say on the substantive law of Pennsylvania, the Elections Clause is a direct delegation of authority to regulate the times, places, and manner of federal elections to the Pennsylvania General Assembly’s legislative process, subject only to alteration by Congress, not the Supreme Court of Pennsylvania. U.S. Const. Art. I, § 4. To permit the Supreme Court of Pennsylvania’s decision to stand 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 struggle between the state’s courts and its legislature. In this dispute, the Elections Clause of the U.S. Constitution plainly sides with “the legislature.”

The Supreme Court of Pennsylvania ignored this constitutional provision, ignored record evidence, and used a case without *any* record evidence to reach its result. There is no evidence establishing that Pennsylvania's ballot received-by deadline is plainly and palpably unconstitutional. *See Crossey, et al. v. Boockvar, et al.*, No. 266 M.D. 2020 at 181a-182a (Pa. Commw. Ct. Sept. 4, 2020). Pennsylvania's judicial branch, assisted by an overly-friendly Secretary of State, usurped the power of Pennsylvania's legislature, imposing the court's preferred policy preference on Pennsylvania's policy-making branch. If Article I, § 4 of the U.S. Constitution prohibits anything, it should at the very least prohibit these actions of the Supreme Court of Pennsylvania.

CONCLUSION

We respectfully urge this Court to recognize the authority of the state legislature as the primary authority to enact elections regulations for federal elections. Similarly, we respectfully urge the Court to recognize that no other state power, including a state's supreme court, has any authority to modify or enact elections regulations enacted pursuant to the Elections Clause.

Respectfully submitted,

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