

**IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

**No. 133 MM 2020**

**PENNSYLVANIA DEMOCRATIC PARTY, et al.**

**Petitioners,**

**v.**

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

**Respondents.**

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**SUPPLEMENTAL BRIEF OF  
SECRETARY OF STATE KATHY BOOCKVAR**

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**TABLE OF CONTENTS**

INTRODUCTION..... 1

ARGUMENT ..... 6

I. The Election Code Permits Ballots To Be Delivered In Person to Locations Designated by County Boards of Election..... 6

II. Naked Ballots Are Required To Be Counted Under the Election Code ..... 12

III. There Is No Requirement That County Boards of Election Contact Voters Whose Ballots Contain Errors and Afford an Opportunity To Cure..... 17

IV. Given Announced Mail Delivery Delays, Ballots Postmarked by Election Day and Received by November 6, 2020 Should Be Counted ..... 18

V. The Poll Watcher Residency Requirement Is Constitutional..... 22

VI. The Non-Severability Provision Is Not Implicated and Does Not Supplant This Court’s Judicial Authority and Function..... 25

CONCLUSION ..... 27

## TABLE OF AUTHORITIES

### CASES

<i>Appeal of James</i> , 105 A.2d 64 (Pa. 1954).....	17
<i>In re Bruno</i> , 101 A.3d 635 (Pa. 2014) .....	5, 20
<i>Burke ex rel. Burke v. Independence Blue Cross</i> , 103 A.3d 1267 (Pa. 2014) .....	10
<i>Bush v. Gore</i> , 531 U.S. 98 (2000) .....	11
<i>Commonwealth v. Mazzetti</i> , 44 A.3d 58 (Pa. 2012) .....	15
<i>Commonwealth v. Williams</i> , 129 A.3d 1199 (Pa. 2015).....	21
<i>Crown Castle NG East LLC v. Pennsylvania Pub. Util. Comm’n</i> , -- A.3d --, No. 2 MAP 2019, 2020 WL 4152006 (Pa. July 21, 2020) .....	14
<i>Delisle v. Boockvar</i> , No. 95 MM 2020, 2020 WL 3053629 (Pa. May 29, 2020) .....	20
<i>Fonner v. Shandon, Inc.</i> , 724 A.2d 903 (Pa. 1999) .....	15
<i>In re Gen. Election Nov. 6, 1971</i> , 296 A.2d 782 (Pa. 1972) .....	17
<i>In re Gen. Election 1985</i> , 531 A.2d 836 (Pa. Cmwlth. Ct. 1987) .....	19
<i>In re Luzerne Cnty. Return Bd. (Appeal of Weiskerger)</i> , 290 A.2d 108 (Pa. 1972) .....	15, 16, 17, 18
<i>Paher v. Cegavske</i> , No. 20-CV-243, 2020 WL 2748301 (D. Nev. May 27, 2020) .....	12
<i>Perles v. Hoffman</i> , 213 A.2d 781 (Pa. 1965) .....	4
<i>In re Petitions to Open Ballot Boxes</i> , 188 A.2d 254 (Pa. 1963).....	17

<i>Pierce v. Allegheny Cnty. Bd. of Elections</i> , 324 F. Supp. 2d 684 (W.D. Pa. 2003).....	11, 24
<i>Republican Party of Pa. v. Cortes</i> , 218 F. Supp. 3d 396 (E.D. Pa. 2016).....	11, 23
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964) .....	11
<i>Shambach v. Bickhart</i> , 845 A.2d 793 (Pa. 2004) .....	16, 18
<i>Short v. Brown</i> , 893 F.3d 671 (9th Cir. 2018).....	12
<i>Stilp v. Commonwealth</i> , 905 A.2d 918 (Pa. 2006) .....	26
<i>In re Taylor</i> , 921 A.2d 1181 (Pa. 2007).....	4, 16

## STATUTES

Pa. Const. art. V, § 2(a) .....	20
25 P.S. § 2602.....	7
25 P.S. § 2602(q.1).....	18
25 P.S. § 2641(a) .....	8
25 P.S. § 2642(b) .....	8
25 P.S. § 2642(c) .....	8
25 P.S. § 2642(d) .....	8
25 P.S. § 2642(f).....	8
25 P.S. § 2642(g).....	8
25 P.S. § 2645(b) .....	8
25 P.S. § 2645 (d).....	8

25 P.S. § 2687(b) .....	24, 26
25 P.S. § 3046.....	19
25 P.S. § 3050(a)(5)(ii)(C) .....	15
25 P.S. § 3055(d) .....	15
25 P.S. § 3062(c) .....	15
25 P.S. § 3063(a) .....	15
25 P.S. § 3146.2b(a) .....	13
25 P.S. § 3146(c) .....	10
25 P.S. § 3146.6.....	10
25 P.S. § 3146.6(a) .....	7, 8, 9
25 P.S. § 3146.6(c) .....	10, 22
25 P.S. § 3146.8(d) .....	13
25 P.S. §3146.8(g).....	13
25 P.S. § 3146.8(g)(1)(2).....	24
25 P.S. § 3146.8(g)(3) .....	13
25 P.S. § 3146.8(g)(4) .....	13, 14
25 P.S. §3146.8(g)(4)(i).....	13
25 P.S. § 3146.8(g)(4)(ii) .....	13, 14
25 P.S. § 3146.8(g)(1.1) .....	23

25 P.S. §3146.8(g)(2) .....	23
25 P.S. § 3150.....	9
25 P.S. § 3150.12b.....	13
25 P.S. § 3511(a) .....	9
42 Pa. C. S. § 501 .....	20
42 Pa. C.S. § 502 .....	20
1 Pa. C.S.A. § 1922(1).....	25

## INTRODUCTION

Secretary of State Kathy Boockvar seeks definitive rulings from this Court on legal questions of first impression concerning provisions in the Pennsylvania Election Code relating to mail-in voting. The importance of these issues and the urgent need for proper interpretation of the Commonwealth's election laws from this Court cannot be overstated. Mail-in voting was widely embraced by Pennsylvania voters in the primary and has taken on greater significance given the challenges posed by COVID-19. Nearly 1.5 million electors who voted in the primary—more than half of the 2.9 electors who voted—cast their votes by absentee or mail-in ballot.<sup>1</sup> There were few significant incidents or errors during the primary and no instances of suspected voter fraud were reported by any of Pennsylvania's 67 counties.<sup>2</sup> Far more—it is estimated that double those who voted by mail in the primary—are expected to exercise their right to vote by mail during the general election in November.

Since Secretary Boockvar filed her application for exercise of extraordinary jurisdiction, the Department of State has been working diligently to ensure a fair and

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<sup>1</sup> See Pennsylvania 2020 Primary Election Act 35 of 2020 Report, at 9-10, <https://www.dos.pa.gov/VotingElections/Documents/2020-08-01-Act35Report.pdf> (last visited September 8, 2020).

<sup>2</sup> See *id.* at 38-39.

transparent general election and has continued to reinforce and guide counties regarding the proper application of the Election Code during the evolving public health disaster. Among other things, on August 19, 2020, the Department of State issued guidance to county boards of election relating to the return of absentee and mail-in ballots and the handling of ballots returned without an inner envelope.<sup>3</sup> The Department continues to address the challenges posed by the U.S. Postal Service’s announced delays in delivery of mail-in ballots.<sup>4</sup>

Notwithstanding these and other efforts, Secretary Boockvar now confronts five different actions in three courts seeking inconsistent forms of injunctive relief based on varying interpretations of Act 77 of 2019. Impelled by the responsibilities of her office, Secretary Boockvar seeks definitive declaratory relief from this Court confirming where electors may deliver their absentee and mail-in ballots, whether ballots returned without an inner envelope must be counted, and whether counties must offer electors an opportunity to correct defective ballots. Secretary Boockvar

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<sup>3</sup> See Pennsylvania Absentee and Mail-in Ballot Return Guidance, [https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS\\_BallotReturn\\_Guidance\\_1.0.pdf](https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_BallotReturn_Guidance_1.0.pdf) (last visited September 8, 2020); Pennsylvania Guidance for Missing Official Election Ballot Envelopes (“Naked Ballots”), [https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS\\_NakedBallot\\_Guidance\\_1.0.pdf](https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_NakedBallot_Guidance_1.0.pdf) (last visited September 8, 2020).

<sup>4</sup> See July 29, 2020 Letter from U.S. Postal Service attached to Application for Exercise of Extraordinary Jurisdiction at Exhibit A.

also seeks a declaration that the statutory residency requirement for poll watchers remains constitutionally valid.

As detailed in Secretary Boockvar’s application for exercise of extraordinary jurisdiction, the plain text of the Election Code answers these questions.

*First*, on the question of ballot return, the Election Code directs that absentee and mail-in ballots be returned in person by the elector to county election boards and does not restrict boards from establishing additional ballot return locations, including secure ballot drop boxes. Contrary to the interpretation urged by certain intervenors, the Code does not constrain counties to only accept in-person delivery at a single board of elections office, but rather vests county election boards with jurisdiction over ballot collection in their counties. Counties thus have the requisite authority to utilize ballot drop boxes and other county election office branch locations as a convenient, safe and effective tool for the return of ballots.

*Second*, with regard to ballots returned without an inner envelope—so-called “naked” ballots—the Election Code and well-settled law support the Secretary’s conclusion that such ballots must be counted. The Code specifies the limited circumstances under which absentee and mail-in ballots must be rejected and directs that all other ballots are required to be counted. Because absentee and mail-in ballots without an inner envelope are not specifically required to be rejected by the Code, they must be counted. This conclusion is compelled by the plain language in the

Election Code and the longstanding directive from this Court that the “Election Code must be liberally construed so as not to deprive . . . the voters of their right to elect a candidate of their choice.” *In re Taylor*, 921 A.2d 1181 (Pa. 2007); *Perles v. Hoffman*, 213 A.2d 781, 784 (Pa. 1965) (citations omitted).

— *Third*, with respect to the proposal by the Democratic Party of Pennsylvania that counties contact voters whose ballots contain minor defects and afford them an opportunity to cure those defects, the Election Code does not require such a procedure.

*Fourth*, there is no merit to the constitutional challenge to the statutory requirement that poll watchers must be residents of the county in which they serve. The residency requirement is neutral, uniform, non-discriminatory and rationally related to the county-based election system in Pennsylvania. It is constitutional.

Nothing in the Election Code supports, let alone requires, a different answer to the issues of statutory interpretation presented here. Intervenor Republican Party of Pennsylvania (“PA Republican Party”) opposed the exercise of emergency jurisdiction by this Court<sup>5</sup> based on its contrary interpretations of the Election Code

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<sup>5</sup> The Plaintiffs in the action pending in the U.S. District Court for the Western District of Pennsylvania, including Donald J. Trump for President, Inc., the Republican National Committee and several Republican candidates and electors, are seeking a preliminary injunction that would require all 67 counties to segregate absentee and mail-in ballots based on their flawed interpretation of the Election Code. They argued in a reply brief filed on September 6, 2020 that a preliminary injunction is warranted because there is no assurance that this Court will act quickly

regarding ballot drop boxes and naked ballots, but those interpretations are inconsistent with the statutory text and would have the impermissible effect of depriving voters of the right to have their votes counted. Additionally, the PA Republican Party threatens that disagreement with its proposed construction of the Election Code will trigger the non-severability provision in Act 77, but the non-severability provision is not even implicated here. No party or intervenor is seeking to invalidate any provision in Act 77 and consequently the non-severability provision will not be triggered by any potential ruling on statutory construction. Moreover, even if the nonseverability clause were implicated—and it is not—such a clause is not an inexorable command but rather a rule of construction and does not limit judicial authority or function.

To ensure a fair and free election, to enable election officials to properly prepare for the election and to eliminate potential confusion, Secretary Boockvar respectfully requests that this Court expeditiously declare that: (1) the Election Code authorizes county boards of election to establish ballot drop-off locations for absentee and mail-in ballots; (2) “naked” ballots must be counted under the Election

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to resolve these statutory interpretation disputes. They obviously misapprehend the speed that attends the exercise of extraordinary jurisdiction. *See In re Bruno*, 101 A.3d 635, 671 (Pa. 2014) (King’s Bench jurisdiction avoids “the deleterious effect upon the public interest caused by delays incident to ordinary processes of law, or deficiencies in the ordinary processes of law making those avenues inadequate for the exigencies of the moment”).

Code; (3) county boards of election are not required to offer voters an opportunity to cure minor ballot defects; and (4) the statutory poll watcher residency requirement is constitutional. In addition, Secretary Boockvar seeks a judicial declaration under this Court’s equity powers directing that ballots postmarked by 8:00 pm on election day and received by November 6, 2020 must be counted for purposes of the November 2020 general election only.<sup>6</sup>

### ARGUMENT

#### **I. The Election Code Permits Ballots To Be Delivered In Person to Locations Designated by County Boards of Election.**

The Election Code vests county boards of election with authority to conduct and manage elections in their jurisdictions. Consistent with this county-based system, the Code permits—and certainly does not in any way prohibit—the county boards to establish and operate secure ballot drop boxes for the safe and convenient return of absentee and mail-in ballots.

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<sup>6</sup> After Secretary Boockvar filed her Application for Exercise of Extraordinary Jurisdiction, this Court entered an Order in the related *Crossey* litigation on August 26, 2020 appointing Commonwealth Court President Judge Mary Hannah Leavitt as Special Master to create an evidentiary record on issues raised in that case, including “the ability of the United States Postal Service to comply with deadlines for the November 3, 2020 general election.” *See* Order in No. 108 MM 2020 dated Aug. 26, 2020. Pursuant to the Order, Judge Leavitt filed proposed findings of fact and conclusion of law and a recommended disposition on Friday September 4, 2020.

The PA Republican Party maintains that voters must return their absentee and mail-in ballots either by mail or in person only “to the office of the county board of elections,” PA Rep. Party Ans. at 19, but there is no such direction in the Election Code. The provisions in the Election Code relating to in-person ballot return do not refer to an “office,” but rather direct electors to return completed ballots in person to their “county board of election.” 25 P.S. §§ 3146.6(a), 3150.16(a). “County board” as used in this section and elsewhere in the Code refers to the municipal body itself, not its office address. 25 P.S. § 2602 (defining “county board” or “board” as “the county board of elections of any county herein provided for”). This is dispositive. Because Sections 3146.6(a) and 3150.16(a) require in-person return of ballots to county election boards, and not in person return to a particular address, ballots may properly be returned to county election boards at locations designated by those boards. The Election Code cannot reasonably be read any other way.

Unable to point to any language in the Election Code restricting ballot return locations, the PA Republican Party argues that voters should only be permitted to return ballots to a central county board of election office to maintain uniformity among the 67 counties in Pennsylvania. PA Rep. Party Ans. at 19. This argument ignores and misunderstands Pennsylvania’s decentralized election system. Elections in Pennsylvania are conducted by the counties. Each county has a board of elections that “shall have jurisdiction over the conduct of primaries and elections in such

county. . . .” 25 P.S. § 2641(a). County boards of election have the authority to purchase their own equipment and supplies, appoint their own employees and issue “rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.” 25 P.S. § 2642(c), (d), (f). The counties determine how many and the size of polling places, which voting systems to use, how many election officers are appropriate and other local matters. 25 P.S. § 2642(b), (c), (d), (g). Counties are also authorized to have multiple offices and to staff those offices how they see fit. 25 P.S. § 2645(b), (d). Far from violating the Election Code, county election boards are expressly authorized to conduct and manage elections within their respective counties.

In briefing on this issue in the Western District of Pennsylvania, the plaintiffs (who are represented by many of the same counsel representing the PA Republican Party in this case) pointed to the second sentence of Sections 3146.6(a) and 3150.16(a), which directs voters to place their ballots into an outer envelope “on which is printed . . . the address of the elector’s county board of election,” and argued that such address is the only place for return of an elector’s ballot. *See* Pls.’ Opp’n to Mot. To Dismiss (ECF No. 320) at 5-6. This argument distorts the statutory language. The only sentence in Sections 3146.6(a) and 3150.16(a) that concerns actual *delivery* of a ballot is the *fourth* sentence and that sentence makes no reference

to the “office” or “address” of the county board of elections, but rather requires delivery “to said county board of election” (*i.e.*, the board of election for the county in which the voter is voting). That critical fourth sentence does *not* direct the voter to return his or her ballot to the *office* or to the *address* listed on the ballot. The Election Code’s specific reference to the “address” of the county board in the second sentence (which relates to what is written on the outer envelope) makes the omission of such reference just two sentences later (in the sentence that actually concerns delivery) dispositive.

Indeed, the General Assembly knew how to specify that delivery must be to “the address” of the office of the county board of elections, as contrasted with the county board of elections (*i.e.*, the body). For example, a military-overseas ballot is counted only if it is returned to “*the address* that the appropriate county election board has specified.” 25 Pa. C.S.A. § 3511(a) (emphasis added). By contrast, absentee and mail-in ballots may be delivered “in person” to the “county board of election,” not a particular “office” or address for the board. 25 P.S. §§ 3146.6(a), 3150.16(a). If the General Assembly intended to restrict ballot returns to the specific “office” address listed on the envelope, it would have said so.<sup>7</sup> This Court, of course,

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<sup>7</sup> It bears noting that, in several Pennsylvania counties, the address on the outer envelope for return of absentee or mail-in ballots is a *Post Office Box*. Notably, the PA Republican Party has never contested that practice and surely it does not contend that voters can only deliver their ballots in person to a Post Office Box whose

cannot add or insert such language that the legislature did not see fit to include. *See Burke ex rel. Burke v. Independence Blue Cross*, 103 A.3d 1267, 1274 (Pa. 2014) (“courts cannot insert words into a statute”).

These same Western District plaintiffs relied on subsection (c) in 25 P.S. § 3146.6 and 25 P.S. § 3150.16 which establish the deadline for ballot return and direct that absentee and mail-in ballots “must be received in the office of the county board of elections no later than eight o’clock P.M. on the day of the primary or election.” *See* Pls.’ Reply Br. in Support of Mot. To Modify Stay Order and Mot. for Limited Prelim. Inj. Relief (ECF No. 437) at 13. That subsection only directs *when* ballots must be received in the office of the county boards of election but does not restrict *how* ballots may be delivered. Subsection (c) must be read together with subsection (a), which specifically addresses the manner of delivery, to mean that ballots may be returned to locations designated by county election boards so long as they are received prior to the 8:00 pm deadline.

The PA Republican Party misses the mark in arguing that allowing county election boards to utilize drop boxes violates equal protection. PA Rep. Party Ans. at 19-20. It does not. The availability of additional ballot return locations does not in any way burden the exercise of the right to vote or affect the validity or weight of

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physical location is unknown (and unknowable) to the voter when that is the address listed on the outer envelope.

any vote. Far from imposing a burden, drop boxes make it more convenient and safer for electors to deliver their completed mail-in ballots (particularly in the midst of the ongoing pandemic). Because all Pennsylvanians enjoy the same right to vote by mail and ballots are counted the same way regardless of how they are returned, alternate or additional ballot return locations do not burden any First Amendment or other constitutional right so as to warrant heightened scrutiny under the *Anderson-Burdick* framework.<sup>8</sup> And there is no doubt that permitting county election boards to establish ballot return sites suitable for their specific jurisdictions—whether urban, suburban or rural—is rationally related to Pennsylvania’s interest in maintaining its county-based election system. *See generally Republican Party of Pa. v. Cortes*, 218 F. Supp. 3d 396, 409 (E.D. Pa. 2016). It necessarily follows that alternate ballot return locations do not deny the right to equal protection. *See, e.g., Short v. Brown*, 893 F.3d 671, 677-79 (9th Cir. 2018) (rejecting equal protection

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<sup>8</sup> The cases cited by the PA Republican Party in its answer to the application for exercise of extraordinary jurisdiction involved circumstances where state procedures resulted in some votes being valued differently than others. *See Bush v. Gore*, 531 U.S. 98 (2000) (manual recount without specific standards to discern intent of the voter violated equal protection); *Reynolds v. Sims*, 377 U.S. 533 (1964) (failure of legislature to implement reapportionment plan notwithstanding population growth resulted in unequal representation); *Pierce v. Allegheny Cnty. Bd. of Elections*, 324 F. Supp. 2d 684 (W.D. Pa. 2003) (different standards governed whether third persons could hand-deliver absentee ballots; given that disparity, “uniform standards [would] not be used statewide to discern the legality of a vote”). No such disparity is present or even alleged here. The use of drop boxes, even if there are distinctions between how rural, urban, suburban counties employ them, does not implicate the legality or weight of a vote.

challenge to California statute permitting voters in some counties to automatically receive ballots by mail because statute only “makes it easier for some voters to cast their ballots”); *Paher v. Cegavske*, No. 20-CV-243, 2020 WL 2748301, at \*7-8 (D. Nev. May 27, 2020) (denying preliminary injunction barring county from mailing ballots to all voters and from assisting voters to return ballots because county’s plan “does not have any adverse effects on the ability of voters in other counties to vote”).

In short, there is nothing in the Election Code that restricts or limits ballot return locations and, as a result, the Court should declare that county election boards are properly authorized to receive absentee and mail-in ballots through use of ballot drop boxes at locations designated by those boards.

## **II. Naked Ballots Are Required To Be Counted Under the Election Code.**

The Secretary seeks to have every ballot counted in the upcoming general election where the voter’s desire to cast a ballot is clear and the voter’s ballot is devoid of those defects that would render votes invalid under the Election Code. By contrast, the PA Republican Party seeks to set aside votes from electors who timely and properly applied for and cast ballots but do not include the inner envelope provided with the ballot. The statutory text and intent require that such ballots be counted.

The PA Republican Party argues that the directive in 25 P.S. § 3150.16(a)—to enclose the mail-in ballot in an inner envelope—and the directive in 25 §

3146.8(g)(4)(ii)—to “set aside” inner envelopes with writing or text—somehow mean that ballots without an inner envelope are invalid. PA Rep. Party Ans. at 22. This argument ignores the separate provision in the Election Code which describes the process for canvassing absentee and mail-in ballots and which makes clear that ballots without inner envelopes are properly counted.

The process by which absentee and mail-in ballots are canvassed is detailed in 25 P.S. § 3146.8. That section directs county boards of election to: (1) “reject[]” and “set aside” ballots cast by electors who died before election day, 25 P.S. § 3146.8(d), (g)(3); (2) examine the declaration on the outer envelope and compare the information on the outer envelope—*i.e.* the elector’s name and address, 25 P.S. § 3146.2b(a)—to the list of eligible mail-in voters, 25 P.S. § 3146.8(g)(3); (3) if satisfied that the declaration is sufficient and the voter is on the list, and the ballots are not challenged on the grounds that the elector is not qualified to vote, in which case the challenged ballot is “set aside,” 25 P.S. §§ 3150.12b, 3146.8(g)(4), open the envelope so as not to destroy the declaration executed thereon, 25 P.S. § 3146.8(g)(4)(i); and (4) “set aside and declare[] void” any inner envelope with text, marks or symbols that identify the elector, 25 P.S. § 3146.8(g)(4)(ii). All absentee and mail-in ballots not rejected or set aside for one of these specific reasons “shall be counted and included with the returns of the applicable election district” as set forth in this section. 25 P.S. § 3146.8(g)(4). Because ballots lacking the inner

envelope—“naked” ballots—are not required to be rejected and set aside, they are valid and must be counted.<sup>9</sup>

The PA Republican Party conflates the outer and inner envelopes in arguing that, because the outer envelope contains markings that identify the elector, a ballot placed directly in the outer envelope must be void. PA Rep. Party Ans. at 23. But what the PA Republican Party is essentially trying to argue is that the outer envelope becomes the inner envelope and, once again, this is not what the Election Code says. The General Assembly directed that only ballots in *inner envelopes* with text, marks or symbols—*i.e.* the “Official Election Ballot” envelope, 25 P.S. § 3146.8(g)(4)(ii)—must be “set aside” but issued no such direction with respect to absentee or mail-in ballots without an inner envelope.

Importantly, the General Assembly was explicit elsewhere in the Election Code in addressing the lack of an inner envelope. In the different section dealing with provisional ballots, the General Assembly directed that a provisional ballot “shall not be counted” if the ballot envelope “does not contain a secrecy envelope.” 25 P.S. § 3050(a.4)(5)(ii)(C). Similarly, the General Assembly was explicit in other sections of the Code directing which ballots must not be counted. *See* 25 P.S. §

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<sup>9</sup> To the extent there exists ambiguity on this point—and there is none—Secretary Boockvar’s interpretation detailed in the guidance issued on August 19, 2020 is entitled to deference. *Crown Castle NG East LLC v. Pennsylvania Pub. Util. Comm’n*, -- A.3d --, No. 2 MAP 2019, 2020 WL 4152006, at \*9 (Pa. July 21, 2020).

3055(d) (“Any ballot deposited in a ballot box at any primary or election without having the said number torn off shall be void and shall not be counted.”); 25 P.S. § 3062(c) (“A vote cast by means of a sticker or label affixed to a ballot or ballot card shall be void and may not be counted.”); 25 P.S. § 3063(a) (“Any ballot marked by any other mark than an (X) or check (✓) in the spaces provided for that purpose shall be void and not counted.”). The absence of such direction with respect to “naked” absentee and mail-in ballots ineluctably requires the conclusion that the General Assembly intended such ballots to be counted. *See Commonwealth v. Mazzetti*, 44 A.3d 58, 67 (Pa. 2012) (“[W]here the legislature includes specific language in one section of a statute and excludes it from another section, the language may not be implied where excluded.”) (citation omitted); *Fonner v. Shandon, Inc.*, 724 A.2d 903, 907 (Pa. 1999) (“[W]here a section of a statute contains a given provision, the omission of such a provision from a similar section is significant to show a different legislative intent.”) (citation omitted).

The PA Republican Party cites *In re Luzerne Cnty. Return Bd. (Appeal of Weiskerger)*, 290 A.2d 108 (Pa. 1972), as ostensible support for the proposition that a ballot without an inner envelope is identifiable and therefore invalid. PA Rep. Party Ans. at 23. *Weiskerger* actually supports counting “naked” ballots in that it holds that ballots that substantially conform to statutory requirements should not be invalidated as a result of minor irregularities. 290 A.2d at 109. The issue in that

case was whether ballots completed in red or green ink were valid even though the Election Code directed that ballots must be marked in blue or black ink to “be valid and counted.” *Id.* This Court held that the ballots were properly counted despite the wrong color ink because the goal in interpreting the Election Code is “to enfranchise and not to disenfranchise” and there was no statutory requirement that ballots in red ink would necessarily be void. *Id.* This reasoning applies equally here and requires the conclusion that “naked” ballots are properly counted.

Indeed, as this Court has long recognized, “there is a longstanding and overriding policy in this Commonwealth to protect the elective franchise.” *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004) (citations and internal punctuation marks omitted). Election laws must be construed liberally in favor of the right to vote. *In re Taylor*, 921 A.2d 1181 (Pa. 2007). This Court has consistently held that ballots containing minor irregularities must be counted where there is no evidence of fraud and the voter’s intent is clear. *See Shambach*, 845 A.2d at 801-03 (holding that write-in votes for already listed candidates failed to conform to procedure in Election Code but were required to be counted in absence of statutory provision stating otherwise); *In re Gen. Election Nov. 6, 1971*, 296 A.2d 782, 784 (Pa. 1972) (holding that absentee ballots completed in red ink and with blacked out blocks rather than an “x” or checkmark were required to be counted); *Weiskerger*, 290 A.2d at 109; *In re Petitions to Open Ballot Boxes*, 188 A.2d 254, 256-57 (Pa.

1963) (holding that ballots with printed “yes” or “no” in addition to required “x” or “check mark” were required to be counted in absence of statutory provision that such marking nullified a ballot); *Appeal of James*, 105 A.2d 64, 66-67 (Pa. 1954) (holding that vote for write-in candidate whose name already appeared on ballot must be counted because, “[e]ven if it were to be said that a minor irregularity was involved, it is not apparent that such a fleeting and fortuitous flaw could invalidate the strikingly clear intent of the voter”).<sup>10</sup>

This Court should similarly declare that “naked” ballots must be counted.

### **III. There Is No Requirement That County Boards of Election Contact Voters Whose Ballots Contain Errors and Afford Them an Opportunity To Cure.**

The Election Code directs that ballots may be pre-canvassed beginning no earlier than 7:00 am on election day and that pre-canvassing shall consist of setting aside the ballots of voters who have died, examining the voter declaration and comparing the elector’s name and address to the list of approved mail-in voters, recording any challenge to the elector’s qualification, opening the outer envelope and setting aside any ballot envelopes with text identifying the elector and then

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<sup>10</sup> The inner envelope protects the voter by providing an additional layer between the outer envelope (which identifies the voter and contains his or her declaration) from the ballot itself. A voter who forgets or elects not to utilize that envelope simply waives that additional layer or protection—it has no bearing on (and does not affect the integrity) of the ballot itself, particularly because the voter’s declaration (executed under penalty of perjury) is on the *outer* envelope.

counting the votes. 25 P.S. § 3146.8(g)(1.1); 25 P.S. § 2602(q.1) (defining “pre-canvass”). There is no provision that contemplates or allows for any other type of inspection or challenge, thus precluding signature analyses by laypersons, and no provision that requires that voters be contacted and afforded an opportunity to cure ballot defects. While the Election Code must be interpreted liberally in favor of counting votes with minor irregularities, *see Shambach*, 845 A.2d at 798; *Weiskerger*, 290 A.2d at 109, and while Secretary Boockvar agrees that notice and cure is advisable as a matter of policy, counties are not required to provide such an opportunity. Accordingly, this Court should declare that the Election Code, as enacted, does not require notice and an opportunity to cure ballot defects.

**IV. Given Announced Mail Delivery Delays, Ballots Postmarked by Election Day and Received by November 6, 2020 Should Be Counted.**

The ballot return deadline issue raised herein and in the *Crossey* litigation goes to this Court’s equitable powers in a time of emergency: whether the Court should temporarily extend the deadline for receipt of mail-in and absentee ballots because of mail-delivery delays during an ongoing public health disaster.

Pursuant to this equitable power, lower courts have previously extended election deadlines in the face of natural disasters imperiling some electors’ ability to vote. For example, in 1985, Washington County suffered major flooding on election day. *See In re Gen. Election 1985*, 531 A.2d 836 (Pa. Cmwlth. Ct. 1987). Given these circumstances, the Washington County Court of Common Pleas entered an

order that, among other things, “(1) suspended, in eleven election districts in Washington County, the statewide general election of November 5, 1985, [and] (2) resumed the election process in those districts two weeks later on November 19, 1985.” *Id.* at 838. Reviewing that order, the Commonwealth Court noted that “neither the Pennsylvania Constitution nor the Election Code . . . expressly provides any procedure to follow when a natural disaster creates an emergency situation that interferes with an election.” *Id.* at 839. The Commonwealth Court went on to conclude that, because Section 1206 of the Election Code states that Courts of Common Pleas have authority to “decide . . . matters pertaining to the election as may be necessary to carry out the intent of this act,” and also because “[t]he purpose of the election laws is to ensure fair elections, including an equal opportunity for all eligible electors to participate in the election process,” common pleas courts have the implicit statutory authority under 25 P.S. § 3046 to suspend voting when there is a natural disaster or emergency . . .” *Id.* (citing 25 P.S. § 3046). Indeed, “[t]o permit an election [to] 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.” *Id.* at 839.

So too here. Like in *In re Gen. Election*, there is a natural disaster, albeit of a different kind, that warrants temporary equitable relief, specifically a short extension

of the deadline only for counties to receive mailed ballots. The recent communication from the U.S. Postal Service concerning delays in mail delivery is critically relevant and warrants equitable relief from this Court. *See Delisle v. Boockvar*, No. 95 MM 2020, 2020 WL 3053629, at \*1 (Pa. May 29, 2020) (“Given the stakes of a quadrennial presidential election, in the event that present hardships persist as November’s general election approaches, it would be incumbent upon the courts to entertain anew any and all claims that are raised in due course.”) (Wecht, J., concurring).

It is axiomatic that this Court is both the “highest court” and “supreme judicial power of the Commonwealth.” Pa. Const. art. V, § 2(a); 42 Pa. C. S. § 501. The Court has “the power generally to minister justice to all persons and to exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King’s Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722.” 42 Pa. C. S. § 502. This authority is at once “flexible and transcendent.” *In re Bruno*, 101 A.3d 635, 674 (Pa. 2014). As this Court noted, its authority is “not limited by prescribed forms of procedure or to action upon writs of a particular nature; rather, the Court may employ any type of process necessary for the circumstances.” *Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015). This Court’s “comprehensive jurisdiction . . . includes the competence to examine and decide, or to review decisions, relating to the type of

causes committed generally or otherwise to an inferior jurisdiction.” *In re Bruno*, 101 A.3d at 670. “[T]he Court’s King’s Bench authority and jurisdiction encompass, supplement, and transcend the other powers and jurisdiction enumerated in the 1968 Constitution and the Judicial Code.” *Id.* at 676 (emphasis added). “The Court has generally called upon the powers of the King’s Bench to supplement existing procedural process that had proven inadequate to carry out the judicial, administrative, or supervisory obligations of the Court in a manner that is expeditious and determinate.” *Id.* at 670. Indeed, in some cases, the Court has employed these powers, which “allow[] the Court to innovate a swift process and remedy appropriate to the exigencies of the event” at issue, “to provide a broad and appropriate remedy” that “did not derive from any existing rules, statutes or procedures.” *Id.* at 672.

Clearly, if the Commonwealth Court and the Courts of Common Pleas are empowered to respond to a natural disaster in this fashion, so is this Court. Moreover, a temporary short extension to address the exigencies of a natural disaster is simply not the invalidation of the statutory deadline. That deadline remains for the next election when mail-in and absentee ballots will have to be received by 8:00 pm on election day in accordance with 25 P.S. §§ 3146.6(c) and 3150.16(a).<sup>11</sup>

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<sup>11</sup> The Republican Party attempts to analogize the circumstances in this case to decisions from other states which refused to extend the deadline for receipt of mail mail-in ballots during the primary. *See* PA Rep. Party Ans. at 22. Those cases were

Pursuant to its equitable authority, this Court should extend the ballot return deadline for the 2020 general election.

**V. The Poll Watcher Residency Requirement Is Constitutional.**

As demonstrated in the Secretary’s application, the poll watcher residency requirement imposes no burden on any fundamental constitutional right and is rationally related to the Commonwealth’s county-based election system and therefore is a valid exercise of legislative power. *See* Appl. To Exercise Extraordinary Jurisdiction at 38-39. The Republican Party of PA points to no authority that might arguably support a different conclusion, but rather proposes that poll watchers are “an essential safeguard against voter fraud” and are necessary to ensure that votes are fairly counted. PA Rep. Party Ans. at 29-31. The specter of voter fraud, however, is wholly unsubstantiated. And it does not follow that allowing poll watchers from outside the county would prevent any hypothetical fraud. As the U.S. Court for the Eastern District of Pennsylvania rightly recognized in rejecting an identical vote dilution theory in *Republican Party of Pa. v. Cortes*, 218 F. Supp. 3d 396 (E.D. Pa. 2016), the General Assembly implemented other

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decided before the U.S. Postal Service issued the July 29, 2020 letter warning about anticipated delays in delivery of mail-in ballots at the time of the general election. Even if the cases cited had any persuasive value here—and they do not—the vastly different circumstances now make those decisions irrelevant.

measures to ensure ballot integrity and it cannot be claimed that the residency requirement “mathematically dilutes” votes.

The PA Republican Party proposes that “the need for poll watchers” is “even more apparent” with the introduction of mail-in voting. PA Rep. Party Ans. at 30. This too is entirely speculative and unsupported. To the contrary, the data compiled in the Act 35 report issued by the Secretary on August 1, 2020 refutes any suggestion of systemic fraud relating to the use of mail-in ballots during the primary. The PA Republican Party also claims that it is “difficult” to find poll watchers for every precinct. *Id.* Even if the Republican Party of PA had offered proof of its assertion—and it did not—difficulty identifying enough volunteers does not transform the regulatory function of poll watching into a fundamental right or render irrational the General Assembly’s policy decision to allow only registered electors in the county to serve as poll watchers. Moreover, the new Act 77 permits “[o]ne authorized representative” of every candidate and political party “to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed” and “canvassed.” 25 P.S. § 3146.8(g)(1.1), (2). The General Assembly’s policy decisions in this regard are not subject to second-guessing by the Republican Party of PA or the courts.

The PA Republican Party also misses the mark in positing that the residency requirement conflicts with “uniform standards that all sixty-seven Pennsylvania

counties” must follow under the Election Code. PA Rep. Party Ans. at 31. The county residence requirement in 25 P.S. § 2687(b) is a uniform statewide standard. While the political parties may have more registered voters in certain counties, the residency requirement applies equally to all political parties and candidates in all 67 counties. *Pierce* is of no help to the Republican Party of PA on this issue. Whereas *Pierce* recognized that states must impose uniform statewide standards to discern the legality of a vote in a statewide election, *Pierce*, 324 F. Supp. 2d at 697, the residency requirement does not affect which votes are counted and, as noted above, applies uniformly in all counties.<sup>12</sup>

The Court should declare that the poll watcher residency requirement is not unconstitutional.

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<sup>12</sup> The Election Code imposes even more restrictive requirements on election officers or poll *workers* who are required to live in the election district in which they serve. 25 P.S. § 2672(a). Intervenors’ distress over the lesser, county-wide residency requirement for poll *watchers* falls flat when compared with the greater restriction on election officers who are even more critical participants in the implementation of free and fair elections.

## **VI. The Non-Severability Provision Is Not Implicated and Does Not Supplant This Court’s Judicial Authority and Function.**

Despite its inability to make out a statutory or constitutional violation, the PA Republican Party threatens that statutory construction rulings in this case will trigger the nonseverability provision in Act 77 and invalidate mail-in voting.<sup>13</sup> PA Rep. Party Ans. at 19. This is incorrect for several reasons.

First, the nonseverability clause is not implicated or relevant here because no party or intervenor is seeking to invalidate any provision of Act 77. The issues presented relate to statutory construction—such as whether the Election Code authorizes the use of multiple ballot delivery locations and requires that “naked” ballots be counted—or this Court’s equitable authority—whether the ballot return deadline should be extended for the upcoming election due to announced mail delivery delays.<sup>14</sup> Act 77 will remain in effect regardless of how these questions are answered. Accordingly, the nonseverability provision does not apply.

Second, because no provision of Act 77 will be invalidated, there is no conflict between the General Assembly and this Court that implicates separation of powers,

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<sup>13</sup> Section 11 of Act 77 states: “Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this Act are nonseverable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void.”

<sup>14</sup> The poll watcher residency requirement in 25 P.S. § 2687(b) predates Act 77 and is not subject to the nonseverability provision.

as there was in *Stilp v. Commonwealth*, 905 A.2d 918, 977-81 (Pa. 2006). But if there were such a conflict, given this Court's broad authority, where a non-severability clause places severe restraints on judicial authority, it is not enforceable. To enforce such a clause "would intrude upon the independence of the Judiciary and impair the judicial function." *Id.* at 980. In short, a non-severability clause does not and cannot supplant this Court's judicial function. *Id.* at 980-81. It is for this reason that, where such a conflict exists, a nonseverability provision is not controlling but rather constitutes a rule of construction which this Court, in its judgment, may properly reject. *Id.* at 972 (Pa. 2006) ("[T]he courts have not treated legislative declarations that a statute is severable, or nonseverable, as 'inexorable commands,' but rather have viewed such statements as providing a rule of construction.").

Third, the rationale for the non-severability clause does not apply here. It cannot seriously be argued that a decision from this Court addressing the legality of drop boxes or validity of "naked" ballots will void or detract from the legislative compromise that culminated in mail-in voting. Moreover, the objective of Act 77 was to make voting easier for registered electors. Invalidating mail-in voting over drop boxes which make it easier to vote by mail would make no sense and it would likewise make no sense to invalidate mail-in voting over a dispute as to which mail-in ballots may be counted. Act 77 must be construed so as to avoid such an absurd result. 1 Pa. C.S.A. § 1922(1).

For these reasons, the PA Republican Party's doomsday scenario is not implicated.

### **CONCLUSION**

The Court should declare that: (1) the Election Code permits county boards of election to establish drop-off locations for absentee and mail-in ballots; (2) the Election Code requires that "naked" ballots must be counted; (3) the Election Code does not require counties to contact voters and offer an opportunity to cure ballot errors; (4) ballots postmarked by election day and received by November 6, 2020 must be counted; and (5) the poll watcher residency requirement is constitutional.

Dated: September 8, 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.



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Daniel T. Brier

Date: September 8, 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: September 8, 2020

  
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Daniel T. Brier