

IN THE SUPREME COURT OF PENNSYLVANIA

MICHAEL CROSSEY, DWAYNE
THOMAS, IRVIN WEINREICH,
BRENDA WEINREICH, AND THE
PENNSYLVANIA ALLIANCE FOR
RETIRED AMERICANS,

Petitioners,

v.

KATHY BOOCKVAR,
SECRETARY OF THE
COMMONWEALTH, AND
JESSICA MATHIS, DIRECTOR OF
THE BUREAU OF ELECTION
SERVICES AND NOTARIES,

Respondents.

Case No.: 108 MM 2020

**ANSWER TO RESPONDENTS’ PRAECIPE TO WITHDRAW CERTAIN
OF RESPONDENTS’ PRELIMINARY OBJECTIONS AND
NOTICE OF SUPPLEMENTAL AUTHORITY**

Respondents’ Praecipe to Withdraw Certain of Respondents’ Preliminary Objections (the “Praecipe”) further confirms the need for the Republican Committee Respondents to be granted leave to intervene in this action. By withdrawing some of its preliminary objections, and in expressly agreeing with some of Petitioners’ requested relief, Respondents’ abrupt about-face in this litigation leaves no doubt that they do not adequately represent the Republican Committee Respondents’ interests. Respondents’ actions have left the received-by deadline set forth in Act 77 without a defender. Instead, both Petitioners and Respondents have joined forces in

their request that the Court usurp legislative authority, disregard the non-severability provision of Act 77, and unilaterally rewrite Pennsylvania's Election Code.

I. No Current Party Is Defending the Election Code or the Republican Committee Respondents' Interests in Preserving Same.

At the time the Republican Committee Respondents filed their Application for Leave to Intervene ("Application"), both they and Respondents "putatively share[d] the same overall goal of upholding the challenged election laws." *See* Application ¶ 29. But Respondents have since put the lie to that. Whereas Respondents originally filed preliminary objections that would have resulted in the dismissal of this action, now they have explicitly joined with Petitioners in requesting an extra-statutory extension of the received-by deadline for absentee and mail-in ballots. *See* Praecipe at 7 ("Respondents agree that . . . this Court should order that ballots mailed by voters on or before 8:00 p.m. on election day will be counted if they are otherwise valid and received by the county boards of election on or before the third day following the election."). Accordingly, no current party to this action is defending the Election Code or the Republican Committee Respondents' interest in upholding it.

"The right to intervention should be accorded to anyone having an interest of his own to which no other party on the record is interested in protecting." *Keener v. Zoning Hearing Bd.*, 714 A.2d 1120, 1123 (Pa. Commw. 1998) (citing *Bily v. Allegheny County Bd. of Property Assessment, Appeals & Review*, 44 A.2d 250

(1945)); *see also* Pa. R.C.P. No. 2329(2) (providing that if the allegations in the petition to intervene “have been established and are found to be sufficient,” the court “**shall** enter an order allowing intervention” unless, *inter alia*, “the interest of the petitioner is already adequately represented” (emphasis added)).

Of critical importance—and what was not clear until Respondents filed the Praecipe—was Respondents’ joining in Petitioners’ request for relief. This, despite Respondents acting primarily in a ministerial capacity under the Election Code, with no power or authority to intrude upon the province of the General Assembly. *See Perzel v. Cortes*, 870 A.2d 759, 764 (Pa. 2005); *Hamilton v. Johnson*, 141 A. 846, 847 (Pa. 1928). But Respondents, in their official capacity, have abandoned their duty to follow and uphold the mandatory, non-discretionary language of the received-by deadline. *See* 25 P.S. §§ 3146.6, 3150.16(c) (“a completed mail-in ballot **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” (emphasis added)); *see also* 1 Pa.C.S. § 1921(b) (“When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”). Insofar as Respondent Secretary of State Boockvar has no discretion on this matter—and thus should be afforded no deference in her “interpretation” of the perfectly clear received-by deadline—her abandonment of her duties by joining in

Petitioners’ requested relief cries out for the Court to allow another, interested party to defend the Election Code.¹

II. Petitioners and Respondents Are Now Jointly Requesting Relief the Court Cannot Grant, in Contravention of the Republican Committee Respondents’ Interests.

By joining in Petitioners’ request for relief, Respondents’ Praecipe suffers the same flaw as the Petition: requesting this Court afford relief it lacks the power to grant. The judiciary “may not usurp the province of the legislature by rewriting [statutes] ... as that is not [the court’s] proper role under our constitutionally established tripartite form of governance.” *See In re: Fortieth Statewide Investigating Grand Jury*, No. 75, 77–82, 84, 86–87, 89 WM 2018, slip. op. at 12–13 (Pa. Dec. 3, 2018); *accord Heller v. Frankston*, 475 A.2d 1291 (Pa. 1984) (“Where a legislative scheme is determined to have run afoul of constitutional mandate, it is not the role of this Court to design an alternative scheme which may pass constitutional muster.”).

¹ Regrettably, this is not the only instance of Respondent Secretary Boockvar apparently invoking discretion she does not have to join in requests for relief not authorized by the Election Code. *See, e.g.*, Secretary Boockvar’s Application for the Court to Exercise Extraordinary filed on Sunday in *Pennsylvania Democratic Party et al. v. Boockvar*, 133 MM 2020. There, she also sought an extension of the received-by deadline, in addition to requesting the Court authorize county boards of elections to establish drop-off locations for mail-in ballots, that “naked ballots” must be counted, despite the complete absence of authority for same under the Election Code.

This is particularly true in the context of the Pennsylvania Election Code. “The power to regulate elections is a legislative one, and has been exercised by the General Assembly since the foundation of the government.” *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914) (citing *Patterson v. Barlow*, 60 Pa. 54 (1869); *see also Agre v. Wolf*, 284 F. Supp. 3d 591, 620 (E.D. Pa. 2018) (Smith, C.J.) (“The process for crafting procedural regulations is textually committed to state legislatures and to Congress.”); *see also* PA. CONST. art. VII, § 14(a) (providing that “the Legislature shall, by general law” regulate absentee ballot voting); *accord* U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . .”).

Act 77 was a grand bipartisan compromise that the General Assembly and the Governor crafted to promote free and fair elections. Petitioners’ requested relief would disrupt that compromise, and Respondents now join in that request.² But the Court is not free to substitute its own judgment regarding an appropriate received-by deadline for that of the General Assembly.

Respondents’ Praeipie manifests they are no longer willing to defend the received-by deadline that was an essential aspect of the grand bipartisan compromise. As a result, the Republican Committee Respondents’ particularized

² Respondents’ Praeipie does not address, as Republican Committee Respondents would argue in their Preliminary Objections, that the Petitioners’ requested relief would void *all* of Act 77. *See* Act 77, § 11; *see also* Republican Committee Respondents’ Preliminary Objections attached to the Application.

interests in maintaining the competitive electoral environment adopted by the General Assembly are plainly not represented by the Respondents or any other party to this action. Accordingly, the Republican Committee Respondents request that the Court take notice of the Praecipe as still further evidence that the Republican Committee Respondents have satisfied all elements for intervention.

III. Conclusion

Proposed Intervenor-Respondents the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee, renew their Application for Leave to Intervene and respectfully request that this Court take notice of the additional evidence presented by the Praecipe that no current party to this action represents the Republican Committee Respondents' interests.

Dated: August 19, 2020

Respectfully submitted,

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

PA I.D. #37950

Devin A. Winklosky

PA. I.D. #86277

Russell D. Giancola

PA. I.D. #200058

PORTER WRIGHT MORRIS

& ARTHUR LLP

6 PPG Place, Third Floor

Pittsburgh, PA 15222 / Phone: (412) 235-4500

kgallagher@porterwright.com

dwinklosky@porterwright.com

rgiancola@porterwright.com

John M. Gore (pro hac vice)
E. Stewart Crosland (pro hac vice)
J. Benjamin Aguinaga*
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001 / Phone: (202) 879-3939
jmgore@jonesday.com
scrosland@jonesday.com
jbaguinaga@jonesday.com

**pro hac vice* application forthcoming

*Counsel for Proposed Intervenor-Respondents
the Republican Party of Pennsylvania,
the Republican National Committee, and the
National Republican Congressional Committee*

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 require filing confidential information and documents differently than non-confidential information and documents.

/s/ Kathleen A. Gallagher
Counsel for Proposed Intervenor-Respondents
the Republican Party of Pennsylvania,
the Republican National Committee, and the
National Republican Congressional Committee

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2020, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

/s/ Kathleen A. Gallagher _____
*Counsel for Proposed Intervenor-Respondents
the Republican Party of Pennsylvania,
the Republican National Committee, and the
National Republican Congressional Committee*